

U.S. FAST TRACKS EMPLOYMENT-BASED IMMIGRATION: PROCEED WITH CAUTION*

by Francis E. Chin

The first major change to the labor certification process in a quarter century has reduced adjudication times from years to weeks. But with the new rules come strict standards and harsh penalties for those who fail to comply.

The Immigration and Nationality Act sets out a complex and sometimes lengthy process whereby employers may sponsor foreign nationals for permanent residence ("green card" status) based on full-time employment. INA §204(a)(1)(F), INA §203(b)(1). For most such individuals, the first step in this process requires that the employer test the labor market to ensure that there are no able, willing, and qualified U.S. workers available for the offered position, and that employment of the foreign national will not adversely affect wages and working conditions of similarly employed U.S. workers. INA §212(a)(5)(A); 20 CFR §656.1. Employers must execute this test of the labor market through targeted recruitment of potential U.S. workers, careful analysis of applicants, and filing of a "labor certification" application with the U.S. Department of Labor (DOL).

The "modern" labor certification process was established in 1977 and served fairly well until the late 1990s, when increased demand and reduced budgets began to overwhelm the system. In December 2004, DOL introduced a new Program Electronic Review Management (PERM) system that was intended to eliminate delays that had increasingly frustrated employers and employees. 20 CFR §656 at 69 Fed. Reg. 77326-421 (Dec. 27, 2004). Implemented in March 2005, PERM automates many functions previously performed by state and federal employees and imposes significant change on substantive aspects of the labor certification process.

The most significant difference between the old and new labor certification systems is the dramatic switch to electronic filing and review. While the prior labor certification process required DOL officials to engage in hands-on, comprehensive review of employer efforts in hiring foreign labor, the new PERM process relies on an attestation-based automated evaluation system. Employers must still undergo a recruitment campaign, evaluate applicants, and create and gather documentation related to the recruitment, as under the prior system. But under PERM and unlike the prior system, the employer does not present its documentation to the DOL and wait -- often years -- for an individual to scrutinize its recruitment efforts. Instead the employer retains all documentation related to the recruitment process and electronically files a 10-page application with the DOL. The electronic application contains attestations regarding the

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company, nature of the offered position and recruitment process, but does not require the immediate submission of documentation to support these attestations. Employers must retain all such documentation for five years, including all recruitment and prevailing wage documentation, resumes received and reasons for rejecting U.S. applicants.

The great advantage of PERM is its promise of speedy adjudication. Under the old system, labor certifications could remain pending for two to five years before adjudication. By contrast, a PERM case that moves smoothly through the system is supposed to be adjudicated in 45-60 days. So far, this estimation has proven to be accurate for applications that have survived initial software problems at DOL. However, the benefit of speedy turnaround is tempered by a new, comprehensive audit mechanism that PERM has introduced in order to ensure the integrity of its attestation-based system. Labor certifications will now be audited randomly or based on answers to certain "trigger" questions in the application.

In an audit, DOL will closely scrutinize all of the documentation associated with the labor certification, assessing whether the employer conducted a bona fide recruitment campaign and whether each U.S. applicant was truly unqualified for the offered position. For the first time, sanctions for failure to comply with labor certification regulations can extend beyond denial of the case at issue. If the DOL is dissatisfied with the employer's recruitment campaign or rejection of U.S. workers, it can impose supervised recruitment for all of the employer's labor certification applications over the next two years. Under supervised recruitment, the DOL must approve and oversee all recruitment efforts and applicant evaluations. This sanction would guarantee slow processing and exceptional scrutiny for all of the employer's permanent residence applications over a substantial time frame.

Every employer undertaking a PERM application must know the intricacies of the new system and prepare each application as though it will be subject to a DOL audit. Employers should meticulously document their recruitment campaign and applicant evaluation process. Finally, employers should evaluate each employee request for green card sponsorship against the risk that filing that employee's case could have adverse consequences for the employer and other employees.

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