To Re-file or Not to Re-file Under PERM: That is the Question

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April 2006

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Introduction

Now that the long awaiting regulations for the Program Electronic Review Management (PERM)[1] program have arrived, many employers and immigration attorneys must decide whether to re-file cases for individuals with currently pending labor certifications. PERM is an attestation and audit process that promises to significantly expedite the adjudication of labor certification applications. As anyone involved in the labor certification process knows, the previous system has been unevenly adjudicated and notoriously backlogged, often forcing beneficiaries to wait years before proceeding with their applications for permanent residence. Those with pending applications have an understandable interest in seeing them re-filed under the PERM program, and many employers are being approached by employees who hope that PERM will speed up the process.

Timing is really the only consideration that would prompt someone to re-file, and it is welcome news that non-audited labor certifications processed under PERM will be processed within an expected period of 45-60 days.[2] Audited cases, however, are obviously going to take longer. At this point there is no way to estimate how long it will take the Department of Labor (DOL) to adjudicate audited cases or to anticipate which of those cases will be denied or proceed to supervised recruitment. Moreover, there are many unanswered questions regarding the processing of PERM cases that make it difficult to anticipate which cases will be flagged for audits.

Another important timing consideration must be factored into a decision on whether to re-file. That involves the adjudication of non-PERM cases. On July 21, 2004, the Department of Labor ("DOL") announced its Backlog Reduction Plan, in which it has set up national backlog reduction centers in Philadelphia and Dallas. These centers are reviewing and adjudicating all of the old labor certification cases in the queue, with a goal of completing that process within two to three years.[3] One wonders whether the DOL expects to meet its backlog reduction goals through withdrawals of cases that will be re-filed under PERM. As this article will explain, there may be far fewer withdrawals than the DOL anticipates.

Even if the PERM audit process is swift, we would all prefer a long awaited approval to a quick denial. Presumably it will be faster to get a decision on a case re-filed under the PERM program than to wait for it to slog through the backlog reduction centers, but even that is not guaranteed with audited cases. Improved timing is the motivation for re-filing under PERM, but in the case of labor certifications, timing is NOT everything. What follows, then, is a detailed discussion of the many factors and pitfalls that could lead to audit and denial and which must be carefully considered before proceeding with re-filing under PERM.

Re-filing Procedures

Under the PERM regulations, a beneficiary's original filing date will be preserved only by re-filing an application for a job opportunity considered "identical" to that described in the pre-PERM labor certification and by complying with all of PERM's filing and recruiting requirements.[4] Although the priority date will be lost if a job order is placed before withdrawing the original application,[5] the procedure for withdrawal is unclear. One thing that is clear, however, is that even if the original filing date is not deemed to be preserved, the pre-PERM application will be considered withdrawn.[6] A re-filing must be made within 210 days of withdrawing the pre-PERM labor certification application.[7]

It is important to emphasize that re-filing involves fulfilling all of the filing and recruitment requirements under the PERM program. Since recruitment must have occurred within 30 and 180 days before filing,[8] there will be very few cases filed pre-PERM that will have recruited recently enough to qualify. Therefore, in nearly all instances, re-filing under PERM means re-recruiting and re-testing the labor market to determine whether there are qualified U.S. candidates. In other words, the process is not a conversion process at all, but rather involves the preparation and filing of an entirely new application, subject to the vagaries of the labor market. Many employers will decide that they do not want to go through this time consuming, labor intensive, and risky process again. Some beneficiaries, too, will agree that they may simply be better off awaiting the adjudication of their pre-PERM cases.

What is "identical"?

The PERM regulations tackle this definition by stating that applications are identical if the employer, alien, job title, job location, job requirements, and job description are the same.[9] Still, what about minor changes? Given the years that a pre-PERM labor certification may have been pending, it is possible that the employer has undergone a restructuring, changed its name, or relocated its principal address. It is difficult to believe that insignificant changes of this nature will effectively result in the loss of a beneficiary's priority date upon re-filing. At a conference in January, 2005, however, a senior DOL official stated unequivocally that "identical means identical."[10] If the DOL continues to adopt this harsh definition, employers will be hard pressed to re-file any cases with critical priority dates.

Filing an "identical" case using O*NET

As anyone who has gone through the labor certification process knows, employers are not at liberty to list job requirements based only on real world recruitment experience, at least without sufficient justification. Instead, the DOL has provided guidance as to what requirements are considered standard. The Specific Vocational Preparation (SVP) for a particular occupation is defined as the amount of time typically required to learn the skills and develop the facility to perform in that occupation.[11] SVP levels range from 1 (for unskilled jobs) all the way to 9 (for jobs requiring over 10 years of experience.)

The DOL provided guidance in determining SVP levels through its Dictionary of Occupational Titles (DOT).[12]The DOT, which hasn't been updated in over twenty years, listed a vast array of jobs, describing their duties in detail and assigning SVP levels. Pre-PERM cases were nearly all filed (and evaluated by the state workforce agencies (SWAs)) using the DOT definitions and corresponding SVP designations. Applications were by and large approved so long as employers did not exceed the SVP in setting experience and educational requirements for an occupation listed in the DOT.

Under the PERM program, the DOT has been replaced by a new system, the O*NET.[13] The O*NET contains fewer occupations than the DOT and classifies jobs as fitting into one of five zones, with each zone representing an SVP range, therefore narrowing the field from nine to five. Similar occupations requiring differing levels of experience in the real world are lumped together under the same O*NET occupational zones. For example, software engineers and computer programmers are both under Zone 4, in which a "minimum of two to four years of work-related skill, knowledge, or experience is needed.[14] Even more confusing is the fact that the SVP ranges for the different O*NET job zones are described as "7 less than 8" or "more than 6 less than 7." Does an SVP of "7 less than 8" mean that the most we can require is an SVP of 7? Based on the DOL's previous position on this subject, the answer to this is likely to be yes.[15] If that is the case, the net result is that many pre-PERM cases list requirements that are within the SVP under the DOT but which exceed the SVP under O*NET. This makes it virtually impossible to draft an "identical" re-filed case under PERM for many occupations without exceeding the SVP.

Consequences of exceeding the SVP

If the DOL holds to its interpretation of the O*NET job zones and if it is a goal to re-file an identical case so as to preserve the priority date, then in many cases the employer will be requiring experience and education under PERM that is outside the scope of what is acceptable under the O*NET. On the PERM Form ETA 9089, question H(12) asks, "Are the job opportunity's requirements normal for the occupation? If the answer to this question is "no", the employer must be prepared to provide documentation demonstrating that the job requirements are supported by business necessity."

If the experience and education requirements requested in the otherwise identical pre-PERM and PERM applications exceed what is defined under the O*NET, then it is ethically impossible to answer Question H(12) "yes" and the employer must provide further explanation by documenting business necessity for the additional requirements. In re-filing an "identical" case, will it be adequate to make a business necessity argument based upon the fact that the pre-PERM filing never exceeded the SVP under the DOT, the only standard available at the time the application was filed? Given that we don't know the answer to that question yet and the fact that the pre-PERM case will automatically be withdrawn, an employer is taking a serious risk in re-filing any case in which the SVPs are not identical under O*NET and the DOT. Moreover, since this is an automated process, a "no" answer to Question H(12) will probably trigger an audit. Since it remains to be seen how long an audit will take given the DOL's limited resources, an employer may be taking an unnecessary risk in re-filing such an application without even seeing the benefit of a speedier adjudication.

Re-filing non-identical cases

A topic of considerable conversation is whether one can re-file a labor certification under PERM that is somewhat different from the pre-PERM filing without risking withdrawal of the previous application. In other words, are there two bites at the labor certification apple? The PERM regulations are not clear on this subject. Some have argued that the re-filing procedures refer to automatic withdrawal only when the employer mentions a desire to maintain the original filing date.[16] Therefore, they reason, it is possible to re-file a PERM application while maintaining a pre-PERM filing.

The preamble to the regulations, however, states, "If the re-filed application is determined not to be identical to the original application in accordance with 656.17(d), the re-filed application will be processed using the new filing date, and the original application will be treated as withdrawn."[17]

Additionally, there is anecdotal evidence that it is not the intention of the seriously backlogged DOL to double its caseload.[18] Whether one can file a second, distinct labor certification under the unknown PERM program while maintaining a pre-PERM filing is a question that must be addressed by the DOL before employers can proceed with confidence.

Pitfalls of Re-filing

There are very serious consequences that will impact certain employees under specific circumstances. These must be carefully considered before proceeding with re-filing.

Losing the priority date if case is not deemed "identical"

As many of us are aware, the employment-based third preference immigrant visa category (EB-3) has retrogressed for employees from China, India, and the Philippines. This means that employees from these countries with labor certifications qualifying under the EB-3 preference classification (jobs requiring bachelors degrees or less) will not be eligible to file for adjustment of status to permanent residence, even with approved labor certifications, until their filing dates ("priority dates") become current. At present, that means that such individuals may have to wait a few years before they are eligible to file.[19] Obviously, employees who lose their priority dates by re-filing "un-identical cases" under PERM are likely to have to face a period just as long or even longer before they are eligible to file for adjustment of status to permanent residence. Therefore it doesn't make sense to proceed with re-filing unless there are assurances that the cases will be "identical."

The EB-3 category is the only one at present that is backlogged. Based on prior history, however, it is possible that the EB-2 category (for jobs requiring master's degrees or higher) could also retrogress at some point.[20] Furthermore, it is possible that employees from countries other than China, India and the Philippines may at some point also face a backlogged EB-3 category. Therefore it is foolish to blithely disregard the possibility that employees can lose their priority dates through re-filing non-identical cases under PERM.

Losing the Seventh Year H-1B Extension

An employee in H-1B status normally has a maximum of six years to remain in this status. Extensions in one year increments are allowed, however, provided a labor certification has been filed within a year of the expiration of H1B eligibility.[21] For many employees, then, it is critical that their applications were filed under pre-PERM rules by a certain date.

At present it is unclear whether the Department of Homeland Security (DHS) will approve a seventh year H-1B extension request based upon a pre-PERM labor certification filing that is withdrawn for re-filing under PERM. It doesn't matter whether the re-filing is deemed identical or not. This is not a question that can be answered by the DOL; it requires a DHS determination. Therefore it would be extremely unwise to re-file even an identical application under PERM unless that filing also meets the seventh year extension eligibility requirements.

Risk of Re-recruiting

In today's job market, there is going to be a significant risk in re-recruiting for many occupational classifications. Additionally, the PERM rules impose greater recruitment restrictions than did the prior labor certification procedures, particularly for professionals.[22] Even in those instances where employers have agreed to undergo the ordeal and expense of further recruitment, it may not be in the employee's best interest. One may wonder how the DOL would ever know that the employer has decided to re-test the labor market. Most recruitment without re-filing may be innocuous, and some employers may well decide to re-test the marketplace. Once a job order has been placed with a SWA, however, as is required under the PERM regulations,[23] there is a possibility that the DOL would be alerted that an employer has begun the re-filing process. Therefore it is not recommended that an employer place a job order with a SWA unless it intends to re-file. This, of course, means that there is a risk that the pre-PERM application will be withdrawn and that a qualified candidate may be located during PERM recruitment who was not located during pre-PERM recruitment.

*Re-filing Under O*NET Using Lower SVP*

As described above[24] there is an inconsistency between determining SVP levels under the pre-PERM scheme using the DOT and determining the SVP levels under the PERM scheme using O*NET. If an employer decides to re-file a non-identical case using the O*NET zones to determine SVP levels, there is a probability that the minimum job requirements for the occupation will be lower under PERM than what they were pre-PERM. One wonders whether an employer should be concerned about telling the DOL that the requirements for the job are no longer what they used to be. What if the employer still has pre-PERM cases for other employees in the same occupation pending at the backlog reduction centers with the higher requirements? What if the employer has re-filed other cases as "identical" under PERM in an attempt to maintain the employees' priority dates, arguing business necessity? Are these inconsistencies going to matter to the DOL? How is the employer going to explain itself in an audit? A large employer with similar cases pending within the same occupational classification is therefore advised to proceed cautiously and not allow employees' individual desires to drive the re-filing determinations.

Wage Considerations

Re-filed cases will need to comply with the new PERM wage scheme, which requires that 100% of the prevailing wage be paid.[25] Formerly, under the pre-PERM labor certification program, an employer could pay 95% of the prevailing wage.[26] As before, the appropriate wage is determined by the SWA having jurisdiction over the area of intended employment.[27] Unless there is a collective bargaining agreement the prevailing wage is determined using the Occupational Employment Statistics Survey (OES), which will have four levels.[28] An employer may also provide wage data that the SWA must consider in the alternative.[29]

Since the pre-PERM cases that a re-filing would replace will often have been filed years ago, the wages provided by the SWAs for the PERM cases could be significantly different. Therefore it is essential to do a careful wage analysis before re-filing to determine whether the new SWA-approved wages can feasibly be paid by the employer. As with pre-PERM filings, fortunately that wage does not actually have to be paid to the employee until he or she is approved for lawful permanent residence, which is still likely to be at some distant point in the future given current processing times.[30]

Skills That can be Acquired on the Job

The PERM regulations state that a U.S. worker cannot be rejected for lacking skills necessary to perform the job duties when those skills can be acquired on the job through a "reasonable period of training."[31] At this point no one knows what will be deemed a "reasonable period." The only guidance given on this matter is in the supplemental information to the PERM regulations, which explains that a determination of what is reasonable will "vary by occupation, industry, and job opportunity."[32] Obviously, this is a matter of significant concern, and should be looked at closely by any employer considering re-filing. If a job applicant was lawfully rejected during pre-PERM recruitment, the employer must be made aware of the possibility that a similar applicant may not be rejected lawfully under PERM-based recruitment.

Actual Minimum Requirements

Under PERM, the DOL will evaluate the employer's actual minimum requirements for the job opportunity. The employer cannot have hired workers with less training or experience for jobs that are substantially comparable.[33] What, exactly, does "substantially comparable" mean in this context? It remains to be seen whether the DOL will accept different occupational levels with graduated job requirements within the same job classification (e.g., Mechanical Engineer I – IV). Therefore an employer should proceed with caution in re-filing a labor certification in which the requirements listed for the beneficiary's position exceed those of any existing or prior employees.

Experience Gained on the Job

Extra caution must be taken before re-filing cases in which the employee gained part of the requisite experience while with the same employer. A general rule of labor certifications (both pre-PERM and PERM) is that an employer cannot consider any training and experience that the employee gained after being hired.*34* In certain pre-PERM cases, however, the employer, in appropriate instances, has been able to use the reasoning of *Matter of Delitizer Corp. of Newton*,[35] where the prior job of the worker was sufficiently dissimilar from the job being petitioned for. The PERM regulations have preserved the spirit of *Delitizer* somewhat, allowing prior experience to be used if the prior position was not "substantially comparable." A "substantially comparable" job is one in which the same duties are performed more than 50% of the time.[36] In the alternative, experience gained on the job is allowed if the employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.[37]

Although it is promising that the PERM regulations retained language resembling the reasoning of *Delitizer* as well as the provision regarding retraining, we obviously do not know how these regulations will be interpreted in an audit situation. Furthermore, question J(21) asks whether the employee gained any of the qualifying experience in a position "substantially comparable" to the job opportunity requested. If the employer is confident that more than 50% of the job duties were similar then the answer would be "no." If, however, the duties were similar but it is no longer feasible to train a U.S. worker, the labor certification application will be audited. If the pre-PERM filing involved on-the-job experience that is difficult to distinguish or relied on the rarely used rationale that it is unfeasible to train a U.S. worker, then it is best not to risk a re-filing under PERM.

The PERM rules do allow prior experience if gained with an employer with a different federal employer identification number (FEIN).[38] This is excellent because it allows experience gained abroad when an employer would not be using a FEIN.

Contracted Employees

Under the PERM regulations, if an employee worked for the employer as a contractor, then any experience gained on the job is treated as if the contractor was an employee.[39] If, however, the contractor worked as an employee for an employment agency with a separate FEIN, then presumably this experience would be viewed separately under the regulations.[40] Therefore, in evaluating a case for re-filing, one needs to determine whether the contracted employee was employed by a separate employer, in which case the experience is useable, or was a self-employed contractor, in which case it is not.

Foreign Language Requirement

A foreign language requirement is acceptable for an occupation under the PERM regulations only if it is justified by business necessity.[41] Demonstrating business necessity requires an employer to show that the nature of the business requires the foreign language, or that there is a need to communicate in a foreign language with a large majority of the employer's customers, contractors, or employees.[42]

Question H(13) asks whether knowledge of a foreign language is required to perform the job duties. If it is, the employer must be prepared to provide documentation regarding the business necessity of this requirement. Although employers also had to show business necessity for a language requirement in pre-PERM filings, the question becomes one of audit and efficiency in re-filing under PERM. One would assume that a "yes" answer to H(13) would trigger an audit. Again, it is entirely unclear how long an audit is going to take and therefore whether there would be any true timing benefit in re-filing. Also, it is possible that an audit will be performed with far more scrutiny than a review of a pre-PERM filing, so there is a risk in withdrawing such an application.

Combination of Occupations

The PERM regulations require a business necessity justification wherever a job involves performing a combination of two occupations.[43] The employer must show that it has normally employed people in the past for that combination of occupations, and/or that workers customarily perform the combination of occupations in the area of intended employment.[44]

Question H(15) of the PERM application asks whether the application involves a job opportunity that includes a combination of occupations. A "yes" answer will presumably trigger an audit. In the cost/benefit analysis of whether to re-file, it may be risky to proceed with an application that one expects will be audited. Perhaps over time it will become clear that the DOL will handle such audits efficiently, but at this point we have no way of anticipating the outcome or timing.

Alternate Job Requirements

Employers often will allow alternate types of experience for a given position. Under the PERM regulations, alternative experience requirements must be "substantially equivalent" to the primary requirements. If the beneficiary is already working for the employer and does not meet the primary requirements, the labor certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.[45]

In a re-filing situation, one must remember that it is essential that the job requirements be "identical" if one is to preserve the filing date. Therefore, this provision could present a problem if the pre-PERM filing does not state that any suitable combination is acceptable.

Also, once again there is a heightened risk of audit in this situation. Questions H(8-10) ask whether there are alternate combinations of education and experience that are acceptable, and Questions J(17-20) ask about the employee's alternate combinations of experience.

Employer-paid for Required Education or Training

Question J(22) asks whether the employer paid for any of the beneficiary's education or training that is necessary to satisfy any of the job requirements. The employer may not consider education or training that has been obtained at the employer's expense unless similar training has been offered to U.S. workers.[46] If Question J(22) is answered "yes," an audit will presumably ensue. An employer should think twice before re-filing such an application.

Employee Influence and Control

If the employer is a closely held corporation or partnership in which the beneficiary employee has an ownership interest, or if there is a family relationship, or even if the beneficiary is one of a small number of employees, the employer must be able to demonstrate a "bona fide job opportunity," meaning that the job is available to all U.S. workers.[47] Supporting documentation includes corporate records, detailed financial history, information about the person who conducted the job interviews, and documentation of familial relationships when the company has fewer than ten employees.[48]

Question C(9) on the PERM form asks whether the employer is a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or whether there is a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the beneficiary. Again, if the answer is "yes" then presumably this application is at greater risk of audit. If so it may not make sense to re-file.

Layoffs

Question I(e)(26) requires the employer to state whether there has been a layoff in the area of intended employment in the same or related occupation within the six months preceding filing. If "yes," the employer is asked whether it notified and considered U.S. workers who had been laid off. Under the PERM regulations, the employer MUST notify and consider laid-off workers, or the application will be denied.[49] Given this regulation, it is not advisable to re-file a PERM application whenever there have been layoffs that could be construed as occurring within a related occupation within the past six months.

Beneficiary is Working Without Authorization

From time to time an employer will petition for an employee who is working without authorization, particularly when that employee is grandfathered under section 245(i) of the Immigration and Nationality Act (INA), which allows for the payment of a $1000 penalty to forgive certain prior immigration violations. In pre-PERM filings, most often the DOL turned a blind eye on that unlawful employment, because the labor certification process was often the only way to legitimize that employee.

The "good old days" of cooperation by the DOL in 245(i) cases may well be gone. The second sentence at the top of the PERM application form states, "Employing or continuing to employ an alien unauthorized to work in the United States is illegal and may subject the employer to criminal prosecution, civil money penalties, or both."[50]

Further, a senior DOL official recently stated that he expected that the electronic data obtained during the labor certification process may easily be shared with other agencies such as Immigration and Customs Enforcement.[51] Since Section J of the PERM application requests information such as the beneficiary's current immigration status, it will be relatively easy for the DOL to determine whether an employee is working without authorization. Therefore, any pre-PERM applications involving unauthorized workers should NOT be re-filed under PERM, as both the employer and the employee are at a much increased risk.

Unanswered Questions

As described above, it is difficult at this stage to recommend re-filing until or unless we get certain key questions answered by the DOL. These questions are:

- How will the SVP's in the O*NET zones be interpreted?
- If a higher SVP is needed to make a case "identical" for re-filing purposes will this automatically trigger an audit because of the need for making a business necessity argument?
- Under what circumstances will the DOL determine that a U.S. worker may not be rejected because required skills or training can be acquired on the job within a "reasonable period"?
- Will all cases requiring business necessity letters (for language requirements, combination of experience, or alternate job requirements) result in automatic audits?
- Will there automatically be an audit whenever the beneficiary gained required experience in a dissimilar job, the employer paid for certain required training, or the employer is a small or closely held company?
- If an audit is done because business necessity, how extensive will that audit be and under what circumstances will the audit lead to supervised recruitment?
- How "identical" must a re-filed case be to maintain the pre-PERM filing date?
- If a re-filed case is not identical or is even substantially different, is there a way to preserve the pre-PERM filing?

Cases That Should NOT be Re-filed

Based upon a careful review of the PERM regulations and in some instances until we receive definitive answers from the DOL on the above questions, certain cases are simply NOT good candidates for re-filing. They are:

- Any applications in which the beneficiaries are dependent on a priority date due to category retrogression;
- Cases in which the seventh year extension for H-1B's can only be applied for by utilizing the pre-PERM filing date (note that this will require an answer from DHS);
- All cases grandfathered under INA § 245(i) in which the beneficiary is working for the employer without authorization;
- Applications in which there has been a shift in the job market such that there is a greater likelihood of available U.S. workers;
- Situations in which the company has experienced layoffs in related occupations within the last six months;
- Cases where there is a perception of an oversupply of U.S. workers in the occupation, such that the DOL may request an audit;
- Applications in which audit-triggering questions on the applications must be answered "yes" (such as those requiring business necessity justification);
- Any applications requiring experience that the beneficiary acquired while working for the same employer;
- Situations involving closely-held companies or with beneficiaries who have familial relationships to the employer; and
- Cases in which the employer paid for certain requisite training for the beneficiary or which listed requirements that the employer could "reasonably train" a U.S worker to do.

Cases Where Re-filing Should be Considered

One wonders whether, in the absence of favorable guidance from the DOL, there are ANY situations in which the employer should consider re-filing a pre-PERM application through PERM. Again, it is important to remember that the only conceivable benefit of re-filing is timing. There are a few instances in which timing considerations are crucial. An example would be where the beneficiary has a child who is at risk of "aging out," meaning that he or she will turn twenty-one too soon to enjoy the benefits of the Child Status Protection Act.[52] Under this legislation, there is a complicated formula for determining whether a child "ages out" by determining the age of the child on the date when an immigrant number becomes available reduced by the days the I-140 petition (for employment-based immigrant classification) has

been pending.[53] In these days of increased risk for retrogression of the employment based classifications, a beneficiary with a strong case may well want to consider re-filing a labor certification application under PERM to protect his or her child.

Another situation in which re-filing might be considered is where the employer needs to speed up the adjudication of a labor certification because of potential, long range projections that involve moving the beneficiary into a different geographic location or position that no longer fits the occupational category (such as moving from an engineering position to an engineering management position.) The employer should not proceed with any labor certification filing, however, unless it intends to employ the beneficiary in the described occupation on a full time, permanent basis.

Another example could be where the beneficiary filed pre-PERM, but too late to preserve a seventh year extension in H-1B status. Waiting for an adjudication to be made through the Backlog Reduction Centers in that case could be a disaster. Therefore it may be prudent to re-file under PERM in the hopes that an adjudication will be made before the beneficiary runs out of time in H-1B status.

Additionally, there may be other unusual or compelling factors necessitating re-filing cases under PERM. In all such cases, a careful analysis must be done to weigh and balance the risks and benefits. An ideal case is one in which there is a clear shortage of U.S. workers for the occupation, the beneficiary has all the requisite experience before joining the company, there is nothing about the case requiring a business necessity argument, the beneficiary is not concerned about maintaining a priority date or preserving a seventh year H-1B extension, the company is not closely held, and the wage is well within the prevailing rate of pay.

Lest we feel too pessimistic about PERM, it is important to remember that there are still such labor certification cases out there. Hopefully, once the DOL responds to many of the concerns listed above, particularly those related to the confusion over the SVP levels and business necessity requirements, employers will be able to proceed efficiently and effectively in re-filing labor certification applications through the PERM program.

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1. 20 C.F.R. § 656, *at* 69 Fed. Reg. 77,326-77,421 (Dec. 27, 2004).
2. 69 Fed.Reg.77,328,77337 (Dec.27, 2004) (supplementary information).
3. Comments of Bill Carlson, chief, DOL foreign labor certification unit, all AILA mid-year conference, Los Cabos, Mexico, (Jan. 21, 2005) (notes on file with author).
4. 20 C.F.R. § 656.17(d), *at* 69 Fed. Reg. 77,326, 77,396 (Dec. 27, 2004).
5. 20 C.F.R. § 656.17(d)(1)(ii), *at* 69 Fed. Reg. 77,326, 77,396 (Dec. 27, 2004).
6. *Id.*
7. 20 C.F.R. § 656.17(d)(2), *at* 69 Fed. Reg. 77,326, 77,396 (Dec. 27, 2004).
8. 20 C.F.R. § 656.17(e)(1)(i), 656.17(e)(2) *at* 69 Fed. Reg. 77,326, 77,392-93 (Dec. 27, 2004).
9. 20 C.F.R. § 656.17(d)(4), *at* 69 Fed. Reg. 77,326, 77,396 (Dec. 27, 2004).
10. Comments of Bill Carlson, chief, DOL foreign labor certification unit, at AILA mid-year conference, Los Cabos, Mexico, (Jan. 21, 2005) ((notes on file with author).
11. See Chapter for a more complete description of the differing SVP levels.
12. National Academy of Sciences, Committee on Occupational Classification and Analysis. DICTIONARY OF OCCUPATIONAL TITLES (DOT): PART I - CURRENT POPULATION SURVEY, APRIL 1971, AUGMENTED WITH DOT CHARACTERISTICS, AND PART II - FOURTH EDITION DICTIONARY OF DOT SCORES FOR 1970 CENSUS CATEGORIES [Computer file]. Washington, DC: U.S. Dept. of Commerce, Bureau of the Census [producer], Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 1981.
13. *See generally* http://www.doleta.gov/programs/onet.
14. *See* http://online.onetcenter.org (last visited Feb. 14, 2005).
15. Under the pre-PERM program, the DOL held that the lower end of the SVP range should be used, so that 7<8 meant SVP 7. Minutes, AILA liasion meeting with DOL, ETA National Office (Sept. 10, 2002), *available at* http://www.aila.org/infonet (last visited Feb. 14, 2005) document no. 02101631.
16. 20 C.F.R. § 656.17(d)(1)(ii), *at* 69 Fed. Reg. 77,326, 77,396 (Dec. 27, 2004).
17. 69 Fed. Reg. 77,326, 77,342 Dec. 27, 2004) (supplementary information).
18. Comments of Bill Carlson, chief, DOL foreign labor certification unit, at AILA mid-year conference, Los Cabos, Mexico, (Jan. 21, 2005) (indicating that there is a probability of withdrawal in such circumstances) (notes on file with author).
19. *See U.S. Dep't of State*, Visa Bulletin, *at* http://travel.state.gov/travel/visa/frvi_bulletincurrent.html.
20. *See e.g. U.S. Dep't of State,* Visa Bulletin (Oct. 1997).
21. *See generally* Naomi Schorr & Stephen Yale-Loehr, *Buying Time: Practice Strategies for H-1B Workers Coming to the End of the Line and Related Issues,* 8 Bender's Immigr. Bull. 453 (Mar. 15, 2003).
22. 20 C.F.R. § 656.17(e)(1), *at* 69 Fed. Reg. 77,326, 77,393 (Dec. 27, 2004).
23. 20 C.F.R. § 656.17(e)(1)(i), *at* 69 Fed. Reg. 77,326, 77,393 (Dec. 27, 2004).
24. *See also* Chapter or a more complete description of the differing SVP levels.
25. 20 C.F.R.§ 656.40, *at* 69 Fed. Reg. 77,326, 77,399 (Dec. 27, 2004).
26. 20 C.F.R. 656.40(a)(2)(ii).
27. 20 C.F.R.§ 656.40(a), *at* 69 Fed. Reg. 77,326, 77,399 (Dec. 27, 2004).
28. 69 Fed. Reg. 77,326, 77,367 (Dec. 27, 2004) (supplementary information).
29. 20 C.F.R.§ 656.40(g), *at* 69 Fed. Reg. 77,326, 77,400 (Dec. 27, 2004) *See also* Chapter for detailed information on wage analysis.
30. 20 C.F.R. § 656.10(c)(1) *at* 69 Fed.Reg. 77,326, 77,390.
31. 20 C.F.R.§ 656.17(6)(2) *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004).
32. 69 Fed. Reg. 77,326, 77,350-51 (Dec. 27, 2004) (supplementary information).
33. 20 C.F.R.§ 656.17(i)(2), *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004).
34. 20 C.F.R.§ 656.17(i)(3), *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004).
35. 88-INA-482 (BALCA May 9, 1990).
36. 20 C.F.R.§ 656.17(i)(5)(ii), *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004). For more discussion on *Delitizer* see Chapter.
37. 20 C.F.R.§ 656.17(i)(3)(ii), *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004).
38. 20 C.F.R.§ 656.17(i)(5)(i), *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004).
39. 20 C.F.R.§ 656.17(i)(3), *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004).
40. 20 C.F.R.§ 656.17(i)(5)(i), *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004).
41. 20 C.F.R.§ 656.17(h)(2), *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004).
42. *Id.*
43. 20 C.F.R.§ 656.17(h)(3), *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004).
44. *Id.*
45. 20 C.F.R.§ 656.17(h)(4), *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004).
46. 20 C.F.R.§ 656.17(i)(4), *at* 69 Fed. Reg. 77,326, 77,394 (Dec. 27, 2004).
47. 20 C.F.R.§ 656.17(l), *at* 69 Fed. Reg. 77,326, 77,395 (Dec. 27, 2004).
48. *Id.*
49. 20 C.F.R.§ 656.17(k), *at* 69 Fed. Reg. 77,326, 77,394, 77,395 (Dec. 27, 2004).
50. 69 Fed. Reg. 77,326, 77,402 (Dec. 27, 2004) (Appendix B).
51. Comments of Bill Carlson, chief, DOL foreign labor certification unit, at AILA mid-year conference, Los Cabos, Mexico, (Jan. 21, 2005) (notes on file with author).
52. Child Status Protection Act., P.L. No. 107-208, 116 Stat. 927 (Aug. 6, 2002).
53. *Id.*