

PERM I: Pre-Filing Strategies and Considerations



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Outlining Minimum Requirements

- Position to be offered at time of green card approval.
- Minimum requirements of position lay framework for entire process.
- Fundamental considerations:
 - Must look to employer's pattern of practice
 - No tailoring to fit employee's resume
 - No excessive or unusual requirements
 - Consistent with O*Net database

Challenges with Minimum Requirements: Employers

- EB-2 vs. EB-3
- Minimum vs. preferred
- Business necessity vs. excessive
- Specific vs. tailored
- Quantifiable vs. subjective
- Primary vs. alternative

Challenges with Minimum Requirements: Employees

- Employee must qualify for position at the time PERM is filed.
- Employee must possess required education or foreign degree equivalent as determined by the Electronic Database for Global Education (EDGE), <http://edge.aacrao.org>.
- Employee must have required experience prior to joining employer, with limited exceptions, 20 CFR 656.17(i)(3)-(5):
 - Job duties where not substantially comparable (51% different)
 - No longer feasible to train
 - Employee worked for related entity with different FEIN
- Employee must meet all special requirements.

Drafting in Consideration of Visa Backlogs

- Anticipate promotions or other job changes.
- Prevailing wage obligations may not be relevant for years.
- Employee may need to secure H-1B status for extensions under the American Competitiveness in the Twenty-First Century Act (AC21). Will an H-1B be available? Plan ahead.
- Changes in corporate structure, location.
- Children may age out.
- Remember to check for cross chargeability.
- Immigration reform could change everything.

Travel Requirements

- What type of travel will be required?
 - Roving – frequent travel to unanticipated worksites, 1994 DOL “Farmer Memorandum”, AILA InfoNet Doc. No. 96100140 (posted 10/1/96)
 - Remote workers/telecommuters
 - Long-term placements
- What if travel is inherent in the job description?

Travel Impacts Wages

- Prevailing Wage Determination must be obtained for the work location(s).
 - Highest Prevailing Wage of various locations must be used.
- DOL sees travel as an additional requirement and benefit that must be disclosed in Prevailing Wage Requests, recruitment, and ETA9089.
 - “Stakeholder Questions submitted for DOL Stakeholder Meeting, February 13, 2013,” AILA InfoNet Doc. No. 13022144 (posted 2/21/13).

Advertising with Travel

- What do you say about travel in the recruitment advertising?
- Where do you post the Notice of Filing, and where do you publish the job advertisements?
 - If worksite is at a location owned by the employer
 - If the employee works at a 3rd party site
 - If the employee also works remotely
 - If the employee will work from home
 - If the worksite is unknown at the time of recruitment
- Where do you list travel in the ETA?

Hypothetical

Kumar is a software engineer for an IT Consulting Company located in New York. Since the time he started working for his employer in H1-B status, he has worked at a client site located in Dallas, Texas. He sometimes works from his home in Dallas.

Hypothetical: Considerations

- Where do you advertise?
- Where do you list as the worksite in the recruitment and Prevailing Wage Request?
- What if Kumar was not working at a client site at the time the Prevailing Wage Request was filed?
- What if Kumar's next job was at an unanticipated worksite?
- What if Kumar's employer required him to report to a local office in Dallas?
- What if Kumar's employer required him to reside in Dallas?
- What if Kumar's employer will require him to move to headquarters when his Green Card is approved?

New Form ETA 9141 - June 18, 2013

- Removes:
 - Hours per week and work schedule
 - Other working conditions affecting rate of pay
- Adds:
 - *Is the employer covered by ACWIA?*
 - *Is the position covered by a Collective Bargaining Agreement (CBA)?*
 - *Is the employer requesting consideration of the Davis-Bacon (DBA) or McNamara Service Contract (SCA) Acts?*
 - *Is the employer requesting consideration of a survey in determining the prevailing wage?*
 - *Survey name*
 - *Survey date of publication*
 - *Indicate the level of the employees to be supervised: subordinate or peer*
- Requests for Information (RFIs) – 7 days to respond to DOL
 - Tip: Proactively include job titles of supervised employees in PWR.

PWD Practice Tips

- Triggers for higher wages:
 - Education and/or experience beyond what is “normal”
 - Managerial duties
 - Travel
 - Foreign language skills
 - Special requirements
- Utilize job duties box E.a.5. to include primary and alternative minimum requirements, special requirements, and any other conditions affecting wage rate.
- Multiple worksites: Consider the higher wage as primary.
- Filing multiple wage requests for alternative requirements: Must use higher prevailing wage, *Matter of Take Solutions Inc.* BALCA Case No. 2010-PER-00907 (Apr. 28, 2011), AILA InfoNet Doc. No. 11042966 (posted 4/29/11).
- Combination of occupations: DOL will use higher prevailing wage.

Watching the Clock: PWD

- PWD will be valid for 90 days to 1 year; must be valid when recruitment starts.
- PERM Filing Deadline – look to Prevailing Wage Determination, 20 CFR 656.40(c):
 - Where recruitment starts **BEFORE** prevailing wage determination: filing deadline is expiration date of PWD **or** normal filing deadline based on recruitment, whichever is **earlier**.
 - Where recruitment starts **AFTER** prevailing wage determination: filing deadline is 180 days from first form of recruitment. PWD must be valid when recruitment begins.
- Tip: Be cautious of filing deadlines when PWD is issued in the months before July.
- Tip: Do not start recruitment until PWD issued and approved by employer, unless there is some emergent need for green card, such as:
 - Visa max cap out.
 - Aging out children.

Watching the Clock: Recruitment

- 180-Day Rule: All recruitment must take place within 180 days, starting on first day of first form of recruitment and ending on day the ETA9089 is filed, 10 CFR 656.17(e)(1)-(2).
- Mandatory steps must take place 30+ days before filing:
 - Job order with State Workforce Agency: 30 days (or more? – include only days open to entire public), “DOL Updates FAQs on PERM Placement of Job Orders,” AILA InfoNet Doc. No. 12061150 (posted 6/11/2010).
 - Newspaper Ads: 2 consecutive Sundays
 - Internal Posting (no union): 10 consecutive business days, 20 CFR 656.10(d)(1)(ii)
 - Contrast to H-1B posting: 10 consecutive calendar days, 20 CFR 655.734(a)(1)(ii)(A)(3)
- Three additional recruitment steps (professional occupations):
 - Only 1 of the additional steps may take place within 30 days of filing.
 - No clear regulations on duration requirements.
 - Company’s website: If used for applying to position, must remain online until recruitment is completed.

Watching the Clock: Post-Recruitment

- 30 day cooling period required before filing.
 - Be sure employer is registered with DOL and has set up an attorney “subaccount”.
 - Complete audit file with copies of all recruitment evidence and business necessity documentation.
 - Draft ETA9089 for employer & employee review.
- Additional risks for delay:
 - Reviewing resumes and interviewing applicants.
 - Government shutdown.
- Aim to file before 6th year of H-1B status begins to be eligible for AC21 §106(a) benefits, 2005 Yates Memo, AILA InfoNet Doc. No. 05051810 (posted 5/18/05).

Questions?

