

LAWFUL PERMANENT RESIDENCY IN THE UNITED STATES THROUGH AN OFFER OF EMPLOYMENT

MAIONAWARD is a boutique law firm which limits its practice to immigration and naturalization law. With approximately 25 years of immigration experience between the partners of the firm, we strive to produce professional, honest and cost effective services to all of our clients. MAIONAWARD represents both corporations and individuals who desire to work, live and travel to the United States.



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INTRODUCTION:

The purpose of this memorandum is to describe the procedures regarding the employer's sponsorship of an alien employee for lawful permanent residence in the United States (a/k/a "LPR" or "green card" holder). Lawful permanent residence is "immigrant status" (not U.S. citizenship) entitling the alien employee to live and work in the United States permanently. Obtaining permanent residence by sponsorship of an employee involves three steps: PERM/alien labor certification, immigrant visa petition approval, and "adjustment of status" to lawful permanent residence in the United States. The employer is involved primarily in the first two steps only. Our office will advise and assist the employer in complying with all of the rules and regulations listed herein to insure a successful application.

It is our understanding that the employer has offered an alien employee a full-time permanent position. It is our further understanding that the employer has a good faith intent to place the alien employee in that position at the time the alien employee is granted permanent residence.

STEP 1: PERM ALIEN LABOR CERTIFICATION:

The PERM Alien Labor Certification rules (PERM) discussed herein became effective as of March 28, 2005 and apply to alien labor certifications filed on or after that date. Under PERM the employer is given the option of filing the PERM application electronically or by mail: electronically is strongly urged and suggested.

PERM is an attestation-based application process. What this means is that the US Department of Labor (DOL) relies on the employer to dutifully and honestly perform the process listed in the following pages and to keep proof of this performance in the employer's or attorney's file. This information is not required when filing, but may be requested should DOL ask the employer to prove that it performed the required steps.

The employer is required to perform the following prior to electronically submitting the PERM 9089 application: (1) obtain a prevailing wage from the local State Workforce Agency for the position offered; (2) obtain proof of the employee's qualifications for the position; and (3) conduct a recruitment campaign to determine if there are any available US workers who are qualified for the position offered.

The prevailing wage is obtained from DOL after we provide some specifics about the position. The employer must agree to pay the prevailing wage or higher in order for the process to continue. The prevailing wage does not have to be paid until the employee becomes an LPR.

The employee should provide the employer and our office with a copy of the relevant college degree, transcripts and previous experience letters.

The recruitment campaign usually begins by placing two Sunday ads in a newspaper of general circulation in the geographical area of the work location in order to test the availability of qualified United States workers. The advertisement will identify the employer by name with an address for prospective employees to respond. The employer will also be required to post a notice in a conspicuous location at the place of business. Additional notification to unions and/or existing employees is also required if applicable.

Once the advertisement runs, applicants will be advised to forward their resumes to the employer for review. Should any applicants respond to the ad, their resumes should also be forwarded to my office by the employer for review. Applicants that appear to meet the minimum educational and experiential requirements will need to be interviewed. The employer is not required to interview all applicants; only those who appear to meet the minimum requirements for the position. However, the employer should not delay in contacting the applicants that should be interviewed. The Board of Alien Labor Certification Appeals has held in several cases that even a two week delay in contacting candidates could be evidence of lack of good faith in recruitment. The employer is not required to pay the cost of transportation to the interview, unless the company normally does so for other applicants or positions, should there be any out of state or foreign applicants. Nor is the employer required to offer wages above the prevailing wage determined to be acceptable by the State Workforce Agency unless the employer would normally do so.

The purpose of interviewing the prospective employee is to determine if the applicant is a qualified United States worker who is willing to accept the position. The employer is required to interview any applicants who, on the face of their resumes, are obviously qualified; or, if the resume raises a reasonable prospect that the applicant meets the stated job requirements. We will advise you about the questions that you may ask or may not ask potential qualified applicants.

However, as an attorney, I may not interview the applicants or make decisions about qualifications.

After the interview process has been completed, I will document the results of the recruitment. If there were no qualified and available United States workers for the position we will note this in a final recruitment report for the file and submit the PERM application. The employer's participation in this first step is especially crucial insofar as the job duties and minimum requirements are accurately described, since the requirements cannot be so narrow as to purposefully exclude American workers, or so broad that everyone in the marketplace will apply. The employer's participation in drafting and/or reviewing the job description and requirements is essential because the employer may be asked to demonstrate a "business necessity" for each requirement which is not "normal" for the position.

i. Employer Registration with DOL

In order to take advantage of the PERM process, the employer must register online with the DOL's Employment Training Administration. The attorney cannot register the employer. Only the employer is allowed under the regulations to perform the initial registration.

During the registration process, the employer will be able to designate this office, Matthew J. Maiona specifically, as an authorized attorney "user." As an authorized user, this office will be able to continue the processing of the case by completing the PERM electronic filing form (ETA 9089) on behalf of the employer/employee and submit it electronically. However, this office will not be able to access the employer's corporate information which the employer will input when registering. Only the employer will be able to change or amend the corporate information.

We will issue a detailed instruction sheet to the employer to assist in the initial PERM registration. The instruction sheet will assist the employer in registering the company first. This will insure that the company is notified by DOL every time a document is filed by my office and also directly by DOL to verify filings.

ii. General Advertising Requirements

As stated above, the employer will have to run two Sunday print ads in a publication of general circulation in the area of intended employment at the minimum. DOL requires that ads be run 30 – 180 days before filing the PERM application. If the position requires significant experience and/or an advanced degree, the employer may use a professional journal in lieu of one Sunday ad. There is no "timing" for the advertising. Ads can be run consecutive Sundays or otherwise to meet the requirements.

The ad MUST name the employer and direct resumes to the employer. The ad must have a fair job title and description, where appropriate. For example, if the job duties are apparent from the title, you do not have to give a job description. However, where they are not clear, "manager", the employer will need to give a job description in the ad. The ad must give the geographic area where the job is to be performed. The wage does not have to be placed in the ad. However, if the employer chooses to put the wage in the ad, the employer must use the prevailing wage. If the employer lists the duties in the ad, they cannot be more than what will be listed on the PERM application.

iii. State Workforce Agency online posting

The Employer must run a 30 day job order with the local SWA no earlier than 60 days before filing the PERM application. Our office will perform this task on behalf of the employer after informing the employer of the action we are taking to insure compliance.

iv. Job Notice posting at employer's place of business

A Job Notice prepared by our office in compliance with DOL rules for such a notice must be posted for 10 consecutive business days (two full weeks) at the place of employment. and, if it is the employer normally places available positions on the internal company job bank/web, the employer must do this for PERM applications as well.

v. Additional advertising requirements for professional positions

If the position is a professional position, the employer will have to perform additional recruitment efforts. A professional position is one which the attainment of a bachelor's or higher degree is a usual education requirement. PERM has also created Appendix A which lists several professional positions which will require the additional steps. If the position is a professional position, the employer with the assistance of our office, must choose 3 additional advertising/recruitment steps from the following 10 advertising/recruitment options:

- Job fairs;
- Employer's external web site;
- Job search web site other than employer's;
- On-campus recruiting;
- Trade or professional organizations;
- Private employment firms;
- Employee referral program, if it includes identifiable incentives;
- A notice of the job opening at a campus placement office, if the job requires a degree but no experience;
- Local and ethnic newspapers, to the extent that they are appropriate for the job opportunity; and

Radio and TV advertisements.

vi. Previous experience with the same employer

Experience gained on the job by the employee may be used if the employer can prove that the experience is not "substantially comparable" to the position for which certification is being requested. A substantially comparable position means a job or position requiring the performance of the same duties more than 50% of the time.

The employer cannot use any education which it paid for on behalf of the employee.

PERM regulations consider "same employer" to be an employer with the same FEIN number. Therefore, it is likely that an overseas employer would be considered a "same employer" under PERM, even if parent/subsidiary/etc, because they would not have the same Federal Employer Identification Number (FEIN). Moreover, a purchased company would have a different FEIN before purchase, and therefore the pre-purchase experience would not be from the same employer under PERM.

vii. Layoffs

The employer must notify laid off workers who are potentially qualified for the position, if they were laid off in the past six months, immediately prior to the filing of the PERM application.

viii. Audits

Audits occur randomly and on the appearance of certain "red flags" in the application. The employer will be given only 30 days to respond to an audit. Extensions are rare because the employer was supposed to have all the supporting documents in the file prior to filing the PERM application as discussed above. This is why we will keep a complete "audit file" in our office documenting all of the steps taken, so that we can rebut any audit notice received.

Aside from a random audit, DOL states that audits will likely be triggered by the presence of any of the following: cell phone number for employer's main number; alien related to business owner (question C-9); presence of job requirements that are not normal for occupation/business necessity letter (question H-12); foreign language required (question H-13);

and combination of job duties (question H-18).

ix. Certification

Once the PERM application is certified, we can proceed with the next step of filing the I-140 Immigrant Visa petition. Employer and employee can monitor that status of the PERM application online once it is filed and a receipt number issued. Generally it takes anywhere from two weeks to three months to obtain a PERM certification. In rare instances cases will pass three months.

STEP 1: FOR COLLEGE AND UNIVERSITY PROFESSORS— “SPECIAL HANDLING”

There are optional special recruitment and documentation procedures for college and university teachers. Applications for certification of employment of college and university teachers must be filed by submitting a completed PERM form to the appropriate ETA application processing center.

The employer may recruit for college and university teachers under §656.17 or must be able to document the alien was selected for the job opportunity in a competitive recruitment and selection process through which the alien was found to be more qualified than any of the United States workers who applied for the job. Documentation of the “competitive recruitment and selection process” must include: (1) a statement, signed by an official who has actual hiring authority from the employer outlining in detail the complete recruitment procedures undertaken; and which must set forth: the total number of applicants for the job opportunity; and the specific lawful job-related reasons why the alien is more qualified than each U.S. worker who applied for the job; (2) a final report of the faculty, student, and/or administrative body making the recommendation or selection of the alien, at the completion of the competitive recruitment and selection process; (3) a copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements; (4) evidence of all other recruitment sources utilized; and (5) a written statement attesting to the degree of the alien’s educational or professional qualifications and academic achievements.

Special Handling applications for permanent alien labor certification for job opportunities as college and university teachers must be filed within 18 months after a selection is made pursuant to a competitive recruitment and selection process.

An employer that cannot or does not choose to satisfy the special recruitment procedures for a college or university teacher under this section may avail itself of the basic process discussed above. An employer that files for certification of employment of college and university teachers under the regular process above or Special Handling must be able to document, if requested by the Certifying Officer, that the alien was found to be more qualified than each U.S. worker who applied for the job opportunity.

Special Handling for college and university teachers relieves the employer several obligations, including the need for further recruitment, the need to state salary in the recruitment advertising, and the need to submit applicants’ names and resumes to the DOL. Most importantly, Special Handling allows employers to hire the most qualified individual rather than a minimally qualified U.S. worker. The employer must demonstrate that it conducted a previous competitive recruitment selection process (involving at least one advertisement in a national professional journal), which found the alien to be more qualified than any of the U.S. workers who applied for the job. However, for Special Handling to apply, a labor certification application for a college or university teacher must be filed within eighteen months after the alien was selected for the job.

Assuming the college, university, medical school, or any other professional school has pursued the required competitive recruitment process, Special Handling can be pursued for foreign nationals who have been offered positions that include, but are not limited to: professor, associate professor, assistant professor, instructor, lecturer, and, of course, teacher. Although the “job title” on the PERM application (ETA 9089) is ordinarily for one of the above positions, Special Handling may be pursued for positions whose titles do not imply teaching as long as classroom teaching is associated with the position and can be evidenced.

Non-teaching positions, such as researchers, librarians, and other administrative staff can be processed under 20 CFR §656.17, the basic labor certification process, or under 20 CFR §656.10, if the alien qualifies for Schedule A (pursuant to PERM, Schedule A is set forth under 20 CFR §656.15). Therefore, Special Handling may be pursued for these and other positions so long as the position includes “classroom teaching.”

STEP 2: IMMIGRANT VISA APPLICATION

Once the PERM labor certification is approved by DOL, the employer will need to file an immigrant visa petition on the employee's behalf including the original signed PERM approval. The petition and supporting documentation proving the employer's ability to pay the prevailing wage, as well as the employee's qualifications for the position, will be filed with US Citizenship & Immigration Services (USCIS). Again, our office will prepare the necessary paperwork and forward such to the employer for review and signature. Upon approval of the immigrant visa petition, the alien employee will be eligible to apply for permanent residence at a U.S. consulate abroad or at a local USCIS office, if she is still in valid non-immigrant status and if the quota is "current" as discussed below.

There exists a quota system determining the number of immigrant visas that may be issued under several "preference" categories as of the date the initial PERM application is filed. This is called the "priority date" which our office tracks every month from the State Department Visa Bulletin. The quota will vary depending upon whether an advanced degree or bachelor's degree, or more or less than two years of experience or training, is required to perform the job. Moreover, nationals of India, China, Mexico and the Philippines have separate (and ordinarily slower) categories than nationals from all other countries of the world.

Please note: if the category the employee is in is current at the time of PERM certification, our office will advise the employer and employee to file Step Two (Immigrant Visa) and Step Three below (Green Card) together. In so doing, the employee will be able to obtain an employment authorization document and travel document while waiting for green card approval.

STEP 3: LAWFUL PERMANENT RESIDENCY – GREEN CARD

During this final phase, the emphasis will be on the alien employee's overall qualifications to immigrate to the United States (Is he/she a criminal or been arrested? Does he/she have a contagious disease?, etc). We will of course assist the alien employee with the process through the final interview.

During this step our office will work directly with the employee and any eligible family members to complete the necessary applications and obtain the necessary documents such as tax returns, medical exams, passports, birth and marriage certificates and the like.

Upon filing the application, USCIS will adjudicate it over the course of several months and either issue a green card or request an interview. If an interview is requested, the approval will be withheld until the conclusion of the interview where a decision will be made.

CLOSING

To reiterate, the employer must have a good faith intent to employ the above referenced alien employee on a permanent full-time basis at the time when lawful permanent residence status is attained. The employer's involvement throughout the process will be to provide the necessary accurate and truthful information regarding the specifics of the position offered, sign the forms and undergo the necessary recruitment process.

I hope that this memo adequately explains the PERM and USCIS immigration process. If at any time the employer decides that they no longer want to continue with the case, the employer is in no way obligated to hire the employee, as long as the employer's reasons for termination are within their contractual rights or are consistent with labor law requirements. Once the alien employee becomes an immigrant, technically, he/she should continue to work for the employer for a reasonable period of time, since the application may otherwise be considered fraudulent.

During the process we will contact the employer and employee from time to time for additional information or to give status updates. Should either the employer or employee require further details or have any questions, please feel free to contact this office.

The MaionaWard Immigration Team looks forward to working with you.

MAIONA  WARD
IMMIGRATION LAW

*IMMIGRATION ATTORNEYS REPRESENTING EMPLOYERS, EMPLOYEES
AND FAMILIES AROUND THE WORLD.*

