

“Permanent” Changes To The Way You Hire Foreign Workers

March Deadline Right Around The Corner

The Department of Labor (DOL) issued new regs for its Permanent Foreign Labor Certification (PERM) program, effective March 28, 2005. The DOL is hoping to achieve a turnaround time of 60 days for processing labor certification applications for green cards. *The trade-off:* a more intensive recruitment effort.

The PERM program exists to help employers hire qualified foreign workers when no qualified and willing U.S. workers are available for the position. However, employers must conduct several job recruitment steps within six months of filing a PERM application, in order to also effectively inform U.S. workers of the opportunity.

Step 1 — Prevailing wage determination (PWD). Before advertising the position, employers must contact the State Workforce Agency (SWA) — the state department of labor, for instance — that presides over the job location in order to obtain a PWD. Employers must pay employees 100% of the federally-mandated prevailing wage.

Step 2 — Advertising requirements. There are two.

Job order: At least 30 days before filing for labor certification (but not more than six months before), employers must place a job order for the open position with the SWA for at least 30 days. This gives individuals located in that state an opportunity to apply.

Print advertisements: Employers must place an ad on two different Sundays in the newspaper of general circulation in the area of intended employment. In lieu of one of the Sunday advertisements, the ad may be placed in a professional journal, if the job being advertised would normally appear in such a journal.

The regs specify that the ads must:

- name the employer;
- direct applicants to report or send résumés, as appropriate, to the employer;
- describe the vacancy with enough specificity to inform U.S. workers of the job opportunity; and
- indicate the geographic area of the job, plus any travel requirements, and where applicants will likely have to reside.

The ad need not contain the salary range or wage rate. But if it does, the amount must not be lower than the prevailing wage rate.

For professional occupations (*exceptions:* college/university teachers, nursing, and specialized science or art occupations requiring an advanced degree), employers must take three **additional recruitment steps**.

Options include:

- job fairs;
- your employer’s website;

- other job search websites;
- on-campus recruiting and placement offices;
- trade or professional organizations;
- private employment firms;
- employee referral programs with incentives;
- local and ethnic newspapers;
- radio and television advertisements.

Step 3 — Recruitment report. Employers must file a recruitment report with the DOL that describes the efforts undertaken to hire a qualified and willing U.S. worker, and the results of those efforts. It must include the number of positions available, the number of U.S. workers who were rejected, and the job-related categories associated with those rejections. You may not reject a U.S. worker based on a skill that he/she lacks for the position, if that skill can be acquired during a reasonable period of on-the-job training. **Note:** The DOL may request an audit to review the résumés and applications of those rejected workers, so be sure to keep them on file.

PERM'S POSITIVE IMPACT

David Nachman, Esq., Managing Attorney at Nachman & Associates, P.C. (Upper Saddle River, NJ), has written several articles on the connection between U.S. immigration laws and their effects on business.

“The immigration laws of our nation seem to afford a more ‘favored’ status to highly-skilled workers coming to the U.S. either to perform in specialized positions or to take up jobs that will [eventually] create additional jobs for U.S. workers,” Nachman surmised. “The U.S. government is sending a message internationally that our nation favors highly-skilled labor and individuals who possess highly-specialized skills and abilities (e.g., doctors, scientists, researchers, engineers, etc.)”

Nachman pointed to the PERM regs’ business necessity requirement that job duties and requirements must “bear a reasonable relationship to the occupation in the context of the employer’s business and are essential to perform the job in a reasonable manner.” Normally, that means occupational requirements must not exceed the Specific Vocational Preparation level as shown in the O*NET Job Zones (i.e., the list of the minimum requirements for recognized job positions in the U.S.). Nachman explained that the regs seem “to permit businesses to apply for certain ‘special’ skills required by businesses that go beyond those mandated in the...O*NET.” The regs indicate that the job requirements may exceed those mandated by O*NET if “adequately documented as arising from business necessity.” ♦