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Special Immigration Alert–*PERM Regulations*

On December 27, 2004, the United States Department of Labor ("DOL") issued the long-awaited final rules overhauling the labor certification process that employers must satisfy to sponsor most foreign nationals for permanent residence in the United States. Known as the Program Electronic Review Management ("PERM") program, these new rules represent the culmination of a four-year effort by the DOL to re-engineer the permanent labor certification process, which almost all agreed was too antiquated, cumbersome and lengthy. The PERM program promises a streamlined electronic submission and approval process for most applications but, in exchange, requires employers to conform to a much more stringent list of recruiting and application requirements. Upon its effective date on March 28, 2005, the PERM program will replace *all* current labor certification procedures, both traditional and Reduction-in-Recruitment ("RIR"), and represent the sole process for securing labor certification for applications filed on or after that date. Those employers with pending applications will have the option to utilize the PERM program if it appears more favorable and they agree to satisfy all of its requirements. Because of the tremendous interest among all of our clients in the PERM program, we have prepared and distributed this Special Alert on an accelerated basis to outline what PERM will require and to provide our preliminary thoughts on what employers should do to prepare for its implementation.

1. The Labor Certification Process

To qualify for permanent residence based on employment, most foreign nationals must rely on their employers to secure labor certification. Basically, the labor certification procedure is a statutory protection for the domestic labor market. Before sponsoring a foreign national for permanent residence, an employer first must express a willingness to hire a qualified U.S. worker for the foreign national's job and then demonstrate to the DOL that there are no such qualified U.S. workers available for the position in the geographic area where it is located.

The PERM program will supercede a labor certification process that has been in place since 1965. Despite the laudatory goals of the labor certification requirement, there has been almost unanimous agreement that it has become too cumbersome and time-consuming to achieve its objective of protecting the U.S. labor market without unduly disrupting the flow of legal immigration. In recent years, the number of labor certification applications filed with the DOL has soared and severe backlogs, some exceeding five years or more, have developed. These adversely impact both employers and the foreign nationals they are trying to sponsor.

2. The PERM Program: A Basic Overview

Upon its effective date on March 28, 2005, the PERM program will be the exclusive procedure for filing new labor certification applications. The PERM program basically expands the current RIR requirements and combines them with an attestation and audit process. All employers now will have to satisfy more stringent recruiting requirements prior to filing labor certification applications. The employer then will file these applications, either electronically or by mail, and represent that they have complied with the labor certification requirements. A new form, the ETA 9089, has been designed specifically for PERM applications. No supporting documentation will be filed by the employer with the ETA 9089, but the employer is required to retain this documentation in the event of an audit. The DOL will review the employer's submissions and, based on confidential criteria that the DOL will not disclose, either adjudicate the application or direct an audit by the regional DOL office. If there is no audit, the DOL estimates that labor certification applications will be granted or denied within 60 days of proper filing.

A major change in this process involves the elimination of the State Workforce Agencies ("SWA's") from the basic procedure. Currently, labor certification applications are filed with the SWA's and they supervise the recruiting process. Under the PERM program, the role of SWA's will be extremely limited. They will make the prevailing wage determination ("PWD") that establishes the minimum compensation the employer must offer to pay before the labor certification application can be approved. They also must process the job orders that employers must open as part of the mandatory recruiting process.

3. The PERM Process-Specific New Requirements

A. *Effective Date:* The PERM program will become effective on March 28, 2005. On that date it will become the exclusive procedure for filing labor certification applications, replacing the current RIR and traditional application procedures. Until that date, employers may file labor certification applications under the existing system and they will be adjudicated under the current regulations.

B. *Conversion of Existing Applications*: The PERM program allows employers with labor certification applications pending with the SWA's to withdraw them, and then refile under the PERM program and retain the existing priority date, as long as: (i) the SWA has not yet initiated recruiting by placing a job order for the existing application; (ii) the new PERM application clearly relates to an identical employment opportunity; and (iii) the employer satisfies all of the PERM application and recruiting requirements. In effect, this will mean that employers seeking to "convert" older applications into PERM applications must readvertise according to the more stringent PERM requirements.

C. *Filing*: All labor certification applications filed under the PERM program must be filed, either by mail or electronically, on new form ETA 9089. The DOL currently is setting up a link within its web site at: **www.workforcesecurity.doleta.gov/foreign/** to accommodate and receive these applications.

D. *Recruiting*: Employers seeking to file labor certifications under the PERM program must engage in mandatory pre-filing recruitment. The extent of this recruiting depends on whether the position is classified as a "professional" occupation under the schedule of professional occupations attached to the PERM regulations.

i. Nonprofessional occupations: Employers must, at a minimum, place a job order with the appropriate SWA and two advertisements, one each on two different Sundays, in newspapers of general circulation in the area of intended employment within 6 months of filing the application. These steps must be completed at least 30 days before but no more than 180 days before filing the application.

ii. Professional occupations: Employers must, at a minimum, engage in the recruiting required for nonprofessional applications. They also must perform at least three additional recruitment steps from the following alternatives:

a. Job fairs
b. Employer's website
c. Employment website other than employer's
d. On-campus recruiting (where appropriate)
e. Trade or professional organizations
f. Private employment firms
g. Employee referral programs with incentives
h. Campus placement offices
i. Local and ethnic newspapers
j. Radio and television advertisements

Only one of these steps can occur within 30 days of filing the application.

E. *Advertising requirements*: Advertisements placed to fulfill the recruiting requirements of the PERM program must contain the following information: (i) the name of the employer; (ii) the name of the employer representative(s) to which applicants must direct resumes; (iii) a description of the position sufficient to apprise U.S. workers of the job opportunity for which certification is sought; and (iv) the geographic area where the job is located. The ad need not state the salary, list all the job requirements, or contain the terms and conditions of employment. If it does, the salary offered cannot be less than the prevailing wage, the terms and conditions cannot be less favorable than those offered the foreign national, and the job requirements cannot be more restrictive than those in the application.

F. *Qualified U.S. workers*: Under PERM, a U.S. worker must be deemed qualified for the position in the labor certification application if s/he either meets the job requirements or could learn those requirements in a reasonable period of on-the-job training.

G. *Recruitment report*: Employers must prepare, complete and execute a recruitment report that describes the recruiting steps taken to support the application and details the lawful job related reasons why each of the applicants was not qualified for the job. This report need not be submitted with the application but must be retained by the employer in case the DOL requests to review it in connection with an audit of the application.

H. *The PERM Labor Certification Application:*

i. ETA Form 9089: All PERM applications must be filed, either electronically or by mail, on the new ETA 9089 form that was attached to the PERM rules. Instead of submitting documents with this form, employers will complete the form and attest to what they have done. Documents must be retained by employers, however, for submission to the DOL in the event of an audit.

ii. Prevailing wage: Under the current labor certification rules, employers are permitted to pay at least 95% of the prevailing wage established by the SWA for the occupation. The Consolidated Appropriations Act of 2005 ("CAA"), however, amended Section 212(p)(3) of the Immigration and Nationality Act ("INA"), 8 U.S.C.§1182(p)(3), to require an employer to pay at least 100% of the prevailing wage. The CAA also mandated that the DOL use a wage survey with at least four levels so they hopefully will be more accurate than the current OES two-tiered wage survey in use today.

iii. Job requirements: The current labor certification regulations permit employers to include special requirements in the application that are required to perform the job duties. The proposed PERM rules threatened to eliminate this flexibility but the final PERM rules dropped this proposed restriction. Under PERM, therefore, employers may continue to include special requirements in labor certifications as long as they are supported by business necessity and consistent with the employer's normal requirements for the position. The presence of these requirements, however, may increase the likelihood of a DOL audit.

iv. Foreign language requirements: The DOL historically has resisted attempts by employers to include foreign language requirements in labor certification applications because they are considered unduly restrictive. The proposed PERM rules severely restricted an employer's ability to include foreign language requirements in a labor certification application. The final PERM rules, however rejected this position and basically incorporated the current procedure. Under PERM, employers can require foreign language experience as long as they can demonstrate that it is job-related and required by business necessity. The presence of this requirement, however, also may increase the likelihood of a DOL audit.

v. Experience gained on the job: The current labor certification rules allow employees to satisfy the minimum job requirements based on experience with the employer as long as it was in a materially different position. The proposed PERM rules eliminated this rule but the final PERM rules reinstate it. Under the PERM program, an employee may satisfy the job requirements based on experience gained with an employer as long as it occurred in a position that was materially different from the one sought to be certified. Again, the presence of this factor in the application may increase the likelihood of a DOL audit.

vi. Definition of employer: The proposed PERM rules defined an employer to include every subsidiary or affiliate anywhere in the world. In effect, this would have made it impossible for many employees to satisfy labor certification requirements based on experience gained with corporate relatives because it would have been considered experience gained with the employer. The final PERM rules define an employer by employer identification number and thus eliminate this potential limitation.

vii. Layoffs: Under PERM, an employer must notify and consider potentially qualified U.S. workers in the same occupation as the one contained in the application that it has laid off within the six months preceding the filing of the application. The termination of contract workers is not considered a layoff, unless the employer is a consulting firm.

viii. Document retention: Employers must retain all documentation relating to a PERM application for at least five years from the date the application was filed with the DOL.

4. Special Situations under PERM:

A. *Foreign nurses*: The final PERM regulations require employers seeking blanket certification of foreign nurses under schedule A to demonstrate that they have: (i) a CGFNS Certificate; (ii) passed the NCLEX-RN examination; or (iii) permanent, full and unrestricted licensure in the state of intended employment.

B. *College or University Teachers*: The final PERM regulations made only minor changes in the labor certification process that applies to college or university professors, so it basically will not change.

C. *Team Sports:* The final PERM rules do not affect the current procedure for securing labor certification for foreign nationals employed by professional sports teams. Employers submitting these applications will continue to use the form ETA 750 and file with the DOL under the existing procedures.

5. Preparation for PERM

The speedy adjudication of labor certification applications under the PERM program promises to be a strong allure for foreign nationals who have had labor certifications pending for years and now believe that they can obtain permanent residence more expeditiously. Unfortunately, this group tends not to focus on the stricter rules that the DOL has established for the PERM program and ignores the fact that PERM might result in denial of their applications. The resultant information gap will be a huge source of friction between employers and their foreign national employees unless employers proactively address the advent of the PERM program and demonstrate to the affected employees why it will (or will not) benefit them.

At this time, we recommend that all employers review their pending and planned labor certification applications to determine which might benefit from the PERM program. In this regard, employers must consider whether they can legally accomplish the additional recruiting that PERM requires. This may be difficult if the employer has no vacancy in the relevant occupational classification because it then cannot represent to the DOL that it is willing to hire a qualified U.S. worker for the position it seeks to certify. Recruiting when no real vacancy exists also opens the employer up to discrimination claims and charges that it conducted a phony recruitment campaign.

For those cases where additional recruiting might be justified, employers also need to consider whether special requirements or other particular factors in the applications might make them less suitable candidates for the PERM program. At this point, there is no indication how the DOL will handle the audit process or the length of time it might take. For this reason, employers might want to have a better track record of the DOL's performance under the PERM program before seeking to convert these applications. Transparency in this thought process, however, will be important so that employees with labor certifications pending understand the reasons for the employer's position and realize that it is in their best interests.

If you have any questions about these issues or any other developments in the immigration area, please contact **Robert S. Groban, Jr.**, the head of our Immigration Law Group, in the **New York** office at **212/351-4689** or **rgroban@ebglaw.com**