

Rose Carson Kaplan Choi & White LLP

ATTORNEYS AT LAW

WHAT IS PERM?

In December of 2004, the U.S. Department of Labor (DOL) announced the long-awaited procedures for the processing of Alien Employment Certification (AEC) applications under PERM¹. This procedure, referred to as the Program Electronic Review Management System (PERM) process, has the stated goal of streamlining the AEC process while significantly reducing the overall processing time². Form ETA 9089 will replace the prior Form ETA 750. The effective date of PERM is March 28, 2005.

The current method for filing AEC applications is referred to as Reduction in Recruitment (RIR) which has been the preferred route for processing of Alien Employment Labor Certifications since 1996. Due, however, to the downturn in the economy and widespread layoffs, the RIR process is now much slower than when originally introduced. For example, the current overall processing time frame in the State of California is approximately two and a half years, up from a few weeks when the economy was strong. The basic premise under RIR is that any "real world" recruiting efforts can be used to satisfy the RIR requirements. Although the method has changed, the underlying premise still remains, i.e., an employer must test the current labor market in the geographical area of intended employment in order to establish a shortage of U.S. workers for the AEC position.

In contrast to RIR, the PERM process has more stringent recruitment requirements. For example, an employer must now place at least two advertisements *on two different Sundays* in a newspaper of general circulation in the area of intended employment. Placement of an ad under an inappropriate heading or keyword would *not* be considered a "good faith effort" to recruit. Among other things, the advertisement must describe the position in sufficient detail to apprise U.S. workers of the job opportunity³. If the job requires experience and an advanced degree, the employer may advertise in a professional journal in lieu of one of the Sunday ads. As was the case under RIR, an employer is *not* required to list the salary in the print advertisements.

In addition to print advertisements, the PERM regulations require that professional positions engage in at least three (3) forms of additional recruitment efforts, including (1) participation in job or college fairs; (2) postings on the employer's Web site or a non-employer Web site⁴; (3) on-campus recruitment, or placement in an on-campus recruitment office, particularly for entry-level positions; (4) use of trade or professional organizations; (5) use of employment agencies; (6) use of an employee referral bonus program which clearly describes the incentives; (7) publication in other appropriate newspapers; and (8) television and radio advertisements. These additional recruitment efforts must take place no more than 180 days before filing the AEC application.

¹ The final PERM regulations were published in the Federal Register on December 27, 2004 with a significant departure from the proposed regulations.

² The overall processing time goal is 45 – 60 days.

An employer is also required to place a job order with the State Workforce Agency (SWA) for a period of thirty (30) days. The ten-day posting requirement under RIR continues under PERM, whereby the employer must post notice of the job opportunity for at least ten consecutive business days at the employee worksite. The comments to the final PERM regulations clarify that the primary purpose of the internal posting requirement is to put employees on notice of the job opportunity and to allow them opportunity to make any comments to the U.S. Department of Labor, i.e., the primary purpose of the internal posting is *not* to recruit U.S. workers.

⁴ Under the PERM regulations, a Web page that is automatically generated as the result of a published print ad is now counted as a non-employer Web site, which is a departure from the prior policy under RIR.

MAINTAINING A PERM FILE IN THE EVENT OF A DOL AUDIT

Perhaps one of the most significant changes under PERM is that it is an audit-based system, i.e., supporting documentation no longer needs to be submitted with the ETA 9089, whether filed electronically or via regular mail. However, an employer will be required to maintain an adequate PERM file for each application in the event that a Certifying Officer requests this information at a later date.

I. Recruitment Documentation

A successful PERM application must consist of a record that the employer has engaged in the requisite recruitment more than 30, but not more than 180 days before filing. Such documentation must be maintained for at least five years in the event of a DOL audit.

1. Print Advertisements

Sundays print advertisements run in national and local publications no less than 30 days and no more than 180 days prior to filing the PERM application. An employer should keep clean copies of all such advertising. These copies should note the publication, the date, and the page on which the ad was run. Ideally, an employer should obtain the original tear sheet or other proof of publication supplied directly from the publisher.

2. Internet/Website Job Postings

In order to document ongoing recruiting via the Internet, we recommend that an employer implement a procedure whereby all Internet job postings are printed out on a monthly basis. Internet printouts should stamp the date/time printed, much like facsimile transmission, as well as the Internet domain address. Since this is sometimes the only evidence of posting on the Internet, it is critical that printouts be made on a routine basis.

3. Evidence of the use of Contract Recruiters/Employment Agencies

As many employers now use contract recruiters, or "headhunters," to recruit key employees, any evidence of this type of recruiting is relevant. Such evidence could include a list of all contract recruiters used, including the recruiters name, address, phone number and contact person and a copy of the employer's contract recruiter contract.

4. Evidence of On-Campus Recruitment and Job-Fair Participation

This could include an on-campus recruitment schedule and list of job-fairs that the company has or will participate in. Documents such as invoices from the various job fairs are also helpful to show the expenses that the company is incurring in order to find employees.

5. Employee Referral Bonus Program

Employee Referral Programs may be evidenced via a Corporate Brochure or other corporate documentation which clearly states the offered incentive.

6. Evidence of Internal Recruitment Efforts

Documentation of any other internal policy or procedure used to recruit or promote from within the company/organization, such as use of other in-house media standard to the position.

⁵ Sunday ads may be placed on consecutive Sundays.

7. Listing of Open Requisitions

Many companies keep a running list of open requisitions that is updated on a periodic basis. Copies of such reports covering the recruitment period in question are strong evidence that the company is actively recruiting and has open positions.

8. Job Order

Form ETA 9089 requires the employer to list the start and end date of the job order, which serve as documentation of the job order.

9. Any other Evidence of Ongoing Recruitment

The above list is by no means comprehensive. Any additional evidence of ongoing recruitment for the occupation in question should also be included.

II. Results of Recruitment

In addition to documenting the company's ongoing recruitment efforts, the PERM regulations require that the employer state the results of its recruitment efforts during the relevant recruitment period prior to the filing of the AEC application.

The results of recruitment for a given occupation may be shown by compiling an "Aggregate Recruitment Report" listing the following as an example:

- Number of applicants for the position in question (i.e., the total number of resumes received);
- Number of applicants found not to possess the necessary skills based upon the initial documentation submitted categorized by the lawful job-related reason for rejection⁶;
- Number of applicants appearing to meet minimum qualifications based on documentation submitted;
- Number of interviews held;
- Individuals offered employment;
- Individuals accepting offer/hired;
- Total number of positions available;
- Total number of hires company-wide during the relevant recruitment period.

An employer should keep in mind that although not required to submit actual resumes received, a Certifying Officer (CO) may request to review resumes at a later date sorted by the lawful reasons for rejection. An Aggregate Recruitment Report must contain the relevant start and end date, as well as be signed and dated by the company Human Resources Representative or other authorized signatory. An employer must retain supporting documentation for a period of *five* years from the date of filing in the event an audit is requested, or a Certifying Officer requests evidence of recruitment.

⁶ An applicant's failure to meet a minimum requirement stated on Form 9089 is a lawful job related reason for rejection, unless the applicant lacks a skill that may be acquired during a *reasonable period*

III. Prevailing Wage Determination

Employers must file with a Prevailing Wage request with the relevant State Workforce Agency (SWA) prior to filing ETA 9089 using state-specific prevailing wage request forms. The final Prevailing Wage Determination will be incorporated into the application on ETA 9089. This wage documentation shall be maintained along with the supporting documentation described above. Employers should note that under the final PERM regulations, employers are required to pay 100% of prevailing wage, as opposed to 95% of prevailing wage under RIR. Relief from this new requirement lies in the new 4-tier levels under the prevalent OES government wage survey, which previously only provided for 2 levels.

WHAT ARE THE ADVANTAGES OF THE PERM PROCESS?

Other than the obvious advantage of reducing the timeframe necessary to obtain an AEC for a given employee, a successful PERM program can give an employer a competitive edge in recruiting key employees. Many top candidates who are in nonimmigrant visa status consider immigration benefits as one of the most important issues in deciding which company to join. An employer who can confidently state that they can obtain permanent residence for the employees in a quick and efficient manner will certainly have an advantage in recruiting. In addition, once a successful PERM program has been established, the amount of effort required on the part of an employer's human resources, legal, and management staff should be much less than under the traditional AEC process.

Secondly, employers may now file either electronically via the Internet or by regular mail to the appropriate centralized processing center. Faxing is not allowed.

As was the case under RIR, there are currently no government filing fees to file a PERM application.

PERM AUDIT PROCEDURES

The DOL may request an audit of any AEC application, whether for cause or without cause. Upon receipt of an audit letter, an employer will have 30 days to respond. The CO may grant one extension up to an additional 30 days. If an employer fails to respond within the deadline the application will be denied and may not be appealed. The CO may also require an Employer to conduct "supervised recruitment" for any future AEC applications filed for up to two years.

OTHER CONSIDERATIONS

Like the prior AEC process, an employer must still show that the basic requirements for the position are not unduly restrictive and are justified by nature of the employer's business. The final PERM regulations also retain the prior "business necessity" standard. To establish business necessity, an employer must establish that the minimum requirements for the position bear a reasonable relationship to the occupation within the context of the industry, and are essential to perform the duties of the position. Business necessity documentation will be required during a DOL audit.

The National Certifying Officer or Certifying Officer has the authority to approve or deny an AEC application based on whether or not the employer has established that there are no U.S. workers who are willing, able, or qualified for the position.

If the NCO or CO finds that the application to be adequate and that the requirements for the position are not restrictive, it may certify the application without requiring any additional information or recruitment.

Please note that this Memorandum is advisory only and should not be used as a substitute for specific legal advice in a given situation. If you have any questions about the AEC process or Corporate Immigration Law in general, please call the Law Offices of Rose Carson Kaplan Choi & White LLP at (650) 617-8888. This Memorandum is valid as of December 28, 2004.

7 In the past, the DOL would traditionally direct an employer to conduct a separate "model recruitment" program to establish that there is a shortage of U.S. workers for the position. This was a three-day series of advertisements run in the major local newspaper, including a Sunday ad after the AEC application has been filed. The employer was required to review all applicants for the position under the supervision of the local State Workforce Agency.