

It's Complicated: Our Relationship Status with PERM

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General Overview – Pre Filing

- Define job description and minimum requirements
- Obtain prevailing wage determination
- Conduct required recruitment and maintain evidence of recruitment
- Review recruitment results and interview applicants as necessary
- Register the Company with the DOL

General Overview – Post Filing

- File form with DOL Electronically
- DOL will check employer's existence
 - Tax I.D. no.
 - Public database
- DOL will confirm Company wants to proceed with application filed
- DOL will approve, deny or select case for audit
- Documentation must be kept for 5 years (form, proof of recruitment, etc.)

Defining the Job Description and Minimum Requirements

Job description

“The Job opportunity’s requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones.” 20 CFR § 656.17(h)(1)

MUST:

- Describe core duties of position
- Apprise Applicants of the Job Offered
- Be consistent with DOL Occupational Classification

Source of Description – Where to Start?

- Employer's Description - general description of the title (formal job requisition) or specific description of the position (input from managers and HR) – what is “normally” required?
- Employee's description of the position – can the employee supply additional details that can lead to special skills requirements?
- Employee's CV – “The employer cannot require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire” 20 CFR 656.17(i)(3).
- Prior descriptions used in nonimmigrant petitions – consistency is always a consideration.
- DOL Occupational Classification Description – consider SVP ranges to inform selection of education levels and requirements for years of experience.

- O*Net™ Job Zones
- **JobZone One: Little or No Preparation Needed**
 - **Experience:** Little or no previous work-related skill, knowledge, or experience is needed for these occupations. For example, a person can become a waiter or waitress even if he/she has never worked before.
 - **Education:** Some of these occupations may require a high school diploma or GED certificate.
 - **Job Training:** Employees in these occupations need anywhere from a few days to a few months of training. Usually, an experienced worker could show you how to do the job.
 - **Examples:** These occupations involve following instructions and helping others. Examples include counter and rental clerks, dishwashers, cashiers, furniture finishers, logging equipment operators, and baristas.
 - **SVP Range:** Below 4.0
- **JobZone Two: Some Preparation Needed**
 - **Experience:** Some previous work-related skill, knowledge, or experience is usually needed. For example, a teller would benefit from experience working directly with the public.
 - **Education:** These occupations usually require a high school diploma.
 - **Job Training:** Employees in these occupations need anywhere from a few months to one year of working with experienced employees. A recognized apprenticeship program may be associated with these occupations.
 - **Examples:** These occupations often involve using your knowledge and skills to help others. Examples include orderlies, forest firefighters, customer service representatives, security guards, upholsterers, and tellers.
 - **SVP Range:** 4.0 to < 6.0
- **JobZone Three: Medium Preparation Needed**
 - **Experience:** Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam in order to perform the job.
 - **Education:** Most occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree.
 - **Job Training:** Employees in these occupations usually need one or two years of training involving both on-the-job experience and informal training with experienced workers. A recognized apprenticeship program may be associated with these occupations.
 - **Examples:** These occupations usually involve using communication and organizational skills to coordinate, supervise, manage, or train others to accomplish goals. Examples include food service managers, travel guides, electricians, agricultural technicians, barbers, nannies, and medical assistants.
 - **SVP Range:** 6.0 < 7.0
- **JobZone Four: Considerable Preparation Needed**
 - **Experience:** A considerable amount of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified.
 - **Education:** Most of these occupations require a four-year bachelor's degree, but some do not.
 - **Job Training:** Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.
 - **Examples:** Many of these occupations involve coordinating, supervising, managing, or training others. Examples include accountants, sales managers, database administrators, graphic designers, chemists, art directors, and cost estimators.
 - **SVP Range:** 7.0 < 8.0
- **JobZone Five: Extensive Preparation Needed**
 - **Experience:** Extensive skill, knowledge, and experience are needed for these occupations. Many require more than five years of experience. For example, surgeons must complete four years of college and an additional five to seven years of specialized medical training to be able to do their job.
 - **Education:** Most of these occupations require graduate school. For example, they may require a masters degree, and some require a Ph.D., M.D., or J.D. (law degree).
 - **Job Training:** Employees may need some on-the-job training, but most of these occupations assume that the person will already have the required skills, knowledge, work-related experience, and/or training.
 - **Examples:** These occupations often involve coordinating, training, supervising, or managing the activities of others to accomplish goals. Very advanced communication and organizational skills are required. Examples include librarians, lawyers, astronomers, biologists, clergy, surgeons, and veterinarians.
 - **SVP Range:** 8.0 and above

<http://www.onetonline.org/>

Defining the Job Description and Minimum Requirements

- Minimum requirements
 - Education, Alternate Education, type of degree?
 - Experience in the Job Offered and/or Alternate Experience?
 - Special Skills/Training (and where to document on the ETA 9089)?
 - Are the requirements reasonable according to the DOL?
 - How do Minimum Requirements impact prevailing wage?
 - Does the beneficiary meet the minimum requirements – prior to working for the sponsor?

Difficult Cases: Foreign National's Experience

What if the foreign national's experience was gained with the employer? If the foreign national's position is not substantially comparable to the offered position, experience gained with the employer may be used.

- “A ‘substantially comparable’ job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.” 20 CFR 656.17(i)(5)(ii).
- **WATCH OUT!!** Use of prior experience with the employer is a probable audit trigger.

Difficult Cases: Alternate Minimum Requirements

If the foreign national could qualify for the position based on different education, experience or training in a comparable occupation, etc.:

- Alternative Minimum Requirements must be “substantially equivalent” to primary requirements. 20 CFR 656.17(h)(4).
- **KELLOGG LANGUAGE!!** If already employed and foreign national is eligible under alternative requirements, the phrase “any suitable combination of education, training or experience” is acceptable,” may be required in the “Special Skills” section. Check out DOL FAQ Round 10 and BALCA Decision in Agma Systems, LLC.

Difficult Cases: Special Requirements

- Job requirements must be employer's minimum requirements – no “tailoring.”
- Foreign language requirements: fluency in a foreign language cannot be required unless the employer can demonstrate a legitimate business necessity.
- Business necessity is demonstrated by the nature of the position (translator) and/or the fact that the majority of the employer's customers speak the required language, AND the foreign national's responsibilities require communication with them. 20 CFR 656.17(h)(2).
- PERMs containing a foreign language requirement may be audited.

Difficult Cases: Requirements Exceeding the SVP

- Business Necessity documentation required when special skills or experience required are beyond those indicated by the DOL O*Net and SVP/Job Zone
- Business Necessity – job duties and requirements bear reasonable relationship to the occupation in context of employer's business and are essential to perform a job in a reasonable manner.

PREVAILING WAGE UNDER PERM

- A Prevailing Wage Determination (PWD) must be obtained from the Department of Labor
- A PWD will be issued with a validity ranging from 90 days to 1 year
- PWD must be valid at either the time recruitment begins or when the labor certification is filed

HOW IS PREVAILING WAGE DETERMINED?

- The Department of Labor utilizes Occupational Employment Statistics Survey (OES) for wage determinations
- Four wage levels are provided
- Employer can submit a private wage survey to obtain a PWD
- Supplemental information can be submitted by employer to dispute skill level or wage determination

DOL Wage Level Guidance

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Source: ETA Prevailing Wage Determination Policy Guidance
(Revised November 2009).

Pre-Filing Recruitment

20 CFR 656.17(e) – the employer must test the surrounding labor market to ensure that there are no qualified U.S. workers by advertising the position to the public according to specific procedures.

Mandatory Recruitment

- Job posting notice stating salary or salary range posted for 10 business days at the place of employment
- Job order with State Workforce Agency for a 30 day period
- 2 Sunday newspaper ads OR 1 Sunday newspaper ad & 1 Journal ad

Pre-Filing Recruitment Professional Job

Professional Job = An occupation for which the attainment of a bachelor's or higher degree is a usual educational requirement

Pre-Filing Recruitment Professional Job (Cont.)

- **Alternate Recruitment – must choose 3 of the following:**
 - Job Fairs
 - Employer's website
 - Other career or job search websites (Houston Chronicle Website)
 - Trade/professional organization (on-line is acceptable)
 - Private employment firms/Headhunters
 - Local/Ethic newspaper if appropriate for job
 - Employee referral program
 - Radio or TV
 - On-campus recruitment (if degree and no experience required)

Recruitment and Filing Timelines

- Mandatory recruitment
 - Job Orders must be posted 30 days
 - The Notice of Job Opportunity must be posted internally (with specific language provided) for 10 business days (excludes weekends and holidays unless the employer can show that it was open and operating on those days).
- Overall Recruitment period
 - Recruitment must be begin within 180 days of filing the labor certification application
 - Recruitment must be completed 30 days before filing the labor certification application
 - Exception – One of the alternative recruitment venues may occur within the 30 days prior to filing the labor certification application for professional positions

Twenty-first Century Work Site Alternatives in a Nineteenth Century Regulatory Scheme

- Travel, Virtual Offices, Home Offices, and Roving Employees
 - Roving employees – no set work location, travels from worksite to worksite
 - Unknown Unanticipated work locations – will have a worksite(s) but the location(s) is not known at the time of filing
 - Home office – work from home during regular business hours
 - Travel – when is travel a job requirement
- How Do Alt Work Sites Impact Your PERM case?
 - Where to recruit?
 - Where to post notices?
 - What to state in advertisements?
 - How will the alt work site(s) impact the prevailing wage?

Examples

- Travel required up to 90% within the continental US and Internationally.
- Dallas, TX or home based within the continental US. Travel to and from HQ for training or short assignments required.
- Dallas, TX with long-term placement (up to two years) within the continental US. (You would list the requirement in the ad and also under special requirements).

Recruitment Results

Employer must review resumes submitted to determine whether applicants possess minimum requirements. Attorneys CANNOT review resumes and make decisions about the qualifications of applicants.

- If it is clear from the face of resume that an applicant is not qualified, then no further action is necessary. Example: applicant has a high school diploma where a bachelor's degree is required.
- If it is not clear, the employer may need to conduct interviews by telephone or in person to get more information about the applicant's education and experience. Example: applicant has a bachelor's degree in Mechanical Engineering when Industrial Engineering is required.

Lawful Reasons for Rejection

- Applicant does not meet minimum qualifications as stated in job description.
- Applicant is unwilling to accept the terms and conditions of the position (Example: applicant does not want to relocate to the jobsite or does not accept the offered salary).
- Applicant is unable to perform the functions of the job (Watch out for the Americans with Disabilities Act!).
- Applicant is not a U.S. Worker (U.S. Workers are U.S. citizens and legal permanent residents).
- Other reasons – applicant's references cannot be verified, etc.

REMEMBER!!!

“A U.S. Worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training. Rejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers.”

20 CFR 656.17(g)(2)

Also, if the employer has had a lay-off in the same or related occupation, in the same area, within 6 months of filing, the employer must “document it has notified and considered all potentially qualified laidoff (employee applicant) U.S. workers of the job opportunity.” 20 CFR 656.17(k)(1). Check out DOL FAQ, Recruitment Report: How does an employer demonstrate that it notified and considered laid-off U.S. workers for the job opportunity listed on the ETA Form 9089?

Recruitment Report

- Describes recruitment steps taken and results.
- Includes number of applicants and U.S. workers rejected.
- Must categorize rejections by lawful related reason.
- Person responsible for recruitment must sign recruitment report.
- Supporting documentation must be retained for 5 years after filing.

Adjudication

PERM Processing Times (as of 10/1/2016)

Processing Queue	Priority Dates	
	Month	Year
Analyst Review	July	2016
Audit Review	February	2016
Reconsideration Requests to the CO	August	2016
Gov't Error Reconsiderations	Current	

The term *current means all H-1B, H-2B and PERM prevailing wage requests that are being actively processed.

The Analyst Review and Audit dates posted on iCERT above reflect the month and year in which cases were filed that are now being adjudicated at the Atlanta National Processing Center. *The Reconsideration Request to the CO dates posted on iCERT above reflect the month and year in which cases that are now being reviewed at the Atlanta National Processing Center were appealed. For various reasons, we may be completing the processing of applications filed prior to the month posted on iCERT. If your application was filed more than 3 months prior to the month posted, you may contact our Helpdesk for a status on the application at plc.atlanta@dol.gov.

Determinations	Average Number of Days to Process PERM Applications	
	Month	Calendar Days
Analyst Review	September 2016	85
Audit Review	September 2016	230

Approval

- **Validity Period**
 - All labor certification applications approved on or after July 16, 2007, will expire 180 calendar days after the date of approval

Audit

- Based on review of application or randomly
- Will request recruitment documentation and other specific information as stated
- 30 days to respond – 1 extension of 30 days at the discretion of the certifying officer
- Certifying officer may approve, deny or direct supervised recruitment
- Failure to respond will result in denial and possible supervised recruitment for 2 years

Supervised Recruitment

- All ad responses go to certifying officer for review not to the employer
- 3 day ad including Sunday – ad with wage must be approved by certifying officer before placed
- Detailed written report submitted to certifying officer within 30 days of certifying officer request

Revocation

- Certifying Officer may revoke approved labor certification if determine approval not justified
- Employer will receive notice of intent to revoke with 30 days to respond or revocation becomes final
- If certifying officer reviews response but determines that revocation is justified, employer may appeal to BALCA within 30 days
- Certifying officer may revoke labor certification at any time after approval

PERM Debarment and Program Integrity

- The DOL may suspend or debar an employer, attorney or agent from the labor certification program based on actions such as fraud, willful provision of false statements, or a pattern or practice of noncompliance with PERM requirements

What Have You Learned?

Hypothetical:

Client employer wants to hire computer programming contractor directly. Contractor is a citizen of India and is working on Client's site in H-1B status sponsored by the contracting employer. Contractor has never been sponsored for an immigrant visa before and has approximately 14 months of his 6 H-1B years remaining. Client wants to place Contractor in a permanent position with no interruptions in employment.

- Can you get the 1-year unlimited extensions by filing PERM within 365 days of H-1B expiration under these facts?
- What can you do to optimize chances of getting to I-140 approval before the H-1B expires?
- How do you minimize the chances of a PWD level-up? How do you advise the client if you do get a level-up? Does it make sense to run the PWD and recruiting concurrently under these facts?
- How do you minimize the chances of finding a qualified applicant during recruitment?

What could go wrong?

- Prevailing Wage Determination comes back with a higher wage than anticipated or changes the SOC code proposed in the application.
- A U.S. Worker applicant cannot be disqualified by any legal means.
- Processing times get slower. Note that PWD processing times are currently longer than PERM processing times!!
- AUDIT!!!
- PERM gets denied without audit based on clerical error (BALCA processing times are very long, so excusable error may not help).
- Foreign National was not clear or was dishonest about his/her qualifications – can qualifications still be proven at the I-140 stage?

Additional Considerations

- Remember that the position offered in a PERM application is a prospective position – details like salary, jobsite location, and description of duties do not necessarily have to match the position the foreign national currently holds.
- Remember that the job description and the description of requirements has to match at each phase of the PERM process. For example, you cannot change some of the requirements between receiving the PWD and starting advertising if the PWD is not favorable. Exception: Kellogg language does not have to be included in advertising.
- Remember that you must prove that the foreign national possesses the required education, experience, and training when you file the I-140. Get all of your degree equivalencies and experience letters up front. Also note that USCIS only requires that the applicant possess qualifications at the time of filing the PERM application.

EB Preference Categories and Degree Equivalencies

The million dollar question: Am I EB-2 or EB-3?

Well, it depends...

The Job Requirements Dictate EB-2 or EB-3

Determine the minimum requirements for the position.

What degree and level of experience do other employees of the company possess, in similar positions?

Do these requirements fit within a Department of Labor SOC code that qualifies as Job Zone 5?

Deviating from the standard will require justification.

Is the Foreign National qualified for the position based on the minimum requirements?

EB-2 & EB-3 Degree Equivalency

Degree equivalency determinations are garnered from administrative interpretations of

8 CFR Sec.204.5(k)(2) and (l)(2)

- Advanced degree means any U.S. academic degree or professional degree or a foreign equivalent degree above that of a baccalaureate.
- Only acceptable equivalency allowed per the reg is U.S. Bachelor's plus 5 years progressively more responsible experience

&

Matter of Shaw, 17 I&N Dec. (Reg'l Comm'r 1977)

- Per *Matter of Shah* a three year bachelor's degree from India is presumed not to be the a foreign equivalent degree to a U.S. bachelor's degree.

Variations for Winning EB-2

- U.S. master's
- Foreign equivalent of U.S. master's
- Four year bachelor's degree + two year master's
- Three year bachelor's + one year post grad + two year master's
- Three year bachelor's + three year master's

**An excellent source of information and examples of acceptable equivalencies: AILA's Focus on EB-2 & EB-3 Degree Equivalency by Ronald Wada

PERM Resources

- INA § 212 (a)(5)(A)&(p)
- 20 C.F.R. part 656
- DOL's PERM Frequently Asked Questions
<http://www.foreignlaborcert.doleta.gov/faqs.cfm>
- AILA's Guide to PERM Labor Certification
- AILA's Immigration Practice Toolbox
- DOL Dictionary of Occupational Titles (DOT)
www.occupationalinfo.org
- OES Wage Data (DOL)
<http://www.flcdatacenter.com/>
- O*NET Occupational Database
<http://online.onetcenter.org>
- OALJ LAW LIBRARY IMMIGRATION COLLECTION
<http://www.oalj.dol.gov/libina.htm>
- (BALCA Decisions)