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PERM Seminar

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Fine Japanese Cuisine
IZAKAYA

EN

Lounge ZEN / IZAKAYA EN

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About PERM Program

- Effective date - 3/28/05
- What is the basic GC procedure ?
- History about Labor Certifications?

The Good Part

- DOL is promising a turn around time for labor certifications in about 60 days (45-60 days), for applications which are not audited.
- No evidence is needed.
- File electronically (or by mail) with no filing fee.

In order to obtain the PERM benefit

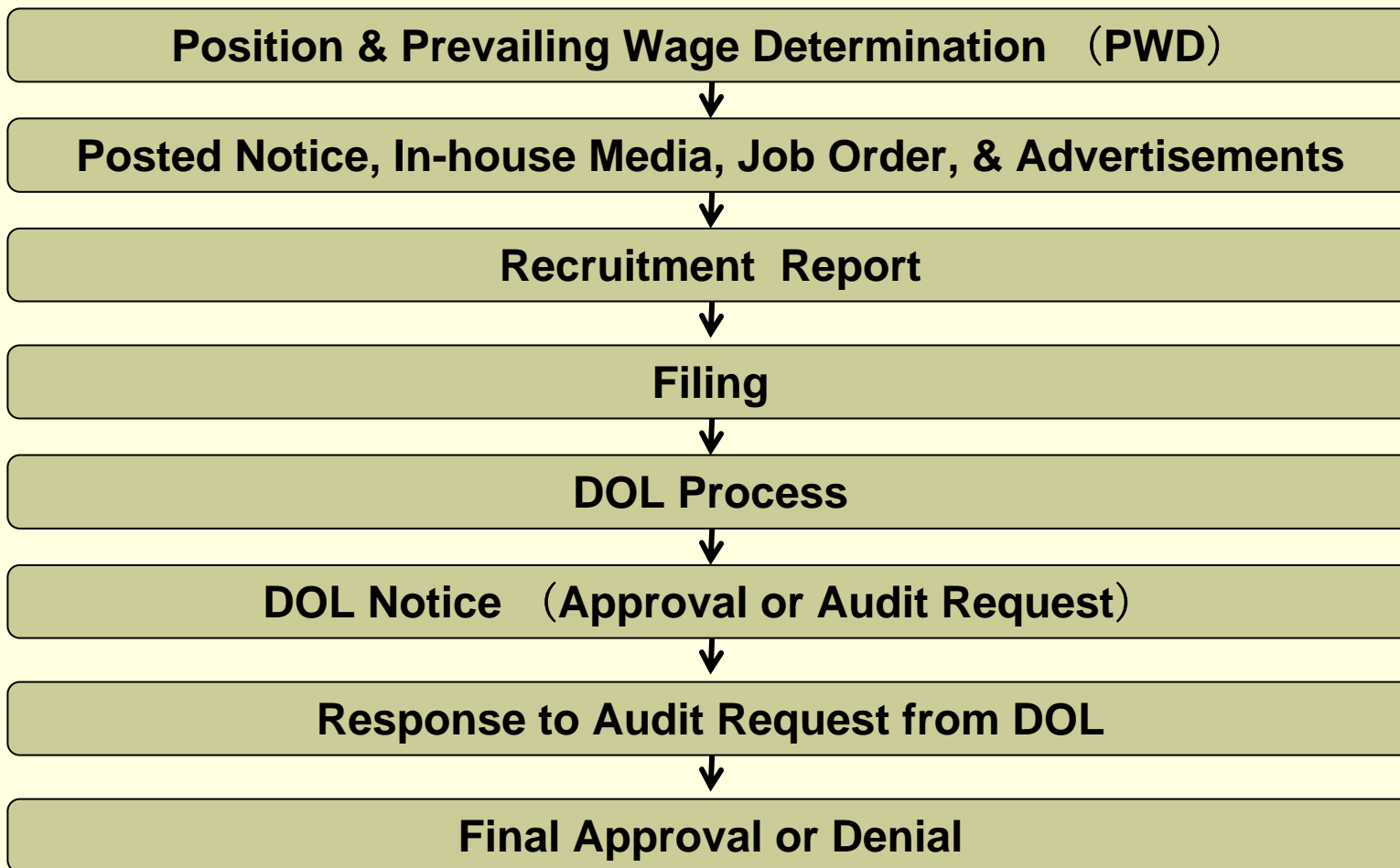
- There is now a window of opportunity for people to use PERM to obtain permanent residence. It is our opinion that there is a limited time to obtain the benefit of PERM. In the past month, the immigrant visa numbers have retrogressed for Indian, Chinese, and Philippine Nationals. As PERM is implemented and more people obtain quick labor certifications, they will be able to move on to the I-140 processing and Immigrant Numbers will retrogress in the EB-3, skilled worker or professional category.

About PERM Program

The Bad Part

- PERM is very complicated and requires meticulous preparation and a thorough understanding of the rules in order to avoid problems in the future. PERM works kind of like taxes in the United States.
- DOL will probably audit a good 25%. (IRS: less than 1%)
- If a company is audited, and they don't respond within the 30 day period allowed to respond or the company doesn't have the appropriate paper work in order, this may trigger a further audit into other labor certifications and may also create a situation where the employer cannot use the PERM program for a two year period and must undergo supervised recruitment.

Procedure for PERM



Procedure - PWD

- The first thing to do in putting together a PERM application is to obtain a Prevailing Wage Determination (PWD) from the SWA (State Workforce Agency) located in the State where the job offer is located.
- Under PERM, and for H-1b purposes as well, the prevailing wage required to be paid will be **100% of the wage.**
- There will now be **four levels** of prevailing wage as opposed to two levels, which will take in account middle level positions as opposed to only entry level (Level One) and senior level (Level Two).
- There is no time limit the government has put as to how long the SWA's have to render an opinion regarding the prevailing wage but the regulations do call for a "quick" response

Procedure – Posted Notice & In-House Media & Job Order

- **Posted Notice** - As before, after the PWD is obtain, the employer must post a notice of the job opportunity for at least **10 BUSINESS days**. The notice must be posted from 30 days to 180 days prior to filing. The notice is essentially the same notice which has existed in the past.
- **In-House Media** - If the company normally uses in-house postings or internet postings within the company, the company must do what it normally does for in-house postings, in terms of length and content of posting.
- **Job Order** - The next thing the employer must do is to place a job order for the position with the SWA for a period of **30 days**. This means that an advertisement must be sent to the SWA at least 30 days prior to filing of the labor certification.

Procedure – Advertising

- The employer must place **2 advertisements on 2 different Sundays in a newspaper** of general circulation in the area of intended employment. The ads must be placed at least 30 days before filing and less than 180 days prior to filing of the labor cert.

The ads must contain:

- The name of the employer.
- The geographic area of employment
- A description of the job specific enough to apprise US workers of the job opportunity. The description may include experience requirements and minimum education requirements.

*The ad does not have to contain the salary or a detailed description of all of the requirements.

Procedure – Advertising (cont)

If the job is considered a Professional Job (the job listed is in the addendum to the regulations), **3 additional recruitment steps** need to be taken.

The employer must choose 3 steps among the following choices:

- job fairs
- employer's web site
- job search web site other than employers. - A website generated by a print ad, so for example, if one advertises in the New York Times and this ad also appears on the NY Times website, it counts as web site other than employers.
- on-campus recruiting
- trade or professional organizations
- private employment firms.
- an employee referral program, if it has specific incentives.
- local and ethnic newspapers, to the extent they are appropriate for the job.
- radio and television advertisements.
- Only one of the additional recruitment steps can be used within the 30 days of filing. The others must be within 180 days.

Procedure – Recruitment Report

- The employer must prepare a recruitment report that describes the recruitment steps taken and the results.
- The recruitment report must include the number of hires and the number of US workers rejected, categorized by the job related reasons for rejection.
 - Rejection of US Workers: If a US workers does not meet the stated requirements for the job, he or she may be rejected. However, if a worker lacks a skill that may be acquired during **a reasonable period** of on the job training, the lack of that skill is not a basis for rejecting an otherwise qualified US worker.
- The DOL may request copies of the workers' resumes, sorted by the reasons for rejection. The rules do not require that the report contain the names of the individual U.S. workers who applied.
- The recruitment report and other supporting documentation must be retained for **5 years** from the date of filing.

Procedure – Filing

- After the recruitment has been completed, the company can then file electronically or by mail to the appropriate ETA processing center.

*The website is www.plc.doleta.gov.

- There is **no filing fee** for filing a labor certification at this time.

Pending Cases (RIR/Traditional to PERM)

- The case can only be withdrawn and re-filed if it is for the **“identical job opportunity”**. This means, the same employer, same alien, job title, job description and minimum requirements including any changes as per SWA requests. The problem is that if the case is not found to be identical, the original application will be lost and cannot be used on another application.
- If the labor certification is needed in order to preserve a 7th year H-1b extension.
- It may be better to start the process over until DOL comes out with interpretations on this issue.

Experience & Business Necessity

■ Experience:

- The new rule allows experience gained by the alien for the same employer if that experience is not substantially comparable to the job for which certification is sought. Substantially comparable is defined as a job requiring performance of the same duties more than 50% of the time. Also, the DOL has taken a very liberal approach with respect to related entities, such as foreign employers, and in the new regulations says that experience can be used for labor certification purposes if the employing entity does not use ***the same Tax Id Number***, which means that experience gained abroad or in a subsidiary may be used.

■ Business Necessity:

- An employer must demonstrate that the job requirements bear a reasonable relationship to the occupation. As before business necessity may be used in the foreign language context. Acceptable uses of foreign language in the workplace include the need to communicate with a large majority of the employer's customers, employees, and contractors.

- Information to be retained include the number and proportion of employer's customers, or employees that do not speak English, plans to market to a foreign country, and why the duties include frequent communication with such individuals.

If you own your own company?

- There is no specific prohibition to filing a labor certification if the alien is the owner or related to the owner of the company. However, **a bona fide job opportunity** must exist.
- If in effect, the owner of the company is the sole employee and sole shareholder, it is likely a bona fide job opportunity **would not** exist.

DOL- The Audit Investigation

- The DOL can request an audit of any pending labor certification for either **cause or randomly**. If selected for an audit, the Employer will receive an audit letter stating the additional documentation to be submitted and set a date **30 days** from the date of the letter for submission and advise that the application will be denied if the information is not received by the deadline.
- The failure to respond to an audit letter could mean that the company's employees would not be able to use PERM for **up to 2 years**.

* **Supervised recruitment:** It is the same process that has existed for years and requires placing a three day ad through DOL, and is very tedious, time consuming, and most importantly, will cause significant delays in processing of a labor certification.

Final Approval or Denial

- The DOL will send a written approval notice or denial notice by **e-mail or by mail**. The actual Final Determination notice will be sent by mail to the attorney or the company. If the Final Determination is negative, a request for review can be made.
- If the Final Determination is negative, a request for review can be made. If there is no request for review, a new labor certification can be filed at any time thereafter.

Denial after Granted

- After the labor certification is approved, it may be invalidated by **USCIS** or a consular officer at the **Department of States** if either one of these parties determines that their was fraud or willful misrepresentation of a material fact.
- The DOL can also revoke an application if it finds that the certification is not justified.

Questions?