

Rose Carson Kaplan Choi & White LLP

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Permanent Residency through the PERM (Program Electronic Review Management) Labor Certification process involves three steps through at least two different government bodies. Processing times may vary significantly depending on the factors discussed below.

Step 1: Labor Certification through PERM

The first step, which is usually the most difficult from a legal perspective, is processed through the U.S. Department of Labor based in either Chicago, Illinois or Atlanta, Georgia, depending on where the permanent job offer is located. Job offers in the State of California are processed through the U.S. DOL in Chicago.

This initial step focuses on the nature of the position offered and the employer's efforts to recruit "U.S. workers" for the position. As you may know, your employer must demonstrate a shortage of qualified, willing, and able U.S. workers for your job in order to obtain a labor certification on your behalf. The employer must also show that the position is of a professional or "skilled" nature, i.e. Software Engineer, Financial Analyst, etc.

Under the "PERM" labor certification process, which is the current method for filing labor certification applications, the employer must demonstrate the unavailability of qualified US workers by carefully documenting evidence of recruitment efforts made immediately prior to filing the labor certification. For professional level positions, this evidence generally includes copies of two Sunday print ads in a major newspaper of general circulation, copies of Internet job postings, copies of a 30-day work order placed with the local SWA (State Workforce Agency), evidence of the employer's participation in job fairs and other recruitment efforts standard to the industry, as well as a final Report listing the number applicants who responded, number of applicants who were qualified or unqualified, number of applicants interviewed, etc. during the relevant recruitment period.

Under the new PERM regulations, employer must conduct a minimum of 30 days of recruitment, and must allow at least 30 days for U.S. workers to respond to the advertisements at the conclusion of the requisite recruitment. Therefore, the minimum recruitment period is 60 days. The length of time PERM labor certification takes to be processed by the DOL varies significantly depending on the nature of the position and whether the application is filed electronically or by regular mail. However, the average processing times as quoted by the U.S. DOL for electronically submitted applications is 45 – 60 days. Applications that are mailed-in generally take significantly longer. Based on what we are seeing now, I would estimate that your case will take any where from one month to six months to be processed. Please be aware, however, that this is only an estimate. Government processing times can change drastically from one month to the next. Also please keep in mind that indistinguishable cases filed at the same time in the same state can take very different times to process for no identifiable reason. It is important to remember that there is always a certain degree of "arbitrariness" that must be factored in when trying to anticipate when a case will be approved by the government.

Step 2: Immigrant Visa Petition

The second step in the process is the Immigrant Visa Petition; also know as the I-140, which is processed through the U.S. Department of Homeland Security, Citizenship and Immigration Service (formerly known as INS). After your Labor Certification application is approved by the DOL, we will submit the original certified document to the USCIS in conjunction with a petition to grant you an immigrant (or "permanent") visa to stay in the United States. In essence, by approving your labor certification application, the Department of Labor has "certified" to the

USCIS that position offered qualifies as the basis for an immigrant visa. At this stage, you will be granted a "Priority Date" which establishes your place in the queue. Your Priority Date is the date that your PERM Labor Certification application was filed or received for filing at the U.S. DOL.

In contrast to the labor certification stage, which focuses on the nature of the position offered, the I-140 stage focuses on your professional qualifications for the position, as well as the employer's ability to employ you on a permanent basis. Thus, the USCIS evaluates your academic credentials and will verify evidence of your professional experience to determine whether you meet the requirements for the position described in the labor certification application. The USCIS will also evaluate the employer's ability to pay the wage offered on your Labor Certification application. Finally, the USCIS will determine which employment-based category you fall under, i.e., whether you are "EB-2" or "EB-3", which can be of great importance for people who are born in India or China (please see below). Like the first step, the length of time that this step takes can vary greatly depending on when and where it is filed. At the time of writing this Memorandum, the USCIS is processing I-140 petitions filed through the California Service Center in approximately four to six months.

Step 3: Adjustment of Status or Consular Immigrant Visa (IV) Processing

Adjustment of Status (AOS)

The third and final step in the process, "Adjustment of Status" or "the I-485 filing," which also goes through the USCIS, requires the most information and effort on your part. During this stage, the USCIS will determine whether you are "fit," both in terms of health and character, to live in the United States permanently. Thus you will be required to take a medical examination administered by an USCIS approved physician, present documentation regarding your identity and background (including marriage, birth and divorce records) and to provide a documentary chronicle of your United States immigration history (i.e. I-20s, previous I-797s, I-94's etc.) At a later point, you will also be required to take finger prints at an USCIS facility so that the government may investigate through the CIA and FBI whether any criminal or political activities in your past disqualify you from permanent residency.

For certain individuals, adjustment of status may be started as soon as the I-140 Immigrant petition is approved. You may check the Immigrant Visa quotas by logging onto the "Department of State Visa Bulletin" link at: http://travel.state.gov/visa/frvi/bulletin/bulletin_1770.html to determine whether you are eligible for "concurrent filing" of the I-140 and I-485 applications.

Once Adjustment is applied for, your dependent family members may apply for travel authorization and/or work authorization at this stage to work for any employer in the United States.

Please note that the USCIS allows for concurrent filing of the I-140 and I-485 applications for those individuals whose Priority Dates are current. In October of 2005, we witnessed a significant retrogression/backlog of visa numbers due to several factors, including recent backlog reduction efforts at the USCIS, which effectively increased the number of approved applications for Permanent Residency, as well as the introduction of PERM, which also increased the number of employment based applicants for permanent residency. As a result of the recent backlog, many individuals are now ineligible for "concurrent filing", i.e., individuals whose priority dates are not current must first file the I-140 Immigrant Petition, then wait for their priority date to become current before applying for Adjustment of Status (known as sequential filing). The U.S. Department of State has not provided an estimate of when Priority Dates will become current, therefore, for certain individuals it may be several months or years before Priority Dates are current. The two factors which determine visa availability are "Country of Birth" and "Employment-Based Visa Category".

Currently, Adjustment of Status applications processed through the California Service Center are taking

approximately 12 months. We will provide you with more information on what is required for this step when the time approaches.

Consular Processing (CP)

Under this track, the applicant applies for an immigrant visa at a U.S. Embassy or Consulate outside of the United States. The process begins when the USCIS, upon request, forwards an immigrant visa package to the National Visa Center (NVC) in Washington, D.C. The NVC then sends a consular processing package to the applicant or the attorney of record. This package, which asks for much of the same information that is filed with the USCIS in an Adjustment of Status case, is completed for the applicant and returned to the NVC. The NVC then forwards the application to the designated consular post in the applicant's home country. Once the consular post is ready to process the case, it will notify the applicant of an interview date. The applicant and any accompanying family members will then need to return to their home country in order to undergo an immigration medical exam and attend the Consular Processing interview. Once the interview is successfully completed, the applicant is issued an immigrant visa. Upon return to the United States, the applicant is granted permanent resident status. At the time of writing this Memorandum, we estimate that Consular Processing can take anywhere from 6 to 12 months depending on the consular post processing the application. Please note that an IV Interview will not be scheduled until the individual's Priority Date is current. Please note that if an applicant for adjustment of status has been out of status or had unauthorized employment for more than 180 days, then he/she is ineligible for adjustment of status and must apply for consular processing. The only exception is if "Section 245(i)" applies to the case, which generally only applies to labor certifications, filed on or before April 30, 2001. For more information about the pros and cons of AOS versus CP, please contact our office.

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 PERM 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 March 11, 2006.