



**BUSINESS IMMIGRATION GROUP**  
**OBSERVER** JANUARY 2005 SPECIAL EDITION

## IMMIGRATION ALERT: PERM FAQs

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### QUESTION: *What is PERM?*

**ANSWER:** PERM stands for "Program Electronic Review Management" and is the acronym used to refer to a revamped, attestation-based labor certification process that includes elements of electronic submission and review. In plain English, it is the long-awaited system to streamline the labor certification process to manageable levels. Such streamlining should translate into certifications that are issued in a matter of months rather than years. On December 27, 2004 the Department of Labor ("DOL") finally published the final regulations to implement PERM.

The basic premise of the labor certification process remains the same, and the same standards of review apply. DOL must certify that there are not sufficient U.S. workers who are able, willing, qualified and available; and that the employment will not adversely affect wages or working conditions of similarly situated U.S. workers. The mechanism by which employers will complete this certification however will radically change.

Beginning March 28, 2005 most employers will have only one option for filing a labor certification application for any position for which a foreign worker is sought and for which DOL certification is required. It will be a two-step process: first, filing a prevailing wage request with the local State Workforce Agency (SWA) and then filing a labor certification application, after performing and documenting the appropriate recruitment steps (which are all outlined in the new regulation). A percentage of cases will be audited.

The case audits will be both random for fraud control and some will be targeted on the basis of certain "selection criteria" which have not been defined but are likely to include certain types of positions, occupations, geographic markets, etc.

The following are some of the most frequently asked questions we have encountered thus far on this new process. This document should be relied upon only as general guidance, not as specific legal advice. GT will be considering each case on an individual basis to determine what, if anything, can or should be done with regard to conversion, refiling, and other issues.

### QUESTION: *When does this new regulation and procedure become effective?*

**ANSWER:** The new regulation will apply to all labor certifications filed on or after March 28, 2005. As of March 28, 2005, the existing procedures for filing an application for labor certification in the traditional (directed recruitment) or the reduction in recruitment (RIR) manner will no longer be available. Cases filed prior to that date under the current procedures will be processed by the Backlog Reduction Centers in Dallas and Philadelphia, until all are processed through to completion.

**QUESTION: *Can we begin the new process before the effective date?***

**ANSWER:** Yes, if the case meets the requirements for PERM we can begin the recruiting process prior to March 28.

**QUESTION: *How does this relate to the backlog reduction efforts? My case was recently moved to a backlog reduction center.***

**ANSWER:** The two efforts are separate but related processes to help DOL manage its considerable caseload. Backlog reduction centers are taking all of the 310,000 cases currently pending at the local and regional offices and slowly moving these on a first-in, first-out basis. Applications filed between now and March 28, 2005 will also be processed through the backlog reduction centers.

**QUESTION: *What are the recruitment requirements for professional and non-professional positions?***

**ANSWER:** Professional Positions:

- Placement of a job order with the local State Workforce Agency (SWA)
- Two advertisements on two different Sundays in a newspaper of general circulation in an area of intended employment (ads may be placed on consecutive Sundays)
- Must name employer
- Must list or define job location
- Must describe the vacancy in a specific enough manner to apprise applicants of the opportunity
- One professional journal may substitute for one Sunday ad if the job requires advanced degree and experience
- If the advertising is placed on the paper's website, it counts as "additional recruitment" (see below)
- Must engage in at least three steps of "additional recruitment", including:
  - Job fairs
  - Employer's web site
  - Job search web sites
  - On-campus recruitment
  - Trade or professional organizations
  - Private employment search firms
  - Employment referral programs with identifiable incentives
  - Campus placement office (for positions requiring degrees only)
  - Local/ethnic newspapers
  - Radio and TV advertising

These steps must be taken within the 180 days prior to filing; only one may take place within the 30 days preceding the filing.

Non Professional Positions

- Placement of a job order with the local State Workforce Agency (SWA)

- Two advertisements on two different Sundays in a newspaper of general circulation in an area of intended employment (ads may be placed on consecutive Sundays)
- Must name employer
- Must include a wage range not lower than the prevailing wage
- Must list or define job location
- Must describe the vacancy in a specific enough manner to apprise applicants of the opportunity

**QUESTION: *I am an HR manager who will be responsible for doing the recruitment for PERM cases. What does the recruitment report need to contain?***

**ANSWER:** Employers are currently required to document recruiting results in a recruiting report; this will continue under the new process. The new PERM reports will look much like those reports required under traditional processing. Employers will need to prepare a recruiting report that describes all recruitment steps undertaken and the results, the number of hires made and the number of US workers rejected, categorized by the lawful, job-related reasons for such rejections. Resumes will not be submitted. The Certifying Officer may, however, upon review of the employer's recruitment report, request the rejected workers' resumes.

**QUESTION: *What if US workers apply? What are lawful reasons for disqualification?***

**ANSWER:** The biggest change in the regulations from current practice can be found in the consideration of U.S. workers. As is the case now, any applicant's failure to meet the employer's stated minimum requirements is a lawful, job-related reason for rejection. However, if an applicant lacks a skill that may be acquired during a "reasonable" period of on the job training, an applicant's failure to have that skill may not be considered a lawful basis for rejecting an otherwise qualified worker. The "reasonable" period is not defined in the regulation and probably will be considered to vary according to jobs and industry. If you are responsible for recruitment, particularly in highly technical positions, you will need to have a clear idea of what is a reasonable period of training for the job skills prior to interviewing potentially qualified candidates.

**QUESTION: *I have a traditional Application for Labor Certification filed and still pending without a "job order" issued yet How does this affect my case?***

**ANSWER:** It may or may not affect any pending application, depending upon whether the employer seeks to convert the case to the PERM procedure. The new procedures allow for "conversion" of any pending case (the regulations do not differentiate between traditional and RIR cases) for which a job order has not yet been placed. Job orders are placed only in traditional filings; an application filed through RIR does not involve a job order, so this does not refer to your application and you will be able to withdraw at any time prior to final certification by the DOL.

You cannot file a second application using PERM and have two application pending at the same time, if they are for the same position, company and location.

You can file a new application under PERM and keep your original priority date so long as the employer withdraws the current pending application and refiles a new application under PERM no later than 210 days after the old case is withdrawn. You can begin recruitment efforts prior to withdrawing your current

pending application. The new filing must be for an "identical job opportunity" and have the recruitment required of a PERM case.

"Identical job opportunity" is defined in the regulations as a job for which the application has the same employer, alien, job title, location, description and minimum requirements. If the applications are found not to be identical, the case will be processed under the refiling date.

The loss of a priority date could be devastating to some individuals. Careful planning and strategic review of each individual matter is critical before withdrawing an initial case.

**QUESTION: *I have an RIR Application for Labor Certification filed and pending can my case be converted to PERM?***

**ANSWER:** Yes if the new PERM application is for an identical job opportunity. If there is an identical job opportunity then the same requirements apply as discussed above in connection with traditional Alien Labor Certification Applications filed and pending prior to March 28, 2005.

If a conversion is deemed appropriate, it is important to note new advertising will most likely need to be conducted because many pending cases will not meet the current advertising requirements. The regulations require that the employer comply with certain recruitment steps listed above. These will have to be complied with prior to filing a new case.

**QUESTION: *I am currently on my seventh year in H1B status. My labor certification was filed traditionally. Can I try to convert it now?***

**ANSWER:** Yes, it might be possible to convert the case to PERM, but this should be carefully considered in light of all of the requirements that must be satisfied to retain the original priority date. Eligibility to continue extending H status is dependent upon the initial application and priority date. If for some reason the DOL determines the new PERM application is not for an identical job opportunity or the required recruitment has not been properly completed, you will risk losing the new PERM application and original priority date. If this happens it will be too late to protect your H status since you will have already withdrawn your original application for labor certification upon which your H extensions were based. Careful consideration should be given to conversion, especially in the earliest days of the new program if your current H1B status is dependent on an existing application.

**QUESTION: *I have an EB-3 Application for Labor Certification currently pending. Can I convert it to EB-2 now under PERM to avoid retrogression?***

**ANSWER:** No. Based on current information, it appears that it would not be possible to "convert" a current EB-3 case to an EB-2. An EB-3 case requires the services of a professional, an individual with a minimum of a bachelor's degree (with or without experience, up to 5 years). An EB-2 case, by definition, would require a minimum of a master's degree or a bachelor's plus 5 years of experience. These are different minimum requirements. An employer cannot convert a case with different minimum requirements because they would not represent an "identical job opportunity."

An employer could, however, file a new labor certification application under PERM for a new job opportunity that is more senior in its requirements (i.e., an EB-2 position). In this scenario the existing pending application would not need to be withdrawn. However, this would mean losing your original priority date.

**QUESTION: *My company recently had layoffs. Does this mean I cannot file an Application for Labor Certification under these new procedures?***

**ANSWER:** It depends. The employer must notify and consider any employees laid off within the preceding six months in the occupation being offered or in a related occupation. "Related occupation" is defined as any occupation requiring workers to perform a majority of the essential duties as the job being offered. The employer must document that it offered the position to those former employees that are able, willing and qualified for the job, and document the results of the consideration of such employees. This may simply not be feasible with large layoffs.

**QUESTION: *Can I file a second Application for Labor Certification under PERM while my current case is pending?***

**ANSWER:** No. You cannot have two cases pending at the same time for the same job opportunity. An employer would have to file an application for a different job opportunity.

**QUESTION: *I am an HR manager with several employees who could benefit from PERM. Can I run ads now to try to file right after it becomes effective, assuming no qualified US workers apply for the positions?***

**ANSWER:** Yes. The regulations provide sufficient guidance for the placement of ads now to meet the standards of the new process. Once those requirements are met, an application can be placed within the correct time frame.

**QUESTION: *What if I get audited?***

**ANSWER:** A percentage of cases will be audited. The case audits will be both random for fraud control and some will be targeted on the basis of certain "selection criteria" which have not been defined but are likely to include certain types of positions, occupations, geographic markets, etc. Certifying Officers can also request information and supporting documentation at their discretion.

The initial review of applications will be automated and completed electronically. They will likely be fairly basic and for the most part static.

In the event of an audit, the employer will be notified and required to provide to DOL specific documentation verifying the information submitted in the ETA 9089. The documentation will be reviewed by an ETA official and either certified or, if the application is incomplete or the documentation does not support the ETA 9089, the application will be denied. The Certifying Officer will also have the authority to request additional information before making a final determination.

The Certifying Officer also has the option in audited cases of ordering the employer to conduct supervised recruitment. The most likely scenario for supervised recruitment will occur where there are ques-

tions regarding the adequacy of an employer's test of the labor market. The supervised recruitment process will be conducted by the National Processing Center handling the application, but will otherwise resemble the current traditional labor certification process. At the end of the recruitment, the employer will be required to submit a recruitment report outlining the lawful, job-related reasons why U.S. worker candidates were rejected.

**QUESTION: *How long will it take to adjudicate a PERM application?***

**ANSWER:** DOL states in the supplementary information accompanying the regulation that, for those cases which are not selected for review, a case will be reviewed in 45 to 60 days. Even considering the additional time needed for the recruitment phase when calculating the processing times such a reduction in processing times is remarkable.

The GT Business Immigration Group looks forward to further updating you on PERM and other immigration related issues. If you do not already subscribe to the Immigration Observer please sign up at [Subscribe GT](#).

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The *Observer* serves as an invaluable resource to individuals, human resource managers and recruiters, and company executives for whom keeping up with the most current immigration information is a professional imperative.

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**RESOURCES**

December 2004 State Department Visa Bulletin Link:

[http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1343.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1343.html)

Service Center Processing Times:

Vermont: <http://www.gtlaw.com/practices/immigration/processing/cis/vscProcesstimes.pdf>

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National Benefits Center:

<http://www.gtlaw.com/practices/immigration/processing/cis/NBCprocesstimes.pdf>

Department of Labor Regional Processing Times:

<http://www.gtlaw.com/practices/immigration/processing/dol.pdf>

State Employment Agency Processing Times:

<http://www.gtlaw.com/practices/immigration/processing/swa.pdf>

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