

Seminar Presentation

SVP/Job Zone Issues & Refiling and BEC Interactions

PERM Nuts & Bolts
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Prepared for ILW.com Seminar
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Refiling under PERM regulations

- The PERM regulations allow a labor certification filed under pre-PERM regulations to be re-filed under PERM without loss of priority date if
 - A job order has not been placed by the SWA as part of the traditional recruitment process. 20 CFR Sec. 656.17(d)(1).
 - The job opportunity under PERM is identical to the pre-PERM job opportunity. 20 CFR Sec. 656.17(d)(1)(i)
 - The employer complies with all PERM requirements for filing and recruitment, DOL FAQ1, See http://workforcesecurity.doleta.gov/foreign/pdf/perm_faqs_3-3-05.pdf (last visited Nov. 16, 2005)
- The employer is required to withdraw the old labor certification and to re-file within 210 days. 20 CFR Sec. 656.17(d)(2). Withdrawal is either by sending a letter to the BEC to request withdrawal (no need to wait to receive confirmation of withdrawal from a BEC prior to refiling the application), DOL FAQ (June 1, 2005) or through withdrawal at the time of refiling by responding with “yes” to question A-1 on form ETA 9089. This response is deemed to be withdrawal of the pre-PERM labor certification regardless of whether the employer’s request to use the original filing date is approved, 20 CFR Sec. 656.17(d)(1)(ii).

Backlog Elimination Centers

- All cases in the BEC are being assigned new case numbers once entered into the Permanent Backlog System BEC FAQ, See.
http://workforcesecurity.doleta.gov/foreign/pdf/backlog_faqs_5-2-05.pdf (last visited Nov. 16, 2005)
- **Backlog is set to be eliminated by 9/2007**
- 700 to 1000 cases processed for entry of the 45 day letters
- By June 30, 2006 all 45 day letters will be sent
- The BECs have partially entered every case

Withdrawal of pre-PERM application

- A job opportunity is identical if the employer (including address), alien, job title, job location, job requirements, and job description are the same as those stated in the original application 20 CFR Sec. 656.17(d)(4)
 - Having a different prevailing wage is allowed

Re-Filing under PERM

- According to the regulations, the CO will require a copy of the original application and any accepted amendments. 20 CFR Sec. 656.17(d)(4). With re-filing audit seems unavoidable.
 - Audit letter has boilerplate language and also requests a copy of the original application.
 - It seems that although the DOL is requesting a copy of the application, they also are waiting to obtain the original application from BEC
 - Because audit response must be filed within 30 days, prior application must be available before submitting the application under PERM.

Re-Filing Issues

- If under PERM the job opportunity will exceed the Job Zone, then the employer must prepare business necessity argument to avoid a denial
- If the alien does not meet the minimum requirements of the job and qualifies only through the alternative requirements (listed in H-10), the employer must consider US workers who may be qualified by any suitable combination of education, training, and experience. 20 CFR Sec. 656.17(h)(4)(ii).
- Adding this language may have effect on the I-140 application for EB-2 category
- This language to the PERM job requirements, may render the PERM application not identical to the prior labor certification.
- Experience gained on the job only if the position was not substantially comparable (less than 50%). 20 CFR Sec. 656.17(i)(3)(i) & 656.17(i)(5)(ii).
- Cannot reject workers if the US worker can acquire the skills necessary to perform the duties with reasonable on-the-job training 20 CFR. Sec. 656.17(g)(2) & 656.24(b)(2)(i)

DOT vs. O*NET

- Prior to PERM, job classifications and SVP levels were determined using DOT and not O*Net.
- Comparison
 - DOT offered over 11 thousand job titles, O*Net offers 1,122 occupational units
 - DOT was dictionary of jobs, O*Net is a database of occupations

DOT vs O*Net

- O*Net provides overview of changing occupations for the purpose of identifying transferable skills. See <http://onetcenter.org/dataStructure.html> (last visited Nov. 16, 2005). See also, Appendix D - The Development of the Occupational Information (O*NETTM) Analyst Database, http://onetcenter.org/dl_files/appendix_d.pdf (last visited Nov. 16, 2005)
- To create the 1,122 Occupational Units, the DOT task statements for the DOT titles that fall under a given Occupation were compressed into general task statements. Updated with current labor market data
- Prior to O*Net, the DOT used ten levels of SVP to rank each occupation from 0 (short demonstration) to 9 (more than 10 years).

O*Net Job Zones

- These 10 SVP levels were collapsed into 5 job zones by eliminating the distinctions between the lowest four SVP levels and the top two levels
- Occupations were assigned to the Job Zones by selecting DOT titles that fall under a given Occupation, then average the SVP ratings of each DOT title. The average SVP score of all DOT titles that fall under the Occupation became the SVP of this Occupation
- This resulted in fractional SVPs, which were found cumbersome and were rounded off into Job Zone boundaries. However, they were not rounded off by mathematical rounding but by eliminating the fractional amount no matter how close to the next-higher job zone the mean SVP was.
- For that reason, even Occupations with higher-level average SVP fractions (e.g. Mechanical Engineer 7.5) were classified into Job Zone 4 because they had an SVP < 8 even though most of the DOT titles within the Occupation had SVP of 8 or higher.
- The O*Net is updating the information with current market data and the SVPs and job zones are changing

Current O*Net (Production) vs. Updated (Development)

- Occupations are scheduled to be updated in December 2005
- Changes affecting the Job Zones for the updated Occupations
 - For example, Nuclear Medicine Technologist changed in April from 4 to 3
- Must monitor the Production vs. Development Database to determine the most advantageous time to file application
- Recommend to retain a printout of the Occupation in the PERM file due to changing SVPs

Normal Requirements

- The job opportunity's requirements must be those normally required and must not exceed the SVP assigned to the occupation
- The job summary specific to the SOC and Occupation is considered to identify the requirements normal to the occupation, See 20 CFR Sec. 656.17(h)(1)
- A particular degree is considered normal if it is 'what most require' or 'what some require'
- Under PERM where an employer can show that its job requirements fall under a particular Occupation the requirements will be considered normal

Re-filing and BEC Interaction

- **Amending BEC application**
- According to the regulations, the CO will require a copy of the original application and any accepted amendments. 20 CFR Sec. 656.17(d)(4).
- The DOL stated in its FAQ that if an employer has been acquired by another company the new company has to send a copy of the articles of incorporation, business license, state registration, etc. and a new Form ETA 750A and B. See BEC FAQ, http://workforcesecurity.doleta.gov/foreign/pdf/backlog_faqs_5-2-05.pdf (last visited Nov. 16, 2005)
- Contact the BEC, send a letter to SWA with the amendment requesting a letter that the wage and the conditions will not be affected by the change, and then send the ETA750 A & B along with the letter to BEC.

BEC and more than one application

- No firm response from DOL whether it is permissible for an employer to have more than one labor certification application in process for the same alien at any given time whether for the same or different job?
 - The DOL initially stated in their August 8, 2005 FAQ that it is not permitted under PERM. However, the answer to this question was “removed” and now it states that “[t]he Department is considering questions and information stakeholders have submitted in response to this FAQ posting, and will be developing and posting a clarified response in the near future.” See http://workforcesecurity.doleta.gov/foreign/pdf/perm_faqs_8-8-05.pdf

- Currently, the DOL has no authority under the regulations to withdraw the old application. The regulations require affirmative withdrawal by the employer
 - Under 20 CFR Sec. 656.17(d)(1)(ii) checking ‘yes’ in response to question A-1 is deemed to be withdrawal of the pre-PERM labor certification regardless of whether the employer’s request to use the original filing date is approved.
 - Under 20 CFR Sec. 656.17(d)(2) the employer is required to withdraw the old labor certification and to re-file within 210 days.

PERM & USCIS

9/23/05 USCIS Interim Guidance

- Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6th Year.
09/23/05 William R. Yates HQOPS,
http://uscis.gov/graphics/lawsregs/handbook/H1B_092305.pdf
(last visited Nov. 16, 2005)

Determining Priority Dates According to USCIS

- Pre-PERM priority date is the date a labor certification is filed with any office in the DOL system
- Schedule A – the date a petition is filed with the USCIS
- Under PERM – the earliest the application is filed with ETA processing center

Determining Priority Dates of Re-Filed Labor Certifications

- According to the USCIS memo, the priority date for re-filed labor certification under PERM after a withdrawal of previously filed application under pre-PERM is the date specified by the DOL in Section O.

Determining Whether Labor Certification has been pending for more than 365 days

- If a labor certification is denied but an appeal is filed, H-1B can be extended as the application is not final (must be appealed within 90 days for pre-PERM and 30 days for PERM)
- If labor certification is pending with BEC, USCIS will accept a document from SWA, from one of the ETA regional offices, or a database screen printout from the BEC
- If the alien is substituting another alien on a labor certification, evidence that the beneficiary is using the labor certification to obtain EB immigrant status (pending or approved I-140)
- If unavailable, USCIS will accept private delivery service receipts with employer attestation

H-1B 7th Year Extension if Re-Filed under PERM

- If ETA750 is withdrawn as part of the re-filing, the filing date of the withdrawn form will be deemed the filing date to determine whether application has been pending for 365 days **only if**
- The elements relating to the job opportunity are identical, then the DOL will approve retention of the old priority date.
 - The USCIS will require a complete copy of the ETA-9089
- The DOL does not allow the employer to retain priority date or if PERM is still pending at the time of filing of H-1B extension but the elements relating to the job opportunity and the alien beneficiary are not **materially different** from the date elements on the ETA-750 form (for example change of address within the same MSA is not material difference, while change in educational requirement from Bachelor to Master's degree will be deemed material difference)
 - The USCIS will require a signed statement from an authorized official of the employer outlining the elements of the job opportunity and data relating to the beneficiary that are different from the ETA750
 - Complete copy of 750A and B
 - Complete copy of ETA 9089 with evidence that shows the date the form was filed with the DOL