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The Labor Certification Process
PERM: Program Electronic Review Management

The primary method for most individuals to obtain Permanent Resident Status through employer sponsorship, (except nurses, physical therapists, individuals whose services would benefit the National Interest of the United States, individuals of extraordinary ability and certain executives and renowned individuals) is through the “Labor Certification” process. It must be established to the Department of Labor that there are not any workers from the United States interested in or qualified for the position being offered. It is necessary to submit various forms to the Department of Labor describing the position, experience, education, licensure and salary requirements and the alien's education and employment history.

On May 16, 2007, the Department of Labor published a rule stating that the attorney's fees and expenses pertaining to the Labor Certification process are an employer's expense which can only be paid by the employer. The employer cannot be reimbursed or paid in any matter for these fees and expenses. It is illegal for the employee to pay these fees and expenses.

On March 28, 2005, the Department of Labor implemented the PERM regulations on Applications for Alien Employment Certification. It is a vast improvement over the previous procedure which took over two years in some states. It is now taking the Department of labor about 8 months to process PERM cases. If the case is “audited”, delays ranging from several months to two years could occur. The backlog and hence the processing time, varies over time.

The initial step in the process is to verify that the salary offered or being paid for the position is appropriate. Accordingly, an application is submitted to the Department of Labor in order to obtain the “Prevailing Wage” for the position. This step takes between 3 and 4 months though processing times sometimes become shorter and longer. Processing times are beyond the control of the attorney or employer. If the position is covered by a Collective Bargaining Agreement, the DOL will utilize the salary listed on the CBA.

Once the Prevailing Wage is obtained, and the wages to be paid to the employee upon being granted Alien Resident Status is at least equal to or greater than the Prevailing Wage, the recruiting phase of the process can commence.

A job order for the position is placed online at the State Workforce Agency – SWA website. The SWA will forward resumes to the employer which the employer is to

review as part of the recruitment process.

The employer must also post the position for at least 10 consecutive business days. The posting must occur between 30 and 180 days before the application for Alien Employment Certification is filed with the Department of Labor. The posting must include the name of the employer and information identical to the job description utilized in the advertisement and the salary. A salary range can be posted, but the lower level of the range must be at or in excess of the prevailing wage.

The employer must register on the Department of Labor website. This will provide the attorney with authorization to represent the employer on this matter.

The employer must take several steps to recruit for the position, in order to establish that a qualified US worker is not available for the position. These recruitment steps include but are not limited to advertising in the Sunday edition of a major newspaper, a national magazine and company website. Applications for professional positions require additional recruitment. The regulations list the following as acceptable additional recruitment procedures: Job fairs, employer's website, job search website other than employer's, on campus recruiting, trade or professional organizations, private employment firms, an employee referral program, if it includes identifiable incentives, a notice of the job opening at a campus placement office if the job requires a degree but no experience, radio and television advertisements and local and ethnic newspapers, to the extent that they are appropriate to the position being advertised.

This office will provide the employer with the different recruitment options. This phase must be done more than 30 days but less than 180 days before filing.

The advertisement must list the name of the employer, geographic area of employment and a description of the position. Educational requirements can be included as well. The advertisement must instruct applicants to send resumes to the employer. The employer is not required to list their address. They can list a post office box or a central office for resumes to be sent. The advertisement does not have to list the salary or a detailed job description.

The employer must attempt to contact each applicant for the position who appears to be qualified. The employer will have to document legitimate reasons why the individual did not qualify for the position. The employer must maintain detailed records as to the recruitment and reasons for rejection of any applicant. If none of the applicants qualify for the position and are legitimately rejected and the Department of Labor concurs, they will issue the “Labor Certification”. If a qualified applicant responds to the advertisement and wants the position, Labor Certification will not be issued and the case must not be filed, unless there is also another identical position available for that applicant. Once all the recruitment steps have been completed and if there were no qualified applicants interested in the position, form ETA 9089 is submitted to the Department of Labor.

The Department of Labor performs random audits of applications on cases as well as audits on cases they feel require further scrutiny. Accordingly, detailed records of the recruitment effort and reasons for rejection are to be maintained, as well as the efforts taken to contact the applicants. If the audit reveals willful violations and misrepresentations, the employer faces severe monetary sanctions.

Once the Department of Labor completes processing the application and issues the Labor Certification, an I-140 Petition for Immigrant Worker is filed by the employer with the United States Citizenship and Immigration Service. The Petition establishes that the alien's credentials meet those listed for the position on Form ETA 9089. It also establishes the employer's ability to pay the salary listed for the position, both when the case was commenced, as well as when the petition is filed. Employers must be willing to submit their Federal Tax Returns or audited financial statements to USCIS, as same will be required. If the sponsor is operating at a loss and the prospective employee has not been on the payroll of the sponsor, the case will probably not be approved. Not for profit entities are usually not required to submit their tax returns or financial statements. If the employer has at least 100 people on staff, then a letter from CFO as to ability to pay may be accepted in lieu of the tax return. This is at the discretion of the immigration officer.

Simultaneous with the filing of the Petition, the alien can submit an Application for Adjustment of Status to Resident Alien Status with appropriate support documentation, as well as an application for an Employment Authorization Card, unless the State Department Visa Bulletin indicates that an immigrant visa is not available in that category for the individuals country of birth. This is known as "Retrogression". If retrogression is not an issue or if the Priority Date on the case is current, then the Application will result in the issuance of a "Green Card,"/ Permanent Resident Status. The spouse and children of the alien, who are in the United States in valid non-immigrant status, may also file for Adjustment of Status, Advance Parole/permission to travel and Employment Authorization. The Employment Authorization card is usually issued within four to five months. The Application for Adjustment of status can take several months to complete, assuming retrogression is not a factor. Delays do occur and processing times vary.

If the I-140 petition has been approved and the Application for Adjustment of Status remains unadjudicated for 180 days, the applicant can change employers without jeopardizing the application, as long as the new position is equivalent to the previous position, in terms of salary and duties. The new employer however will need to complete and sign an Application for submission to USCIS verifying the salary job title and position and establishing that it is identical or substantially similar to the position listed on the I 140 petition and Labor Certification case.

The beneficiary can opt not to file for Adjustment of Status and employment authorization and choose to complete the processing at the U.S. Consulate in their

home country. That process would be commenced after approval of the Petition. This procedure may be faster, if retrogression exists. However, the beneficiary cannot change employers during the pendency of the case if they elect to proceed at a U.S. Consulate, and do not qualify for an Employment Authorization Card or Advance Parole (permission to travel). They must maintain their H-1B status and can travel with an H visa.

If an individual has been in H-1B status for six years, and an Application for Alien Employment Certification or Petition for Immigrant Worker is pending for more than one year, then the H-1B petition can be extended. If the corresponding H-1B visa has been extended, and the individual is employed by the H-1B petitioner, then the individual can travel outside the United States, assuming they have a valid H-1B visa to return. Individuals in H-4 status can travel as well, provided they have H-4 visas. Advance Parole may be another option for permission to travel. Please discuss all options with an attorney.

The Labor Certification procedure is for employment in the future, not for present employment. However, when the case is commenced, the individual must have all the experience and credentials required for the position. For example, a physician who has not completed his training may not qualify for an Attending position at this time, unless they qualify for licensure in the state of employment. However, the case may be successful if the requirement for the position is that the individual qualify for the position at some point in the future, for example 6 to 10 months.

PERM applications for PGY positions are not being approved at this time

The Labor Certification process through Adjustment of status, if there is no retrogression, may take around 2 years to complete. However times can vary and it may be longer depending upon backlogs at both the Department of Labor and Immigration. Furthermore, the processing time will be longer if the case is audited by the Department of Labor, or denied and appealed. Furthermore, if you and your spouse are from a country affected by retrogression (India, China) then Adjustment of Status will be delayed as well. Additionally, the case can be denied for different reasons, including a determination by the Department of Labor that a rejected applicant was qualified for the position or a determination by USCIS that the employer does not have sufficient resources to pay the beneficiary's salary. Effective August 2017, USCIS requires that these applications have interviews with immigration Officer.

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