PERM | FREQUENTLY ASKED QUESTIONS

Background: The first step in most employment based immigration processes is the filing of an Application for Alien Employment Certification or Labor Certification. The process by which this application is filed is called PERM (Program Electronic Review Management). This FAQ memo provides an overview of the PERM regulations, the PERM filing system, and issues that employers and employees should consider when planning a PERM case. Employees being sponsored for PERM should also review this FAQ on PERM for Employees, https://www.jackson-hertogs.com/jh/P0524.pdf.

In a nutshell, behind every PERM case is a test of the labor market for available U.S. workers. By filing a PERM case, an employer is attesting that U.S. workers could not be found for the sponsored job opportunity. When unemployment goes up, there are more U.S. workers available, and DOL has greater concerns that employers may be ignoring or overlooking available U.S. workers in favor of the sponsored foreign worker. Market forces may impact whether and when a PERM application is filed, as well as how DOL views the application.

1. What is PERM? How does it work?

PERM (Program Electronic Review Management) is the U.S. Department of Labor's (DOL) program for permanent labor certification. PERM's general requirements are:

- The employer must obtain a prevailing wage determination from the State Workforce Agency (SWA) prior to filing the PERM application. The employer must offer at least 100% of the "prevailing wage" rate as determined by the SWA. In determining the correct prevailing wage, the employer can either accept a DOL generated wage or can request that the SWA use a wage source that the employer provided, if the employer's alternative wage source complies with the regulations.
- The employer must complete a mandatory recruitment regimen prior to filing the PERM application with DOL. This includes, among other things, two Sunday advertisements in a newspaper of general circulation and a 30 day job order with the State Workforce Agency (SWA) in the area of intended employment.
- PERM labor certifications are filed either electronically or by mail directly with DOL. Filing electronically is highly recommended by DOL. Jackson & Hertogs files all PERM cases electronically.
- After passing through initial review and automated screening by the DOL computer system, applications are either certified, denied, or audited. If the employer is audited and does not timely respond to the audit letter, the case will be automatically denied. After responding to an audit letter, the case may be certified, denied, or the employer may be directed to complete additional recruitment supervised by DOL. Although DOL will regularly issue random audits for quality control, it is expected that few cases will be directed to undergo DOL-supervised recruitment.

2. How quickly are PERM applications processed?

DOL's processing times are subject to change, and there is no mandated processing time that DOL must meet. When the PERM system began in 2005, DOL's goal was to process all applications within 45 to 60 days of filing; however, this processing time was never guaranteed. In 2008, processing times for many PERM cases were 6 months or longer. Cases selected for audit or supervised recruitment will generally take longer to process. Audit review cases have taken over one year for DOL to review.

DOL publishes processing times for PERM applications on its website, at https://flag.dol.gov/processingtimes/.

3. I have heard that most PERM cases are approved automatically – is this true?

No. PERM is designed to be an attestation-based system. The initial review and intake of the labor certification form is completed by an automated system at DOL. If the application passes certain validation checks and all parts of the application are complete, the application may be certified. If the application does not pass the initial validation check, or if any information is missing or incomplete, the application will be automatically denied without audit. DOL has estimated that between 10-20% of all PERM cases will be issued audit letters. Some of the audit letters will be based on selection factors determined by DOL (targeted audits), others will be sent out for quality control purposes (random audits). Generally, the audit letters are designed to verify the recruitment, wage, position requirements, and other information the employer has attested to on the application. Under the PERM regulations, employers are required to maintain all supporting documentation for the application for five years from the date of filing.

While the majority of PERM cases are approved, do not assume that approval will be automatic.

If DOL issues an audit letter on an application, and the employer is unable to provide DOL with evidence that it has completed all of the required steps prior to filing the PERM application, DOL may sanction the employer by requiring the employer to complete DOL-supervised recruitment on all labor

certifications filed by that employer for up to two years. This would impact not only a single case, but all cases that might be filed by that employer. DOL also has the authority to bar employers from filing any PERM cases for up to three years, if DOL identifies fraud, misrepresentation, or a "willful failure" by the employer to comply with the regulations or to respond to audits.

Further, under the regulations, DOL may revoke an approved PERM application at any time after certification. This measure appears to be designed to give DOL the power to revoke applications that may have been approved in error, such as due to a software malfunction, or to revoke applications where DOL later discovers fraud or misrepresentation. If DOL chooses to revoke an approved PERM application, the employer will be given 30 days to respond with documentation to convince DOL that the approval should not be revoked. However, if the basis of the revocation is that the case was approved in error, it may be difficult (if not impossible) for an employer to overturn DOL's decision to revoke.

4. May any employer file PERM cases?

To file a PERM case, the employer must complete a specified pattern of recruitment during the 180 days prior to filing the application, and document that the recruitment did not identify any qualified, willing, and available U.S. workers. Employers that have undergone layoffs, employers that are seeking entry-level jobs, or employers that are not actively hiring may not be able to complete the required recruitment. This would mean that a PERM filing would have to be delayed until the employer can recruit and demonstrate that there are no U.S. workers available and qualified for the position as required by PERM.

5. If a PERM case is denied by DOL, when may it be re-filed?

Generally, denied applications may be re-filed immediately, unless the employer appeals the denial. Jackson & Hertogs may recommend re-filing over appeal, unless the case is ineligible for re-filing (i.e., the original recruitment became too old to file a second application) or there is an overarching strategic reason that an appeal is better than a re-file. Appeals of PERM denials have taken 1-3+ years to be processed. For most denied cases, re-filing makes more sense than submitting an appeal.

The other exception to immediate re-filing of a denial is if DOL denies a PERM case and also imposes a sanction requiring that the employer submit all subsequent applications under supervised recruitment for a two year period. If DOL imposes this sanction, a denied case may be filed again only under supervised recruitment. Under supervised recruitment, DOL will direct the employer to recruit after the case is filed and will supervise the recruitment, as opposed to the employer recruiting on its own before the case is filed, Under this scheme, all resumes must be submitted to DOL first, the employer must conduct recruitment on a much stricter timeline, and the employer must provide a more detailed recruitment report. We do not anticipate that DOL will impose this sanction on many employers.

6. Can a PERM approval be revoked?

Yes. Under the regulations, DOL may revoke a PERM certification. While there is no specified time limit in the regulations, because the PERM regulations require employers to maintain supporting documentation for the PERM case for five years from the date of filing, it is anticipated that any revocations that might occur would happen within five years of filing the application.

If DOL determines that a certification should be revoked, DOL will notify the employer. The employer will then have 30 days to respond to the revocation notice, and justify why the certification should not be revoked. If DOL proceeds with the revocation, the employer may appeal the revocation to the Board of Alien Labor Certification Appeals (BALCA). Note that the notice of revocation will go to the employer, not the sponsored employee, so it is possible employers may receive revocation notices for former employees.

7. Can an employer use the recruitment that was done when the employee was originally hired, instead of the PERM recruitment regimen?

Generally no. All employers who file under the PERM program must complete the PERM recruitment regimen during the 180 days immediately prior to filing the application. Unless the recruitment was recently done, most previous recruitment for a particular position will be too old to use for the PERM application. PERM also requires certain recruitment steps that are rarely done by employers of professional staff, such as newspaper advertisements and job orders with the SWA.

Employers may be able to use some of their ongoing recruitment efforts for PERM, such as employee referral programs, or recruitment on the employers' websites. However, the mandatory PERM recruitment steps must be done for each and every PERM case. Jackson & Hertogs will work with clients to determine if any of their existing recruitment efforts may be used for a PERM filing.

8. Why can't employers use the company's standard job description and requirements on the PERM application?

DOL will compare the employer's job duties and requirements for the position with the job duties and requirements described for the appropriate occupation in DOL's online Occupational Information Network (O*Net). The O*Net is an online occupational classification system that describes typical job duties, education, experience and special requirements for a wide range of occupations. The O*Net is found online at https://www.onetonline.org/. If the employer's job description and requirements for the position are generally consistent with the job duties and requirements as determined by DOL for the position under the O*Net, it may not be necessary to make changes to the job description and/or requirements. However, PERM job requirements cannot include any subjective elements, such as "good" or "strong" knowledge of a product or skill. Also, job descriptions cannot be "tailored" so that only the sponsored foreign worker will qualify for the PERM application. Experience gained with the sponsoring employer generally cannot be used to qualify the sponsored foreign worker for the position that is being described in the PERM application unless the employee's prior position(s) with the employer is significantly different from the position described in the PERM application. Foreign language requirements are generally viewed as restrictive by DOL, unless they can be justified as essential to performance of the job duties.

In those instances where the employer's minimum requirements exceed what DOL believes to be the standard vocational preparation (SVP) for the occupation, the employer is required to explain why its "excessive" requirements arise out of its business necessity. The employer must be able to document that the experience and/or educational requirements set forth in the PERM application are related to its minimum requirements for the position and that an individual without such a background could not perform the duties of the position. At the same time, it must be very clear that the requirements were not tailored around the foreign worker's specific background. Employers should also note that if a requirement is one that could be gained during a "reasonable period of on the job training," this requirement cannot be used as a basis to reject an otherwise qualified U.S. worker.

9. If an employee has a Master's degree, should this be the minimum education requirement for the PERM labor certification, so that the employee can immigrate in the EB-2 preference category?

Please refer to the prior answer for general job requirement limitations for PERM.

Whether a Master's degree can be required as part of a PERM application depends upon what academic requirements the employer regularly requires when hiring for similar positions, and whether the DOL considers a Master's degree to be a reasonable requirement for such a position. A labor certification cannot be tailored to match an individual employee's academic credentials. Rather, the minimum requirements for any PERM application should be what an employer can reasonably require of the position, per its own past practices and DOL's expectations as found in the O*Net. Again, if the Master's degree requirement exceeds what O*Net states is "normal" for that occupation, the employer must be able to justify that the requirement arises out of its business necessity. If the employer cannot do this or if the employer's normal requirement does not support a Master's degree requirement, then the employer cannot require a Master's degree of U.S. worker applicants even if this means that the foreign national may have to immigrate under a lesser preference category.

10. What is the difference between EB-2 and EB-3 preference categories?

To be eligible for EB-2 (employment-based second preference category), the employer's minimum requirements must be no less than either a Master's degree, or a Bachelor's degree and 5 years of professional post-bachelor's experience. If an employer's minimum requirements for the position are less than either a Master's degree, or a Bachelor's degree and 5 years of post-bachelor's experience, the job offer is only eligible for EB-3 (employment-based third preference category).

Employment based immigrant visas are categorized into essentially three categories: EB1, EB2 and EB3. These designations are dictated by the type of case under which the individual will eventually immigrate. The place that the individual holds in line is called a priority date; the date the PERM application is filed with DOL determines the priority date. That filing date becomes the employee's place in the queue if/when the immigrant visa petition is approved. It is more likely that there will be a backlog in EB3 immigrant visa availability, as compared to EB2. Visa availability varies based on country of birth as well as the minimum job requirements. We have details on priority date movement available on our website: http://www.jackson-hertogs.com/us-immigration/visa-bulletin-and-quota-movement-2/

11. If an employee has eight years of work experience, should this be the minimum experience requirement on the PERM application, to reduce the number of applicants who can qualify?

The number of years listed as the minimum required in a labor certification is a function of how many years the employer tends to regularly require for such positions, and how many years of experience the DOL will allow to be required for a position before deciding the employer is creating unduly restrictive requirements that mirror an individual's background. A labor certification cannot be tailored to an individual employee's resume, but only to what the employer can reasonably require of the position, per its own past experience and DOL's expectations as found in the O*Net. If the employer's

requirements exceed the SVP for that occupation, then the employer must be able to explain and document that the requirements arise out of its business necessity.

12. Is there a wage requirement for a PERM case?

Yes. Employers must guarantee to pay the "prevailing wage" rate for the position. The employer must request a prevailing wage determination from the DOL before the PERM case is filed. The prevailing wage rate determination depends on the geographic area of employment, the occupational classification, and the amount of education and experience required by the employer. Generally, a more senior position will receive a higher wage determination than an entry or intermediate level position. Also, positions that have extensive special requirements or management duties may receive a higher wage determination than positions that have no management duties and only limited special requirements.

While the employer must guarantee to pay no less than the prevailing wage rate, please note that the employer is not required to pay the sponsored worker the prevailing wage rate on the approved PERM application unless and until the employee immigrates into the permanent position. However, the employer must be able to prove its ability to pay the offered wage as of the date the PERM application is filed with DOL. Proof of ability to pay is required by USCIS with the I-140 Petition, and USCIS often requests evidence that the employer has paid the prevailing wage rate to the employee as part of the review of the PERM-based I-140 Petition.

13. The PERM application form asks if the requirements are "normal". What does that mean?

DOL has specified that if an employer's requirements for a position are within the Standard Vocation Preparation (SVP) for an occupation, as defined by the O*Net, the employer's requirements will be considered "normal". SVP varies by occupation, and includes both education and experience. For example, a Bachelor's degree is considered equal to two years of SVP, and a Master's degree is equal to four years of SVP.

SAMPLE: The O*Net states that the SVP for the occupation of Electrical Engineer is two to four years of education, training, and/or experience. If an employer is sponsoring an Electrical Engineer for PERM, in order to state that the requirements are "normal", the employer could require either four years of experience or a Bachelor's degree and 2 years of experience or a Master's degree and no experience. However, if the employer stated that the requirements were a Master's degree and two years of experience, the employer's requirements would exceed the SVP, and would not be considered "normal".

If an employer's requirements for a job exceed those specified by DOL, the employer must document that the requirements are justified by "business necessity". Business necessity means that the requirement is essential (i.e., necessary) to perform the stated job duties, and that it is not a mere preference of the employer or to secure EB-2 classification for an employee.

The most important thing to keep in mind is that an employer's internal hiring requirements are not the standard for what is normal – DOL's standards determine what is "normal".

14. Can the sponsored worker assist the employer in reviewing resumes received for the PERM application?

No. DOL specifically bars the sponsored worker from any involvement in the recruitment process.

In addition, DOL bars the attorney from reviewing resumes or considering applicants – all reviews of applicants must be done by the employer.

15. After the PERM case is certified, can the employee file for the green card?

Possibly. The PERM application is only the first step in the green card process. Within 180 days of DOL's certification of the PERM application (Form ETA 9089), the employer must file its Form I-140 immigrant visa petition based on the certification with the U.S. Citizenship and Immigration Service (USCIS). Under USCIS regulations, if the "priority date" (the date the PERM application was filed) is current, it may be possible to also file an I-485 adjustment of status (AOS) application concurrently with the I-140 Petition. If the priority date is not current, however, the employer may still file the I-140 petition. However, the sponsored employee cannot file the I-485 AOS application until there is an available immigrant visa number. It is also possible to file the green card application with a U.S. Consulate overseas. However, in such a case the I-140 must have been approved, and the priority date must be current.

U.S. immigration law limits the number of immigrant visas that can be issued/approved each year. A foreign national's place in the "waiting line" is determined by the priority date, preference category and country of birth. An immigrant visa is considered available when the applicant has a "priority date" that is earlier than the date listed in the Department of State's Visa Bulletin for the applicant's particular "preference category" and country of birth. One's priority date is based on the date that the PERM labor certification application is filed with DOL, or the date that the I-140 immigrant visa petition is filed if a labor certification is not required (i.e., an extraordinary ability EB-1 case). Please note that the priority date is not "locked in" until the I-140 immigrant visa petition is actually approved. Preference categories are based on the educational and experience requirements for the position as listed on the labor certification or on the category of immigrant visa petition filing.

16. May the sponsored employee pay for the PERM application?

No. DOL's regulations state that PERM is an employer business expense, and that payment for PERM by the sponsored alien is not appropriate.

17. Does the labor certification expire?

Yes. Labor certifications expire 180 days after they are certified by DOL. In order to use the labor certification, the employer must file an I-140 Petition before the underlying labor certification expires. If an I-140 Petition is not filed while the labor certification is valid, the labor certification will expire, and a new PERM filing would be necessary.

18. If an employer has layoffs, may the employer still file a PERM case?

Possibly. If the employer has laid off employees in the PERM occupation or in a related occupation in the 180 days prior to filing a PERM case, the employer is required by DOL to "notify and consider" any U.S. workers who were laid off. However, if the layoffs were in a different geographic location, or were in occupations unrelated to the PERM application, the layoffs would not impact the PERM application.

Employers who have had layoffs (or who may undergo a layoff) may want to delay filing any PERM cases until at least 180 days after the date of layoff.

19. What does DOL consider to be a "layoff"?

DOL considers any termination "not for cause" to be a layoff, so even a small reduction in force is a layoff in the eyes of DOL. Often, this type of termination information is not widely distributed within a company, so employers must keep informed about any layoffs, as this may impact PERM applications.

If employees are terminated for cause, or voluntarily leave (i.e., they accept a voluntary severance package in return for resignation), these can and should be distinguished from layoffs, and should not impact a PERM application.

20. Be aware of labor availability and recognize its impact on PERM applications.

If PERM recruitment identifies a qualified, willing and available U.S. worker, the PERM application cannot be filed. Filing a PERM application that suggests high availability of workers may result in the case being denied, or the case being directed to undergo DOL-supervised recruitment. In these circumstances, it may be more prudent to wait and file a PERM case that has a better likelihood of success than to file a case that results in denial or in DOL-supervised recruitment being imposed on the employer.