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Labor Certification for Employment-Based Permanent Residence

For most people, the initial step in obtaining permanent residence based on employment is labor certification. The purpose of this memo is to provide general information about the process. Nothing in it should be considered legal advice. Before acting on any information provided here, please seek the counsel of a qualified immigration attorney. For more information, contact David Ware at dware@David-Ware.com or (504) 830-5900.

In short, labor certification is a determination by the U. S. Department of Labor (DOL) that there is no qualified available U. S. worker willing to fill the position offered and that employment of the foreign national whom the employer intends to hire will not adversely affect the job opportunities, wages and working conditions of U.S. workers. In order to obtain labor certification, the employer must demonstrate that proper recruitment efforts were undertaken and that no qualified U.S. worker applied for the job. It is often the most cumbersome, difficult, and lengthy aspect of the permanent residency process. DOL's new PERM (Program Electronic Review Management) System will require more recruitment than was required in the past, but it promises to drastically speed processing of labor certification applications.

Perhaps the most troublesome aspect of process is that, in most cases, a U. S. worker need only meet the *minimum qualifications* for the position in order to be considered qualified by DOL. In other words, the employer does not simply establish that the foreign national on whose behalf it seeks certification is the most qualified applicant; it must establish that there are no U.S. workers meeting the minimum requirements for the position. College and university teachers and performing artists of exceptional ability are *not* subject to this standard, and for them the employer need only establish that the alien is the more qualified than U.S. applicants.

Who Needs Labor Certification

Labor certification is required only for persons seeking to immigrate on the basis of employment. It is not necessary for those seeking to immigrate on the basis of a family relationship to a U. S. citizen or Lawful Permanent Resident, "diversity immigrants," or refugees and asylees. Some categories of employment-based immigration do not require labor certification.

Labor certification not required

Labor certification is *not* required for the *first preference* category. This category includes: (EB-1-1) aliens of extraordinary ability in the sciences, arts, education, business, and athletics; (EB-1-2) outstanding professors and researchers; and (EB-1-2) multinational executives. Labor certification is *not* required for the *fourth preference* ("special immigrants") and *fifth preference* (investors).

Labor certification required

Labor certification *is* required for the *second preference* and *third preference*, with some exceptions. The second preference includes: (EB-2-1) aliens of exceptional ability in the arts, sciences, or business; and (EB-2-1) aliens with advanced degrees in professional fields. The third preference includes: (EB-3-1) aliens with bachelor's degrees in their fields; (EB-3-2) skilled workers; and (EB-3-2) unskilled workers.

Exceptions to the requirement

Alien labor certification is not required for:

A) *EB-2s with National Interest Waiver*

persons who qualify for the second preference and whose services are deemed to be in the national interest (and who receive a “national interest waiver”);

B) *Qualified Physical Therapists and Professional Nurses (Schedule A, Group 1)*

persons who qualify for the second preference (EB-2) or third preference (EB-3), and who work in occupations listed on Dept. of Labor’s Schedule A, Group 1, which currently includes only qualified physical therapists and professional nurses;

C) *Certain EB-2-2 Aliens of exceptional ability (Schedule A, Group 2)*

persons who qualify for the second preference (EB-2), and who are aliens of “exceptional ability in the sciences or arts” as defined in Dept. of Labor’s Schedule A, Group 2, by showing two of the following:

- (1) receipt of internationally recognized prizes or awards in the field
- (2) membership in international associations requiring outstanding achievement
- (3) published material in professional publications about the alien or her/his work
- (4) participation on a panel, or individually, as a judge of the work of others in field
- (5) original scientific or scholarly research of major significance in the field
- (6) authorship of published scientific or scholarly articles in the field
- (7) display of alien's work, in the field, at artistic exhibitions in multiple countries

Many people who qualify for Schedule A, Group 2 choose to proceed as an EB-1-1 alien of extraordinary ability, as the criteria are very similar.

D) *Certain qualified graduates of foreign medical schools* (Schedule A, Group 2)

(particularly those unable to use the EB-1 extraordinary ability category, which is not subject to the labor certification requirement, and those in the EB-2 category for whom the labor certification requirement has been waived), can often be classified in Schedule A, Group 2.

NOTE: Schedule A labor certifications are not adjudicated by the DOL. They are simply attached to the petition filed with the immigration service. Since the immigration service will adjudicate the schedule A certification, and appeal to the Board of Alien Labor Certification Appeals is not possible, it is important to submit all evidence necessary to satisfy all criteria.

How to Obtain Labor Certification

The employer must undertake a proper recruitment campaign in order to qualify the job opportunity for labor certification. This involves advertising the position in a variety of venues and engaging in other efforts to recruit qualified U.S. workers and properly documenting these efforts. Under PERM the required recruitment varies by the kind of position—professional, nonprofessional, and college/university teachers—and there are some mandatory steps and some options from which the employer may choose. While DOL has repeatedly stated that it has considered the common practices of employers in crafting the regulatory requirements, most employers find that “real world recruitment” does not suffice for labor certification.

While some employers regularly undertake recruitment efforts that will satisfy DOL, most do not. This requires that after a foreign national has been hired, for instance as an H-1B or TN nonimmigrant, the employer must conduct a new and proper recruitment campaign if the job opportunity is to qualify for labor certification. In practice, this means that foreign national employees who hold a nonimmigrant status must watch as their jobs are advertised, and applications accepted, and only after the employer can show that no qualified U.S. workers applied can it move forward in obtaining permanent residence for the employee begin. The process must be handled very carefully if the employer is to meet its legal requirements but not encourage applicants that the employer would consider unqualified but whom DOL might consider qualified or at least “trainable.”

Employer's Attestations

In order to qualify a job opportunity for labor certification, the employer must attest that:

- (1) offered wage equals or exceeds prevailing wage (unless wage is set by union contract, prevailing wage determination is obtained from the State Workforce Agency and is average wage for the occupation in geographic area in which employment will occur, **see Online Wage Library at <http://www.flcdatcenter.com/>**)
- (2) wage is not based on commissions, etc., unless regular payments totaling at least prevailing wage are guaranteed
- (3) employer has ability to pay wage or salary offered to alien
- (4) employer is able to place alien on payroll on or before proposed entry to U.S.
- (5) job opportunity does not involve unlawful discrimination
- (6) job opportunity is not: (i) vacant because former occupant on strike, locked out, or (ii) at issue in a labor dispute involving work stoppage
- (7) job opportunity's terms, conditions, environment not contrary to law
- (8) job opportunity has been clearly open to any U.S. worker
- (9) U.S. workers who applied were rejected only for lawful job-related reasons
- (10) that the opportunity is a ***full-time, permanent*** opportunity

Notice and Records

The employer must give notice of filing (and document that notice was given) to any bargaining representative or, if there is no bargaining representative, the employer must post a notice for *10 consecutive business days*, stating: (1) that the notice is provided because the employer intends to file a labor certification application; (ii) that anyone may provide pertinent documentary evidence to CO; and (iii) the address of the DOL Certifying Officer (CO) with jurisdiction over the employer. The notice must be provided between 30 and 180 days before filing the application. In other words, the employer **cannot** satisfy notice requirement more than 6 months before filing, but it **must** satisfy the notice requirement at least 30 days before filing. Unless the job opportunity is for a Schedule A occupation, a shepherd, or a college teacher, the notice must also state the rate of pay which, must exceed prevailing wage. See "Labor certification for College and University Teachers for more information on "special handling" of these applications). If the job opportunity is for a Schedule A occupation or shepherd, it must contain description. The notice must be published in all in-house media (electronic or print) usually used for the employer's recruitment. The employer must retain copies of labor certification application and all supporting documentation for at least 5 years

Filing the Labor Certification Application

Under PERM, the employer is no longer required to submit documentary evidence in support of the labor certification application, it simply maintains it so that it can be made available to DOL in the case of an audit. Once the recruiting and posting requirements are met and the results are recorded, the application is prepared by submitting ETA Form 9089 online. Applications are screened and are either certified, denied, or selected for audit. DOL explains that some audits will be random and others will be triggered by information contained in the form submitted. If certified, the employer must then immediately sign the form if it is to be considered valid. There is a similar process for submitting the Form 9089 by mail, but it is not discussed here.

Once the labor certification application is approved, the employer may file an immigrant petition for the employee.

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PROFESSIONAL OCCUPATIONS

The U. S. Department of Labor's new PERM (Program Electronic Review Management) System provides specific procedures for qualifying "professional occupations" for labor certification. This memo is describes the process and provides general information about it. Nothing in it should be considered legal advice. Before acting on any information provided here, please seek the counsel of a qualified immigration attorney. For more information, and for special procedures for "college and university teachers," contact Steve Springer at steve@David-Ware.com.

Required Pre-Filing Recruitment

No more than six months before filing the labor certification application, the employer must have completed a proper recruitment campaign. This includes two mandatory steps and three "additional recruitment steps" that the employer must choose from a list of ten options.

MANDATORY RECRUITMENT

1) **Job Order:** The employer must place a "job order" (an ad to go into a job bank)—to remain active for 30 days—with the State Workforce Agency (SWA); and

2) **Advertisements in newspaper or professional journal:** The employer must place an ad on two different Sundays in the most appropriate newspaper of general circulation in the area of intended employment. If the job is in a rural area in which the appropriate newspaper has no Sunday edition, the issue with the widest circulation may be used. The ad must:

- 1) name the employer
- 2) direct applicants to send resumes or report, as appropriate
- 3) provide a specific description of the job vacancy
- 4) indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and the area in which they would likely have to reside
- 5) not contain a wage rate lower than the "prevailing wage"
- 6) not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089, and
- 7) not contain wages or terms and conditions of employment that are less favorable than those offered to the foreign national the employer has hired or intends to hire.

If the job requires experience and an advanced degree, and a professional journal normally would be used to advertise the job opportunity, the employer may—in lieu of one of the Sunday ads—place an ad in the most appropriate professional journal.

ADDITIONAL RECRUITMENT

In addition, the employer must complete three of the following activities:

- 1) recruitment at job fairs,
- 2) recruitment through the employer's web site,
- 3) recruitment through a job search web site (other than the employer's site),
- 4) on-campus recruiting,
- 5) recruitment through trade or professional organizations,
- 6) use of private employment firms or placement agencies,
- 7) use of an employee referral program,
- 8) use of a campus placement office,
- 9) recruitment through a "local" or "ethnic" newspaper,
- 10) radio and television advertisements.

The posting requirement applies to all labor certification applications, so a proper notice of the job opportunity must be provided to the bargaining representative, if any, or posted and published in any in-house media the employer normally uses for such notices (as described in *Labor Certification for Employment-Based Permanent Residence*).

The employer must document the competitive recruitment and selection process and retain these records for at least five years. The employer must prepare a recruitment report, signed by the employer or its representative, describing the recruitment steps undertaken and the results achieved, including the number of applicants hired, and the number of U.S. workers rejected (categorized by job-related reason for rejection). U.S. workers who could acquire the necessary skills during a reasonable period of on-the-job training may not be considered unqualified. The Certifying Officer may request to see resumes and applications of U.S. workers, so those must be retained by the employer.

In describing the job, the employer must be careful to avoid unusual requirements unless they can be documented as arising from business necessity (in other words, that they are actually necessary and not just intended to reduce the applicant pool). The employer generally cannot require U.S. worker applicants to possess training and/or experience beyond what the foreign national employee or intended employee possessed at the time of hire unless he or she gained that training and/or experience in another position with the employer. This means that if the foreign national has already been hired in the job, the employer cannot list requirements that would not have been met by the foreign national when hired.

If the employer is a closely-held corporation or partnership in which the foreign national has an ownership interest or a familial relationship or is one of a small number of employees, the employer must document additional information about the employer and hiring officials and demonstrate the existence of a bona fide opportunity. In short, in these situations, DOL is often less trusting that a proper recruitment campaign and competitive process has been completed.

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COLLEGE AND UNIVERSITY TEACHERS

The U. S. Department of Labor's new PERM (Program Electronic Review Management) System provides special procedures for "college and university teachers." This memo describes the process and provides general information about it. Nothing in it should be considered legal advice. Before acting on any information provided here, please seek the counsel of a qualified immigration attorney. For more information, contact Steve Springer at steve@david-Ware.com.

PERM retains key aspects of "special handling" previously available for college and university teachers. These procedures are optional, but they are often much preferable to the process for "professional positions," which would also be available to teachers. The standard process requires employers to establish that no U.S. workers meeting the minimum requirements applied. The special process requires only that the employer establish only that a competitive recruitment and selection process was undertaken and that the foreign national it intends to hire was *more qualified* than any of the U.S. workers who applied for the job. ***The labor certification application must be filed within 18 months after the selection is made.***

Colleges and universities regularly undertake competitive recruitment and selection processes in hiring faculty members, so it is possible that an employer who hired a foreign national faculty member in H-1B or another nonimmigrant status, and who decides within 18 months of the selection of that faculty member, to seek permanent labor certification, will have already undertaken a proper recruitment process and will not need to re-recruit for the position for labor certification. If the initial recruitment efforts were not sufficient, or if more than 18 months have passed since the selection, the employer may re-recruit for the position, re-offer it to the foreign national (if she or he is again the most qualified applicant), and then proceed with the permanent labor certification application which must be filed within 18 months of this selection.

A proper recruitment campaign under PERM includes placement of a ***PRINT*** advertisement—stating the job title, duties, and requirements—in one appropriate national professional journal, though the employer may consider placement of additional advertisements to ensure that this requirement is met. The posting requirement applies to all labor certification applications, so a proper notice of the job opportunity must be provided to the bargaining representative, if any, or posted and published in any in-house media the employer normally uses for such notices (as described in *Labor Certification for Employment-Based Permanent Residence*).

The employer must document the competitive recruitment and selection process and retain these records for at least five years. The documentation must include, among other things, a statement by the employer's official with hiring authority setting forth the total number of applicants for the opportunity and the job-related reasons why the foreign national is more qualified than any U.S. workers who applied. It must include a final report by the body making the recommendation to select the foreign national applicant. A copy of the advertisement in an appropriate national journal must be included, along with evidence of any other recruitment undertaken. And a written statement attesting to the "degree of the alien's educational or professional qualifications and academic achievements" is required.