

# NACUANOTES

March 24, 2005  
Vol. 3 No. 2

## TOPIC:

## CHANGES TO THE ALIEN WORKER LABOR CERTIFICATION PROCESS

### INTRODUCTION:

Effective March 28, 2005, the United States Department of Labor (“DOL”) will change the way employers apply for labor certification and hire potential foreign employees. DOL’s long-awaited [Program Electronic Review Management \(“PERM”\) Regulations](#) will initiate a new electronic method for application filing and processing. Colleges and universities must be aware of the new procedures, which change the way a labor certification application is initiated, filed, and adjudicated. The regulations and their procedural changes are summarized in this NACUANOTE.

### DISCUSSION:

Labor certification is a procedure by which many foreign nationals seek full time, permanent employment and ultimately permanent residency in the United States (“U.S.”). Under labor certification, an employer is required to apply to the DOL for permission to hire a foreign national to work in a specified position for which there are no qualified workers available who are U.S. citizens. If and when the DOL certifies the application, the employer may then apply to the United States Citizenship and Immigration Services (“USCIS”) agency for permanent residency on behalf of the foreign employee.

***The Labor Certification System: Requirements – Pre–PERM Regulations.*** The 1965 labor certification law [\[1\]](#) made foreign nationals ineligible for permanent employment in the U.S. unless the DOL found:

- At the time of the foreign national’s application for a visa and admission to the U.S., there were not sufficient U.S. citizen workers who were able, willing, qualified, [\[2\]](#) and available to perform the relevant work at the place where the alien was to perform that work; and
- The employment of such alien would not adversely affect the wages and working conditions of workers in the U.S. who were similarly employed.

To put the statute into effect, the DOL implemented regulations requiring employers to survey the labor market to find qualified, available, and willing U.S. workers [\[3\]](#) to work at the offered job. This assessment could be accomplished through two methods:

- **“Standard”**  
labor certification cases, wherein applications were processed through the State Workforce Agency (“SWA”). An employer submitted a labor certification application including position requirements to the SWA, which reviewed the application, determined whether the minimum requirements for the position were appropriate, and if the wage met the prevailing wage standards. If the SWA was satisfied with the application, it issued recruitment instructions to the employer. The employer proceeded to advertise for the position (with direct input from the SWA), interview, and select the appropriate candidates. The employer then submitted a recruitment report to the SWA detailing the hiring process -- including information regarding received applications, persons interviewed, and the reasoning behind a hire and the denials. The information was then forwarded from the SWA to the DOL for a decision; or
- **“Reduction in recruitment”**  
cases, where the employer had to demonstrate that it engaged in a “pattern of recruitment” designed to locate U.S. workers to fill the available position,

and that it was unsuccessful in finding such employees who were both qualified and available. The “pattern of recruitment” must have taken place over the six-month period prior to filing the documentation with the SWA. The employer was also required to submit a recruitment report detailing the efforts to recruit U.S. workers for the position and the reasons behind their denial of employment.

### ***Special Handling for Teaching Faculty:***

DOL recommended that colleges and universities seeking to hire foreign nationals as teaching faculty (for tenured or tenure-track positions) follow a “special handling” labor certification process. In this situation, a labor certification application had to be filed with the DOL within 18 months of a decision to hire. All applications were required to show that the institution advertised for the position in an appropriate national journal and that the employee was the most qualified in the particular field. Both a local and regional DOL office then reviewed the application.

If no U.S. workers could be found to fill the available position, the DOL would “certify” or issue an approval of the application to hire the foreign national.

Because of the lengthy recruitment review process and the involvement of state agencies and the DOL under the pre-PERM regulations, the labor certification process was extremely slow, and could take from months to several years to complete. The PERM Regulations were issued to remedy these delays.

### ***The Labor Certification System: Requirements - Post-PERM Regulations.***

The new PERM Regulations are designed to streamline the labor certification process. The regulations differ from the previous rules in several ways:

**Prevailing Wage** - The employer must now pay at least 100% of the prevailing wage [4]. This is a 5% increase over the current regulations. The employer must submit a prevailing wage request to the SWA. The DOL will maintain a separate wage survey for colleges and universities.

**Prevailing Wage Determination Appeals Process.** If the employer submits a request to the SWA and disagrees with the determination, the employer may appeal to the PERM Center Director (although no processing times for these appeals are stated in the Regulations). If, in the employer’s opinion, the re-determination is still too high, then the employer can appeal the PERM Center Director decision to the [Board of Alien Labor Certification Appeals](#) within 30 days of the re-determination. If the employer disagrees with the Board’s determination, the employer may choose to utilize the DOL’s online salary survey, including its newly designed four-tier wage determination scale [5], or the employer may also submit alternate wage data from a qualifying survey (although the latter methods not involving a direct request to the SWA may delay certification). The wage survey must meet the criteria of the DOL General Administration Letter No. 2-98 [6] to be considered an appropriate wage survey.

### ***Minimum Position Requirements***

- The DOL will no longer use Specific Vocational Preparation levels as the measure of the “minimum requirements” for a position. The DOL will now utilize the Occupational Information Network (“O\*NET”) “Job Zones” to determine the standard minimum requirements for a position. The O\*NET is a comprehensive database of worker attributes and job characteristics. The 974 occupations in the O\*NET database are related to a common framework that describes job requirements and worker attributes, as well as the content and context of work using over 275 descriptors. The O\*NET database is in compliance with the current federal mandate to follow the Standard Occupational Classification.

### ***Recruitment***

– Employers are still required to search the labor market for qualified U.S. workers for a given position. Under PERM, however, the DOL will not monitor an employer’s recruitment effort after an application is filed (absent situations where a case is audited). The new regulations require employers to post notification [7], including using any and all “normal” means of in-house media typically used to alert employees of position openings within the company. Additionally, employers must place a job order with the SWA that will remain open for a 30-day period and also are required to place advertisements [8]. For “professional” positions, additional forms of recruiting are required [9].

**Special Handling Recruitment.** The special handling provision for teaching faculty has been removed. The employer may now recruit for college and university teaching faculty under the basic PERM labor certification process (the same process used for hiring other employees) **or** elect to have the case handled as an “optional recruitment” matter. Under section [656.18](#)

of the Regulations dealing with optional special recruitment and documentation for teaching faculty, recruitment documentation must consist of:

1. A statement from an authorized official outlining the recruitment process including the number of applicants and specific lawful job-related reasons why the foreign national was more qualified than others;
2. A final report selecting the foreign national;
3. At least one print advertisement in a national journal to contain the job duties, title, and requirements;
4. Other recruitment evidence; and
5. A statement attesting to the foreign national's qualifications.

Provisions for college and university teachers of exceptional ability in the sciences and arts [\[10\]](#) are covered in sections [656.5](#) and [656.15](#) of the Regulations.

**Recruitment Report.** Employers are required to maintain recruitment reports and documentation of recruitment for five years from the date of filing. The report must be signed by the person normally required to review applicants and must describe the steps, results, and number of applicants (including the reason for rejection) in the recruitment process [\[11\]](#).

**Filing** - Applications may be filed directly with DOL electronically [\[12\]](#) or via mail [\[13\]](#). The DOL has indicated that electronic filing is the preferred method. An employer that files electronically will receive an electronic response. If filing by mail, the employer must sign the applications prior to filing, and will receive a response by mail.

**Timing** - DOL states that applications will be adjudicated within 45-60 days, with a determination of approved, audited, or denied [\[14\]](#).

The rule requiring an employer to wait six months after the denial of a labor certification application to re-file for the same position has been eliminated. Upon denial, employers may immediately file a new application for the same position. As a result, the DOL will no longer issue "Notice of Findings."

**Revocation** - Ultimately, the DOL maintains the right to revoke any case "for cause" [\[15\]](#) for at least five years from the filing date of the application, and may revoke approved applications on any ground indefinitely.

### ***So how do you process a labor certification application under PERM?***

1. An employer determines the appropriate prevailing wage for an available position using one of the methods noted above and then conducts a recruitment process.
2. Finding no qualified, available U.S. workers for the position (or in the case of teaching faculty, finding the foreign national is more qualified), the employer completes a labor certification application and submits it either electronically or via mail directly to the DOL.
3. Barring a recommended or randomly selected audit, the DOL will issue a determination within 45 to 60 days.

### ***What to do on March 28, 2005 if you have already filed a labor certification application.***

If you have already filed a labor certification application and are awaiting a decision when the PERM rules go into effect, you have two options:

- Your case proceeds under the pre-PERM rules. If you filed your application according to the “standard” or “reduction in recruitment” method, your case will proceed under the rules established for those cases; or
- You can withdraw your existing application and re-file under PERM - Conversion. An employer is allowed to preserve the original filing date of a labor certification application filed before the implementation of PERM *if and only if* the re-filed application under PERM is for an **identical** position. The duties, title, and requirements of the pre-PERM labor certification application and the PERM application must be the same for the employer to maintain the original filing date. The employer must withdraw and re-file under PERM within 210 days. All conversion cases must comply with PERM recruitment and prevailing wage standards. A conversion filing will be delayed as the DOL will need to locate the original filing to compare the job duties and ensure the positions are “identical.”

### ***How do you select an option?***

- With the recent backlog of visa availability in the third employment-based preference category for foreign nationals born in India, China, or the Philippines, and the probability of further backlogs in this category for all nationalities, the loss of the original filing date would be very detrimental, and could result in an individual remaining in the “green card” process for several years. Therefore, preserving the original filing date may be a strong consideration in your selection of an option above.
- The DOL has created backlog reduction centers (“BRCs”) for pending labor certification applications. DOL’s goal is to eliminate its current backlog of applications within the two-year period that these centers are funded. To that end, only those applications filed within states with current case backlogs and not yet opened (no processing initiated by the SWA or DOL) will be forwarded to the BRCs. DOL will issue “45-day” letters to confirm that the employer, job offer, and foreign national all remain as stated in the filing. The reduction procedure is centered on a strict “First-In, First-Out” policy, based on the original filing date of the labor certification application. Thus, this DOL backlog reduction process may also be a consideration in your selection of an option above.
- The conversion rules do not discuss whether maintaining the original filing date will also maintain an H-1B individual’s ability to obtain a seventh year of H-1B stay based on the previous pre-PERM labor certification filing (assuming that it was filed at least 365 days prior to the date the individual’s six-year period of stay expires).

## **CONCLUSION:**

The PERM Regulations are a significant development in the labor certification process. College and university administrators with responsibility for hiring foreign staff members along with those hiring foreign teaching faculty should become familiar with these new procedures for filing and processing labor certification cases. Pending applications should be reviewed to determine if conversion to PERM processing is a viable option. New applications must take account of the new procedures set forth in the regulations.

## **FOOTNOTES**

## **RESOURCES FOR COUNSEL:**

### **Regulations and Guidance:**

- 20 C.F.R. Parts [655](#) and [656](#).

- [PERM: Labor Certification Rules](#)
- [U.S. Department of Labor General Administration Letter No. 2-98 \(January 1, 1998\).](#)

### **U.S. Department of Labor Resources:**

- [U.S. Department of Labor Publishes Final Permanent Labor Certification Regulation \(news release, December 27, 2004\)](#)
- [PERM Website](#)
- [PERM PowerPoint Presentation](#)
- [Hiring Foreign Workers \(Foreign Labor Certification Overview\)](#)
- [Foreign Labor Certification](#)
- [Foreign Labor Certification Data Center \(including Occupational Employment Statistics Program information\)](#)
- [Form ETA 9089](#)
- [PERM Processing Centers](#)

### **NACUA Resources:**

#### **Outlines**

- [Hiring the Foreign National Scholar or Faculty Member, March 3-5 2004, Karen Weinstock and Russell C. Ford](#)
- [Immigration Law Issues and Strategies for University Research Operations After September 11th, October 30-November 1, 2002, Laura W. Khatcheressian](#)
- [Hiring Foreign Nationals as Faculty: The Usual Progression, March 21-23 2002, Thomas J. Arkell](#)

- [Hiring Foreign Nationals as Faculty: Representation Issues for Higher Education Immigration Attorneys, March 21-23, 2002, Jeffrey C. McLellan](#)
- [Hiring Foreign Nationals—Opportunities and Pitfalls, June 28, 2000, Enrique Gonzalez](#)

### **Publications**

- [Immigration Law: Faculty and Staff Issues by Laura W. Khatcheressian, 2004](#)

### **Additional Resources:**

- [O\\*Net Consortium](#)

### **AUTHOR:**

[Russell C. Ford](#)

*Permitted Uses of NACUANOTES Copyright and Disclaimer Notice*

**View this document in PDF or Word**

**[NACUANOTES Homepage](#) | [NACUANOTES Issues](#)  
[Contact Us](#) | [NACUA Home Page](#)**

*"To advance the effective practice of higher education attorneys for the benefit of the colleges and universities they serve."*