

**ILW Conference Series:
FUNDAMENTALS OF IMMIGRATION COMPLIANCE**

PART THREE: PERM Compliance

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Introduction of Speakers

Purpose: The purpose of this seminar is to review current PERM processing trends and processing timelines, to provide fundamental information on the new prevailing wage requirements, to provide fundamental information on how to plan for PERM audits and likely audit triggers, to review the role of the attorney in PERM cases, as well as to review employer responsibilities. Finally, we will review the basics of Supervised Recruitment, since the DOL has promised to increase the issuance of supervised recruitment orders to meet its goal of protecting U.S. workers in these tough economic times.

I. Introduction and Regulations – PERM

A. Regulations and FAQs

1. Regulations – 20 CFR 655 and 656.
2. iCert Portal – <http://icert.doleta.gov/>. New online resource from DOL for electronic filing of the PERM 9080; also provides processing times for PERM processing; also provides downloadable forms in PDF format.
3. Frequently Asked Questions about PERM Processing – found online at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>. Provides published answers by DOL – often one of practitioners’ only resources for guidance with PERM forms and filing.
4. BALCA Digest of Cases - http://www.oalj.dol.gov/PUBLIC/INA/REFERENCES/REFERENCE_WORKS/BALCA_PERM_DIGEST.HTM#date_applicant

B. DOL Updates

1. New DOL iCERT portal for filing PERM applications – currently only for submitting Labor Condition Applications, but PERM expected in 2010.

- (a) iCERT Advantages:
 - 24/7 System Access
 - Ability to Create and manage sub-accounts
 - Case tracking mechanism
 - Current processing times at your fingertips

- (b) iCERT Disadvantages
 - System glitches possible, especially in the early days of mandatory usage (registration problems)
 - Limited testing to date on the portal
 - More amenable to data mining

- 2. New Form 9089 Expected in 2010 – proposed form allows for more explanation of certain responses; allows for changes in signing authority; is extraordinarily long; introduces some new ambiguities and difficulties.

- 3. Prevailing Wage Determinations Centralized Through DOL – new procedures for submitting Prevailing Wage Requests (Form ETA 9141) to DOL via iCERT portal (anticipated start date January 20, 2010) instead of local State Workforce Agency – will likely slow processing by several months initially; will create a federal database for all position information.

- 4. PERM Processing Times As of 12/31/2009:
 - (a) Regular Queue – March 2009
 - (b) Audit Queue – December 2007
 - (c) Appeal Queue – August 2007

- 5. *Kumykov v. Carlson*, No. 09-01217 (N.D. Ga. TRO Issued June 4, 2009). Court ordered DOL to adjudicate PERM case outsider normal processing times (age-out).

C. Role of the Employer and of the Attorney In the PERM Process

- 1. 20 CFR 656.10(b) – outlines the requirements for employer vs. attorney review and analysis of recruitment results and candidate applications/information.

- 2. Caselaw in the late 1980's and 1990's ruled on attorney involvement in the labor certification process, particularly in the review of applicants by the attorney.

- 3. DOL Restatement of Attorney's Role – August 2008 (Fragomen case):

- (a) Attorney cannot screen/evaluate resumes before employer does and cannot withhold resumes from the employer
- (b) Recommended best practices for attorney:
 - can prepare straightforward checklist to assist in evaluation
 - can open resumes/letters from applicants for the purpose of sorting by job title and forwarding to employer
 - can counsel employer on the assembly of the recruitment results after all qualified applicants have been contacted

II. PERM Filings in a Down Economy & Preparing for PERM Audits

A. Preparing PERM Applications in a Down Economy

1. PERM requires that the employer demonstrate that it conducted significant recruitment and could not find any qualified, willing and able U.S. workers to assume the position. Recruitment during a bad economic period is very risky for the labor certification process.
2. Bad Economy creates unemployment, which means there are more job applicants, especially in certain job sectors; DOL is concerned about “protecting the U.S. worker” and has announced that it will be auditing more cases and conducting supervised recruitment (to be discussed more later).
3. Common Issues that Arise in a Down Economy:
 - (a) Reduction in Force/Layoff
 - A layoff is an involuntary separation of one or more employees without cause or prejudice;
 - According to 20 CFR 656.17(k)(1), if there has been a layoff in the area of intended employment within six months of filing an application, or in a related occupation, the employer must document that it has notified and considered all potentially qualified U.S. worker.
 - Contract workers need not be considered; nor do workers who were terminated for cause.
 - (b) Hiring Freezes – do not impede the filing of a PERM application, but they can impact “good faith” recruitment because a bona fide job opportunity must exist.
 - (c) Industry Layoffs – DOL has announced that it is paying attention to industry announcements and employer notices, so audits should be

expected if filing PERM applications for employers in certain industries, or for certain positions.

B. Preparing for Audits

1. Down Economy means more audits – last year, nearly 40% of all cases filed were audited;
2. When an audit arrives, the employer only has 30 days to respond, the PERM may not be withdrawn, so **employers must be prepared for an audit before filing the PERM application.**
 - (a) Document and verify evidence from the Employer before recruitment to show that any prior experience gained with the Employer was in a sufficiently dissimilar position; also, if there are any special requirements, the employer should gather evidence to justify the business necessity of these skills or additional training required.
 - Charts
 - Affidavits
 - (c) Create easy templates to assist the employer in documenting
 - Review of resumes
 - Phone interview Q&A
 - Office interview Q&A
 - Reasons/Notes for disqualification of applicants
 - (d) Employer should document in detail the lawful, job-related reasons for disqualification of applicants – make very clear notes.
 - (e) Employer should document all attempts to contact non-responsive applicants. Recent Audit Notices have asked for phone logs and proof of correspondence with applicants.
 - (f) Save all resumes and application materials.

III. Supervised Recruitment

A. Regulations & Background

1. Regulations at 20 CFR 656.21 clearly outline the authority and guidelines for Supervised Recruitment.
2. Article by Maggie Murphy and others also provides useful practice pointers: <http://www.ilw.com/articles/2009,1210-murphy.shtm>

3. Supervised Recruitment methods are similar to “traditional,” pre-PERM labor certification filings where recruitment was ordered at the time of DOL review, and not prior to filing/processing, to test the job market at the time of processing.

B. Triggers and Timing Issues

1. Potential “triggers” for Supervised Recruitment:
 - (a) Employer’s layoffs
 - (b) Industry layoffs
 - (c) Relatively high rate of unemployment in the geographic area
 - (d) Note: the DOL reads WARN Notices, local newspapers and the internet
2. Timing Issues:
 - (a) 30 days to respond to initial notice with draft recruitment
 - (b) Must recruit when and where DOL specifies
 - (c) 30 days to respond to DOL notice requesting recruitment report
 - (d) Extension may be granted once, for “good cause”

C. Other Considerations

1. DOL Statistics in 2009 – 200 Cases Under Supervised Recruitment:
 - (a) 25% withdrawn
 - (b) 45% denied
 - (c) 11% certified
 - (d) 20% still pending when data released
2. Can Supervised Recruitment be Avoided? Careful assessment of the labor market prior to filing may help avoid supervised recruitment – obtain industry statistics from the SWA in advance of filing to time appropriately, if possible. A change in economic conditions after filing may save the employer.

3. If Supervised Recruitment was ordered after an audit, the case cannot be withdrawn. Cases can be withdrawn if Supervised Recruitment is ordered (when no audit), but take note that re-filing by the employer after withdrawal in response to supervised recruitment may trigger uniform Supervised Recruitment for all future cases filed by that Employer.
4. Supervised Recruitment requires additional advertising – after the employer has already paid a significant amount of money for recruitment.
5. DOL has announced that it will increase Supervised Recruitment activities in 2010.