



THE LABOR CERTIFICATION PROCESS (“PERM”)

Employment-Based Permanent Residency Process Overview

Employees who are employed pursuant to nonimmigrant work visas such as H1B or L1 are considered “temporary” employees for immigration purposes as nonimmigrant visas have time limitations with regard to the number of years one may remain working in the United States on each any visa (for example H1B visa holders have a six year maximum period they may remain in the United States working). To assure the employer’s ability to continue to employ the nonimmigrant employee on a “permanent” basis, employers may begin the employment based permanent residency process (or “green card” process) on behalf of nonimmigrant employees.

The employment based green card process contemplates sponsorship of a prospective employment position that will be offered to the nonimmigrant employee upon approval of the permanent residency process (green card approval). The employment based permanent residency process is typically a three step process for most employees. The first step involves the filing of a labor certification application with the Department of Labor (DOL). The second step involves the filing of an I-140 immigrant visa petition with the United States Citizenship and Immigration Service (USCIS). The third step involves the filing of an I-485 Adjustment of Status application with the USCIS. In some circumstances, the second and third step may be filed concurrently.

As the labor certification is the first step in the process and establishes the foundation of the employment based permanent residency process, it is important that you have an understanding of the DOL’s filing requirements as well as the obligations of both the employer and the employee during this process. Once the DOL approves or “certifies” the labor certification application, we will be able to proceed with the second and third steps of permanent residency processing.

This memo will therefore provide you with an overview of the first step:

Labor Certification

The labor certification process is also known as the “PERM” labor certification process and “PERM” is the DOL’s acronym for “Program Electronic Review Management System.” The labor certification process is an Employer’s test of the labor market through various recruitment steps as mandated by the DOL. The recruitment phase spans a minimum of 60 days. Once these recruitment steps are completed, the Employer may file the labor certification with the DOL only

if the Employer is able to state that Employer is unable to find a qualified, able and willing United States worker based on its recruitment efforts.

If a qualified, willing, and able U.S. worker is found, the company is not obligated to hire the qualified applicant. However, the labor certification may also not move forward. The DOL could not certify a position as open and available to a foreign worker if the labor market reflected available U.S. workers.

Basic Requirements for any Application:

- Full Time Employment: The PERM labor certification position must contemplate full-time employment by the Employee (not part-time)
- Permanent Offer of Employment: The PERM labor certification must list an offer for a Permanent position (not a temporary or seasonal position)
- Minimum Requirements: The educational and experience requirements listed in the PERM labor certification must reflect the Employer's minimum requirements for the position and bear a rational and reasonable relationship to the duties of the position. These requirements cannot be unduly restrictive and cannot be tailored to the background of the Employee
- Wage: Upon permanent residency approval, the Employer must pay the Employee at least the prevailing wage as determined by the State Workforce Agency of the intended worksite. The intended salary is listed in the PERM labor certification and is "locked in" as the minimum salary for these purposes.

Younossi Law's Processing of PERM Labor Certification:

As the DOL's requirements and timelines are quite specific, below is a brief outline of Younossi Law's labor certification processing steps once an employer initiates the permanent residency process on behalf of an employee:

- (1) Younossi Law sends out fact gathering documents to the Employer and the Employee.
- (2) Once the completed questionnaires are returned to Younossi Law, Younossi Law assesses the information which includes reviewing the Employee's educational credentials, verifying the Employee's work authorization for all periods of employment, calculating dates of employment and determining impact of any gaps in employment and prior lapses in status or work authorization.
- (3) Younossi Law and Employer then discuss proposed PERM labor certification criteria via conference call including discussion of the Employer's minimum requirements for stated job duties and overall Employer obligations in recruitment process.
- (4) When the PERM labor certification criteria is finalized by Employer, Younossi Law contacts Employee to provide employment verification letters from prior employers to verify that required experience and skills were obtained prior to the current employment position.

- (5) Upon Employee's submission of employment verification letters, Younossi Law requests prevailing wage and job classification information from the State Workforce Agency (SWA) based on PERM labor certification criteria.
- (6) Younossi Law works with Employer to establish a recruitment schedule that conforms to DOL requirements.
- (7) Recruitment begins for at least a 30 day period of time. Once the last item of recruitment runs, the DOL requires at least 30 additional days pass before the PERM labor certification can be filed with the DOL. As such, any PERM recruitment process runs for a minimum of 60 days.
- (8) At the conclusion of the recruitment period, Younossi Law requests a Recruitment Report from Employer which should document Employer's review/assessment of resumes and relevant notes of interviews of applicants.
- (9) If Employer's recruitment efforts have not yielded qualified, able, and willing United States applicants, Younossi Law submits the Employer's PERM labor certification to the DOL.
- (10) DOL processing time is quoted to be approximately 120 days but the DOL has also acknowledged that this is only a goal. Actual processing times can be (and have been) lengthier depending on government volume and/or whether the DOL opts to audit the application.

Establishing PERM Labor Certification Position Criteria:

Minimum Requirements:

It is important to remember that the PERM labor certification is an application by an Employer to the DOL regarding a specific permanent and prospective position with the company. Although the Employee may possess educational credentials and experience that exceed the company's minimum hiring criteria for a position, the DOL's requirement is that the PERM labor certification lists an employer's MINIMUM requirements for a particular position so as to ensure a fair test of the labor market for qualified, able and willing United States workers. Limitations include:

1. The PERM labor certification requirements should not be "tailored" to the Employee's particular background and/or credentials.
2. The requirements should be considered legitimate based on the nature of the position and bear a rational and reasonable relationship to the duties required.

Employment Based Visa Categories and Visa Backlogs:

The Employer's stated minimum requirements on a PERM labor certification do ultimately determine the visa category and therefore "place in line" for an available immigrant visa for which the Employee must wait.

- Advanced Degree Requirements (EB2): Positions that minimally requires a Masters degree or higher or, in the alternative, a Bachelors degree plus five (5) years of

progressive experience fall into the Employment Based Second Preference Category (EB2).

- Bachelor's Degree Requirements (EB3): Positions that require at least a Bachelors degree or at least two (2) years of specialized training fall into the Employment Based Third Preference Category (EB3).

Typically, the EB2 visa category is less backlogged than the EB3 visa category which translates to a shorter period of government adjudication time for the overall permanent residency process.

The issue of visa backlogs has historically had a greater impact on nationals of India, China, Mexico and the Philippines as these are countries that have the greatest subscription or usage of employment based immigrant visas. While this issue is important to bear in mind for the overall timing of the permanent residency process, it should not influence an Employer's determination of what its minimum requirements should be for a PERM labor certification application as that could be considered "tailoring" the position to meet the requirements of a higher visa category.

Prospective Position:

In addition to listing the minimum requirements for the position on the PERM labor certification, bear in mind that the PERM labor certification contemplates a prospective employment position that is to be offered to the employee upon approval of the permanent residency. Given current government processing times and the possibility that these times could lengthen due to visa backlogs, it is possible that the overall permanent residency process could take at least three to five (3-5) years for most employees. As such, when crafting the PERM labor certification criteria, it is important to take into account potential job changes and promotions for the Employee based on the current career track within the company and reasonably project what role or duties the Employee will hold at the conclusion of the permanent residency process. If the Employee moves into a new role that falls into a different occupational classification compared to the PERM labor certification occupation, it is possible that the permanent residency process may have to begin again based on the new occupational classification.

Beyond the Labor Certification and Priority Dates:

The date the PERM labor certification is filed with the DOL establishes the Employee's Priority Date or "place in line" with respect to the permanent residency process. Once the PERM labor certification is approved or "certified," the Employer can proceed with the second step and, in certain cases, the third step of the permanent residency process (I-140 Immigrant Visa Petition filing with USCIS and I-485 Application to Adjust Status filed with USCIS). When the USCIS approves the I-485, the Employee becomes a Permanent Resident of the United States or a United States "green card holder" and is expected at that time to fill the position outlined in the original PERM labor certification application.

Younossi Law looks forward to working with you on the permanent residency process. Should you have any questions regarding the process, please contact the immigration professional with whom you usually work at Younossi Law.