
PERM Regulations Finally a Reality

2005-01-05

Just before 2004 ended, the Federal Register finally published, on December 27, the much-heralded "PERM" regulations governing the filing of labor certification applications for the permanent employment of aliens (i.e., the employer-certified "Green Card" process). As a result, labor certification applications filed on or after **March 27, 2005** are subject to the drastically different filing procedures set out in the final rule. While the standards used to adjudicate applications will remain substantially the same, the process will change significantly with the promise of added efficiencies due to (1) removing the State Workforce Agency (SWA) from active participation in the recruitment process, (2) the electronic filing option and (3) the elimination of the filing of all supporting documentation. Such efficiencies, however, only will become real once all the kinks in the system are ironed out, a daunting process. Highlights of the new PERM rules include:

- Employers must pay at least 100% of the prevailing wage.
- The prevailing wage still may be determined by the SWA, which shall provide four levels of wages based on experience, education, geographic area in which the job is located and the level of supervision.
- Employers must now recruit via advertisements and at the job site *before* filing the labor certification application.
- Employers must maintain proof of appropriate recruitment, including a recruitment report detailing the recruitment steps taken and the results achieved. These documents must be kept close at hand and must be submitted if a request for support is issued. *Employers also must notify and consider for the position any employees it has laid off in the area of employment within six (6) months of the filing.*
- The new Labor Certification Form (ETA Form 9089) may be submitted electronically or by mail directly to the ETA processing center, after which it will be certified by the Department of Labor. The Department of Labor optimistically predicts an eventual 45-60 day turnaround for electronically filed applications not selected for audit.
- If an application is selected for audit, either randomly or because of perceived issues, the employer must submit documentation verifying the information provided in the application, which will be reviewed by a Certifying Officer. Employers will have 30 days to respond to an audit letter. A Certifying Officer may order supervised recruitment or request any additional information before making a determination.

- Employers must submit the printed, signed and certified Form 9089 with the Form I-140, Immigrant Petition for Alien Worker. A copy of the signed, certified Form 9089 also must be maintained in employers' records.
- Employers are required to retain supporting documentation for five (5) years from the date the Application for Permanent Labor Certification is filed.

Due to significant negative comments, the final regulations, as published, reflect many changes from the proposed regulations. The good news is that the new regulations continue to allow employers to use "Job A-Job B" experience as well as contract experience gained by a foreign national on the job, as long as the job is "not substantially comparable" to the job for which certification is being sought.

As everyone, including the Department of Labor, continues to digest and understand the impact of these changes, employers, even before the effective date of the regulation, should begin planning their labor certification needs with the expectation that this new system will take time to understand and implement. While we are hopeful that these changes will produce streamlined and quicker results, it is more likely that the transition process will cause some significant delay and confusion. For additional information on these changes or any other immigration matter, please consult any member of the WilmerHale Immigration Group.