Client ALERT

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Overview of the Department of Labor's Proposed PERM Regulations

This past spring, the Department of Labor ("DOL") issued proposed regulations which seek to overhaul and streamline the labor certification process. While the proposed regulations (called the PERM program) envision a system which would improve processing times and eliminate bureaucratic waste by reducing the role of the State Workforce Agencies, the proposed regulations also severely limit the type of experience which can be required in connection with a labor certification and increase the burden on the employer company. In addition, the proposals contain new prevailing wage guidelines which would impact the H-1B program as well as the labor certification program. The discussion below highlights the new proposed labor certification structure and prevailing wage guidelines under PERM.

Basic Structure of the PERM Program

Recognizing that the current labor certification process is extremely time-consuming and that several jurisdictions are severely backlogged with respect to processing applications, the DOL has proposed the PERM program which would reduce processing times for most cases to within 21 calendar days of the date the application is filed.

The new program contemplates an automated attestation-based processing system similar to that currently employed in the labor condition application process used in connection with H-1B petitions. The PERM system anticipates requiring employers to conduct recruitment prior to filing labor certification applications as is currently the case with reduction-in-recruitment (RIR) cases. The basic process is as follows:

a) As an initial step, an employer would be required to file a prevailing wage determination request, including job description and job requirements, with the State Workforce Agency (SWA). The sole role of the SWA under the proposed system would be to make a prevailing wage determination and to return the endorsed prevailing wage determination form to the employer.

b) The employer, after conducting mandatory and alternate recruitment steps (discussed below), would then submit an application on a Permanent Labor Certification Form (ETA Form 9089), a machine readable form, together with the prevailing wage determination from the SWA, to an application processing center for automated screening processing. Form 9089 contains a list of 56 items, the majority of which require no more than a "yes" or "no" response, including whether the beneficiary gained any of the qualifying experience with the employer; whether a foreign language requirement is included in the application; and whether U. S. job applicants were rejected solely for lawful job-related reasons. Importantly, the employer is not required to provide documentation supporting the attestations at this stage.

c) Once submitted, an application will be reviewed by a computer system. If the application does not trigger an audit, the computer system will generate an adjudication within 21 calendar days. If an application is selected for an audit, either because it has been identified for an audit for problems or because it has been randomly selected for an audit for quality control, the employer will be notified of the audit and will be required to submit documentation to a Certifying Officer ("CO") to verify information stipulated in the application. After an audit has been concluded, the CO can certify the application, deny the application, or order supervised recruitment in cases where questions regarding the adequacy of the employer's test of the job market arise. [Denials of applications can be appealed to the Board of Alien Labor Certification Appeals (BALCA)].

The employer would have 21 days within which to respond to audit letters from the DOL. Significantly, if the CO determines that an employer materially misrepresented that it had complied with all documentation requirements or otherwise determines that a material misrepresentation was

made with respect to the application for any reason, the employer may be required to conduct supervised recruitment in future filings of labor certification applications for a period of 2 years.

Some of the Key Changes Introduced by the Proposed PERM Regulations

1) Proposed Advertising

The proposed PERM regulations introduce a specific delineation of "professional" and "nonprofessional" occupations, and enunciate different recruiting requirements for these categories:

a) *Professional Occupations* – a professional occupation is one for which a bachelor's or higher degree is a usual requirement. The proposed regulations identify both mandatory and alternate recruitment steps which must be undertaken.

> i) Mandatory Steps: 1) placement of a job order with the SWA serving the area of intended employment; 2) placement of 2 advertisements in the Sunday edition of the newspaper of general circulation most appropriate to the occupation and the workers likely to apply for the job opportunity in the area of intended employment; and 3) placement of an advertisement in an appropriate journal in lieu of one Sunday advertisement *if the position requires experience and an advanced degree*.
> Importantly, the mandatory recruiting steps must be conducted at least 30 days, but no more than 180 days, before the application is filed, and the mandatory advertisements must be placed at least 28 days apart.
> ii) **Alternative Recruiting:** In addition to the mandatory steps outlined above, the employer would also be required to select three additional pre-filing recruitment steps from among commonly used professional recruitment sources, such as job fairs, job search web sites and private employment agencies.

b) *Nonprofessional occupations* – a nonprofessional occupation is one for which the attainment of a bachelor's or higher degree is not a usual requirement for the occupation. The *mandatory* recruitment steps for nonprofessional occupations are as follows:

> i) placement of a job order with the SWA serving the area of intended employment; and
> ii) placement of 2 newspaper advertisements which must be placed at least 28 days apart, and which must be placed in the Sunday edition of the newspaper of general circulation most appropriate to the occupation and the workers likely to apply for the job opportunity.

2) The Business Necessity Exception

Under the current system, the requirements stated on a labor certification application must be those normally required for jobs in the U. S. Employers have, however, been able to justify requirements that exceed those that are considered normal using the "business necessity" standard which permits retaining a requirement if the absence of that requirement would undermine the essence of the business operation. The proposed regulations would no longer retain a business necessity standard as a justification for job requirements that exceed requirements that are normal to jobs in the U. S.

However, a foreign language may still be required due to the nature of the position , *e.g.*, a translator, or, for example, because the employer can document its need to communicate with a large majority of its customers or regular contractors who cannot communicate effectively in English.

3) Allowable Job Requirements

Under the proposed regulations, job requirements other than those related to the number of months or years of experience or training may not be used unless justified in the following limited circumstances: a) the employer employed a U. S. worker to perform the job opportunity with the duties and requirements stipulated in the application within 2 years of filing the application; or b) the requirements are normal to the occupation in order for the person to perform the basic job duties and are routinely required by employers in the industry.

4) On-The-Job Experience Requirements

It is long-established that an employer may not require experience which the foreign national gained with the petitioning employer *except* when that experience was gained in a different position from that for which the employer is seeking labor certification. The proposed regulations would eliminate this exception. Instead, employers could not require any experience whatsoever that the foreign national has gained with the petitioning employer even if that experience was gained in a different position, or working as a contract employee, or even when that experience was gained with predecessor organizations, successors-in-interest, a parent, branch, subsidiary or affiliate of the petitioning employer whether in the U. S. or in another country.

5) Lay-offs

The current system does not specifically require employers to consider potentially qualified U. S. workers who may have been laid off within a reasonably contemporaneous period of time from when the labor certifi-

cation application was filed. In a memorandum issued by the DOL in March 2002, the DOL has advised, however, that it can require such information from an employer.

The proposed regulations would codify this memo by providing that if there has been a layoff in the area of intended employment within 6 months of the filing of the application, the employer must attest to and document notification and consideration of potentially qualified U. S. workers involved in the lay-off and the results of such notification.

Other Key Provisions Contained in the Proposed PERM Regulations

1) Revocation of Approved Labor Certifications

The proposed regulations would grant authority to a CO to revoke labor certifications within one year of the date the labor certification is granted or before a visa number becomes available to the foreign national beneficiary, whichever occurs first, if the CO finds that the certification was inappropriately granted.

2) Proposed Changes to Prevailing Wage Regulations

The proposed PERM regulations include provisions which would have far-reaching implications relative to prevailing wages. These provisions impact not only labor certifications, but also the H-1B program as well.

a) Currently the prevailing wage regulations provide that if the employer's job opportunity is in an occupation which is subject to a wage determination under the Davis Bacon Act (DBA) or the McNamara-O'Hara Service Contract Act (SCA), this wage must be used as the prevailing wage whether or not the employer has a government contract in the area of intended employment. The proposed regulation deletes the requirement that the DBA or SCA wage be used in prevailing wage determinations.

b) Under current prevailing wage regulations, an employer is considered to meet the prevailing wage if it offers to pay 95% of the prevailing wage as determined by the SWA or appropriate published survey. However, the proposed regulations require paying 100% of the prevailing wage.

c) Under current regulations, an alternate published survey for purposes of documenting the prevailing wage is acceptable if, among other things, it provides a weighted average or mean of wages paid to workers similarly employed in the area of intended employment. The proposed regulations would allow for the use of median wage rates.

The proposed PERM regulations also address an important issue specific to the H-1B program, namely, the transition of workers from inexperienced to experienced. The proposed PERM regulations provide that where a survey that is the basis for a prevailing wage determination contains more than one wage rate for the occupational classification, the employer is required to pay the H-1B worker at least the applicable wage for the work performed. Thus, as an entry-level H-1B employee gains experience and is able to work independently, the applicable prevailing wage would be the wage from the survey for workers who work independently. In other words, the prevailing wage obtained would have to be reviewed according to the level at which the employee is functioning and would have to be amended as the employee advances.

Conclusion

While the PERM program does provide for a significant reduction in processing times at the DOL, there are numerous areas of great concern. The American Immigration Lawyers Association (AILA) is currently working with the DOL on ways to modify the proposed regulations.

The information in this Alert is not intended to be legal advice. However, if you require legal assistance or would like additional information about immigration matters, please contact your local Paul Hastings representative or ***Daryl Buffenstein*** *at 404-815-2232 or via email at darylbuffenstein@paulhastings.com.*