

# ***Bailamos bachata!***

**PERM Recruitment, Requirements, Degree  
equivalency issues, Audits, and DOL Updates**

**Dustin O'Quinn,**

The Dustin O'Quinn Law Firm

**Peter Bade,**

Berry Appleman & Leiden LLP

**David Ware,**

Ware Immigration

# Recruitment Overview



# Recruitment

Regulations divide most occupations into two categories:

▶ Professional

- Attainment of a Bachelor's degree or higher is usual educational requirement.

▶ Non-professional

- All others.

University of Common Sense

*In Recognition of Life-long Learning and Dedication to Hard Work  
Having gained Knowledge from Personal Experience and through the Example of Others*  
**Benjamin Franklin**  
*Has gained Expertise and Mastery in his Chosen Field*

*With the approval of the Faculty, the Board of Trustees decrees Recognition as*  
**Doctor of Philosophy**  
**in Common Sense**  
*With all the rights, honors, and privileges appertaining.*



© 2014, University of Common Sense

*At the birth of the Church, Day of May  
In the Year of Our Lord, Two Thousand Seven*

*Samuel O. Wise*  
*University President*

# Professional Recruitment

## Mandatory

- Job Order with the SWA
- Ad in newspaper of general circulation on two different Sundays
- Internal Posting (10 business days) (in a readily accessible and unobstructed location where other work-related notices are routinely posted and electronically on Employer's website)

## Optional – pick three

[20 C.F.R. § 656.17 (e)(1)(ii)]

- Employer's website
- A job search website
- Job fairs
- On-campus recruiting
- Employee referral programs (with incentives)
- Trade or professional organizations
- Private placement agencies
- Campus placement offices (if no experience required)
- Local/ethnic newspapers
- Radio/Television ads

# Non-Professional Recruitment

## All Steps are Mandatory

- Job Order with the SWA
- Ad in newspaper of general circulation on two different Sundays
- Internal Posting (10 business days)



# Newspaper Advertisement

## ▶ Requirements

- Name Employer
- Provide contact information for applicants
- Indicate geographic area of employment
- Include any need for travel
- If rate is included, cannot be lower than prevailing wage
- Job requirements or duties listed may not exceed those in the Form 9089
- Terms of employment may not be less favorable than those offered to the foreign national.

# Required Print Advertisements for Professional Occupations

20 C.F.R. § 656.17(e)(1)(i)(B)

- ▶ Placing an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity.
- ▶ If the job opportunity is located in a rural area of intended employment that does not have a newspaper that publishes a Sunday edition, the employer may use the newspaper edition with the widest circulation in the area of intended employment.
- ▶ If the job requires experience and an advanced degree, and a professional journal normally would be used to advertise the job, employer may, in lieu of one Sunday advertisement, place an advertisement in the professional journal.

# State Workforce Agency Job Order

- State Workforce agency serving area of intended employment
- 30 calendar days



**OKLAHOMA  
WORKS**





# Posting a Job Order with the State Workforce Agency

- ▶ 20 C.F.R. § 656.17(e)(1)(i)(A)
- ▶ Placement of a job order with the State Workforce Agency serving the area of intended employment for a period of 30 days.
- ▶ *NOTE:* To count the thirty (30) day period, count the day the Job Order is posted as day one and the day it is removed as day thirty (30). Example: If the Job Order is posted on May 1, 2011, then it can be removed on day thirty (30), May 30, 2011. A Job Order is necessary for each position for which the employer is seeking permanent labor certification.
- ▶ *NOTE:* Job Orders do not typically include the salary offered. But if the employer wants to include the salary offered on the Job Order, the minimum salary must be at least the prevailing wage, as specified on the PWD.

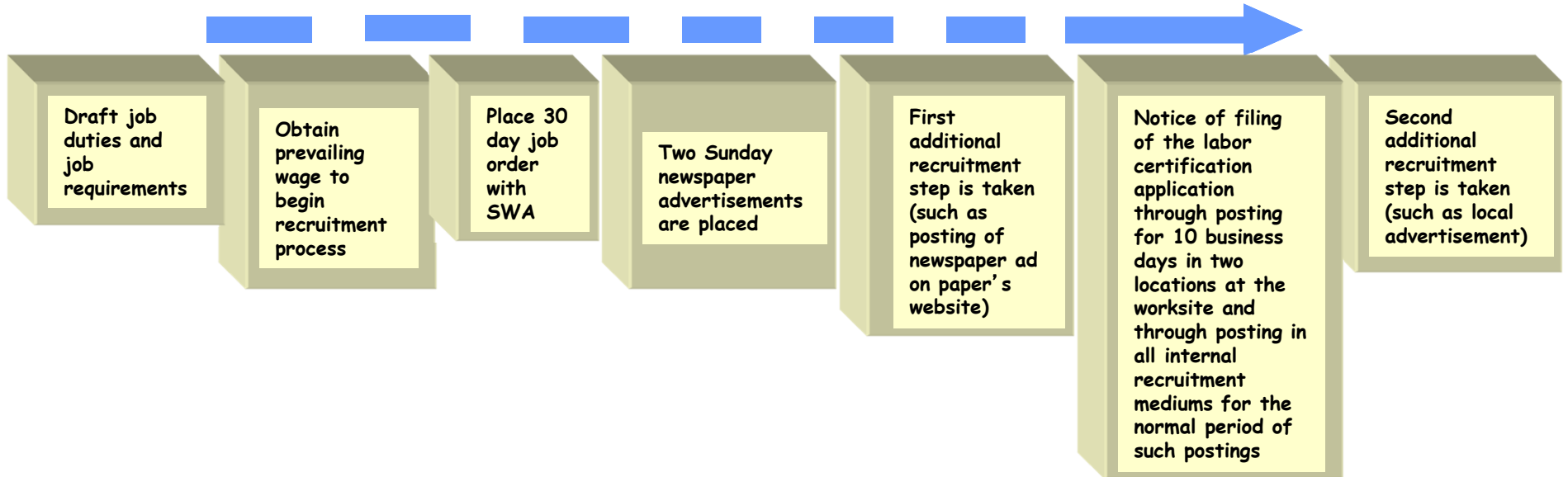
# Recruitment Timing



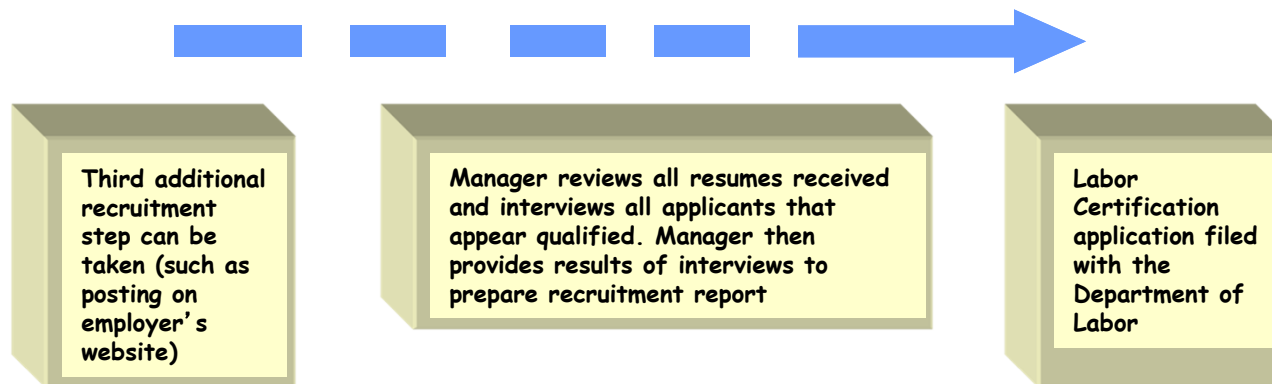
- All Recruitment must be completed within 180 days prior to filing the application
- Mandatory steps must be completed at least 30 days before filing
- Of the three additional steps required for professional positions, one may take place within the 30 day period before filing. (We recommend NO recruitment measures during this period.)

# Timeline

180-31 days Prior to Filing



Within 30 days of filing



# PERM Requirements, and Looking Ahead to I-140 approval



- Immigrant Visa Category
- Education
- Experience & Skills
- Prevailing Wage

# TAKE AWAY: Make sure your employee qualifies for the PERM position too!

Official Website of the Department of Homeland Security

[Login](#) or [Sign up](#)

U.S. Citizenship and Immigration Services

FORMS NEWS CITIZENSHIP GREEN CARD TOOLS L

## Case Was Approved

On November 4, 2015, we approved your Form I-140, Immigrant Petition for Alien Worker , Receipt Number SRC1601350323. We will mail your approval notice. Please follow the instructions in the notice. If you move, go to [www.uscis.gov/addresschange](http://www.uscis.gov/addresschange) to give us your new mailing address.

Enter Another Receipt Number ?

# Education Met?

- Ensure that employee has required degree.
  - Acquired before joining company filing the PERM application?
  - 4 year or 3 year BA degree?
  - Appropriate educ. equivalency language used?
  - Appropriate foreign equivalency obtained (AACRAO or EDGE analysis)?

Best practice: ensure employee qualifies for education listed in ETA 9089 at beginning of process.

# Experience and Skills Met?

- Skills and Experience gained Prior to joining Employer?
- Special requirements/skills listed in ETA 9089 adequately covered in experience letters?
  - See 8 CFR § 204.5(g)(1); USCIS will discretionarily consider other documentation in lieu of letter from prior employer.
- Regulations say *progressive* - 8 CFR § 204.5(k)(3)(i)(B)
- Listing and documenting license requirements on ETA 9089 form:
  - AILA Practice Pointer: AILA Doc. 14041655
  - DOL PERM FAQ: AILA Doc. 14072853

# Immigrant Visa Preference Categories

- EB-2: 4 year single source BA degree + 5 years post-bachelor's progressive experience; or MA degree, or higher degree (or foreign equiv.). 8 CFR § 204.5(k)(2)
- EB-3 – all others not EB-2. 8 CFR § 204.5(k)(3)(i)(B)
- Professional – holds at least BA or foreign equiv. and professional position. 8 CFR § 204.5(l)(2)
  - Skilled worker (e.g. 3 year BA degree from India, or combination degree of work exp. + some education)
- Discuss and set expectations with employee and employer about filing preference category, and expected wait times until LPR acquired.



# Prevailing Wage Issues

- Identify/resolve any potential prevailing wage issues at PERM stage with Employer
- Requirement to document Ability to pay at I-140 stage. 8 CFR § 204.5(g)(2)
  - Easiest ways: 10-K if public co., or if employee making prevailing wage at time PD established (i.e. PERM filing).
  - See USCIS Yates Memo 2004. AILA Doc. 04051262
  - Totality of financial situation of the employer approach. *Matter of Sonogawa*, 12 I&N Dec. 612 (AAO 1967).
- OES wages or third party surveys (e.g. Radford or Towers Watson) as wage sources.
- Obtaining “All Other” SOC Classification for PWD.
  - AILA Doc. 15061102

# Degree Equivalency Issues

- Substantially equivalent Alternate Requirements – 20 CFR § 656.17(h)(4)(i) – “Alternate experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought.”
- Field Memorandum No. 48-49 (May 16, 1994) – AILA Doc. No. 94052390
  - Bachelor’s Degree = 2 years of SVP
  - Master’s Degree = 4 years of SVP
- Prevailing Wage Determination Policy Guidance – Nonagricultural Immigration Programs (Revised November 2009) – AILA Doc No. 10010468
  - SVP 7 = Over 2 years up to and including 4 years
  - SVP 8 = Over 4 years up to and including 10 years

# Degree Equivalency Issues – BALCA's Approach

- *Matter of GlobalNet Management L.C.*, 2009-PER-110 (Aug. 6, 2009)
  - “14 years of work experience is not substantially equivalent to a Bachelor’s degree and 2 years of work experience.”

BUT...

- *Matter of Microsoft Corporation*, 2011-PER-02563 (Oct. 16, 2012) – “But the CO never stated that the SVP levels must be identical to be found substantially equivalent... The CO in no way formulated a new policy of requiring absolute equality in SVP levels when reviewing the equivalency question.”

# Degree Equivalency – USCIS Approach

- 8 C.F.R. § 214(h)(4)(iii)(c) – “For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.”

# Degree Equivalency – Possible Practical Options

- Mathematical SVP Equivalency
  - “In lieu of a Bachelor’s degree, will accept two additional years of experience as stated.” – (But consider H-1B issues)
  - Master’s + 1 or Bachelor’s + 3 (But consider EB-2 vs. EB-3 issues)
- Substantial Mathematical Equivalency
  - Master’s + 2 or Bachelor’s + 5
  - Master’s + 3 or Bachelor’s + 5
  - What about Master’s + 0 / Master’s + 1 or Bachelor’s + 5

# Degree Equivalency – Practical Options

- Substantive Equivalency Options –
  - “Will accept any combination of education and experience deemed equivalent to a Bachelor’s degree by a qualified credentials evaluation service.”
    - This is a BIG no-no: recent DOL denials indicate “CO is unable to determine employer’s actual minimum requirements”
  - Current DOL adjudication trends require quantification, e.g. in lieu of a Bachelor’s degree, employer will accept three years of postsecondary study in XX plus one year work experience.”
    - Is CO able to determine employer’s actual minimum requirements?
    - Does description of job adequately appraise U.S. workers?

# Audit Trends

- Last Audit Matrix available from 2013
- DOL claims it is constantly changing audit mix, triggers
- OJT, payment, US worker contacts, reasons for rejection, now all standard
- Lots of changes in Business Necessity Question
  - Originally in boilerplate
  - Carlson removed in 2013, assuring liaison would only be used when needed
  - Reappeared in very confusing form as standard “Audit Reason”
  - We raised issue at liaison
  - Question modified: mere statements from employer insufficient
  - We raised issue again 10/20
  - Question now gone from recent audits

# OFLC Reengineering Efforts and Liaison Updates

- DOL currently working on new PERM regulation and updated 9089
- Regulation should be out some time in the spring of 2016
- Changes to form will be limited – DOL’s software is old and they have no money for major changes or updates to the PERM portal
- The new regulation will likely include:
  - Harmless error
  - Changes in advertising: whither the JO, Sunday ads?
  - Possibly allowing experience gained in same job
  - Changes in notice to other workers, applicants



# Executive Action and PERM

- OFLC wants to move to a fee-based model, like USCIS
- In the last 5 years, OFLC has seen a 150% increase in application filings, but a 10% reduction in funding
- Fee authority will require a change in the statute and the Obama administration's 2015 budget proposal included fee authority, but that budget proposal has not been enacted
- Possible premium processing option for PERM applications should fee authority be obtained