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## Memorandum

**TO:** Clients with pending Labor Certification Applications  
**FROM:** Glenn E. Matthews  
**DATE:** April 11, 2005  
**FILE NO.:** 15036  
**SUBJECT:** [Update on new PERM Labor Certification Program](#)

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This Memorandum is being provided to advise you of new developments in the U.S. Permanent Labor Certification process. You are receiving this Memorandum as you fall into one of the classes listed below:

1. You have an application for permanent labor certification pending with a State Employment Security Agency or the federal Department of Labor regional office;
2. You are a United States employer with application(s) for permanent labor certification pending for one or more of your employees; or
3. You are a client holding non-immigrant status who has expressed an interest in applying for permanent alien labor certification.

We hope the information contained herein is helpful to you in understanding the background and intent of the new labor certification system. I invite you to contact me directly on **519-672-2251 ext. 311** or on [glenn.matthews@siskinds.com](mailto:glenn.matthews@siskinds.com) once you have reviewed this Memorandum to discuss the issues raised in more detail and the options available to you in light of your unique situation specifically.

### **BRIEF BACKGROUND:**

On March 28, 2005 the United States Department of Labor (DOL) launched a new permanent alien labor certification program known as, "Labor Certification for the Permanent Employment of Aliens in the United States", or **PERM** for short. This new system changed the existing manner in which U.S. employer could seek labor certification on behalf of their employees in the following key ways:

- > A new on-line application system has been created;
- > Recruitment is now required to be completed prior to filing for labor certification;
- > The Department of Labor will now run the entire labor certification process. The State Employment Security/ Workforce Agencies will no longer play a large role in the process;

- > The standards for recruitment and prevailing wage requirements have changed;
- > Employers no longer file supporting documentation with their applications. Rather, the DOL will maintain the right to "audit" employer labor certification files from time-to-time as a means of maintaining PERM program integrity.

The intent of the new PERM system remains the same as the former system: to ensure that there are no qualified U.S. workers who are able, willing and available to fill positions offered to aliens, and to ensure that the permanent employment of the alien will not adversely effect the wages and /or working conditions of U.S. workers similarly employed. In essence, PERM is all about the protection of the U.S. labor market.

**HOW ARE CASES FILED?**

PERM is based on the filing of a single application form either on-line, or by mail with the U.S. DOL directly. National DOL processing centers have been established in Atlanta and Chicago. Employers must submit their application to the processing center with responsibility for the state or territory where the job opportunity is located. The jurisdiction of each processing center is as follows:

**Atlanta National Processing Center:**

Alabama	Connecticut	Delaware	District of Columbia
Florida	Georgia	Kentucky	Maine
Maryland	Massachusetts	Mississippi	New Hampshire
New Jersey	New York	North Carolina	Pennsylvania
Puerto Rico	Rhode Island	South Carolina	Tennessee
Vermont	Virgin Islands	Virginia	West Virginia

**Chicago National Processing Center:**

Alaska	Arizona	Arkansas	California
Colorado	Guam	Hawaii	Idaho
Illinois	Indiana	Iowa	Kansas
Louisiana	Michigan	Minnesota	Missouri
Montana	Nebraska	Nevada	New Mexico

North Dakota	Ohio	Oklahoma	Oregon
South Dakota	Texas	Utah	Washington
Wisconsin	Wyoming		

While filing applications under PERM by mail is possible, the DOL advises that this method of filing should be discouraged as cases will not receive "priority dates" for many weeks after filing. It is therefore recommended that all cases filed under PERM be filed on-line to ensure that a priority date is assigned to the case immediately. Further, the PERM on-line system has been designed in such a way to accept only those cases which are completed correctly (ie. all required information is inputted into the fields correctly). Cases filed by mail which are completed incorrectly would simply be returned to the employer weeks or months after mailing.

The employer must file a completed "Application for Permanent Employment Certification", ETA Form 9089. As noted, employers need not file any supporting documentation with the ETA 9089 application form, but extensive supporting documentation must be maintained in an employer file for at least five (5) years from the date of case filing. This documentation may be reviewed at any time by the DOL audit team. Further, applications submitted electronically must, upon receipt of the labor certification, be signed immediately by the employer, alien, and preparer (attorney) in order to be valid.

Once a perfect case is accepted for filing, we anticipate receiving labor certification approvals under PERM within **60 to 120 days of filing**.

Prior to filing an application under PERM, employers must ensure that they have completed with a very strict recruitment process as explained below.

### **RECRUITMENT PROCESS:**

One major change to the previous labor certification system which PERM has brought entails the requirement that all recruitment for the position offered be completed **prior** to filing the application for labor certification. Previously, employers could file an application for labor certification and wait months or years before a State Employment Agency would review the case and send out recruitment instructions. Under PERM, recruitment must be completed in advance and generally involves three (3) main steps as follows:

1. Publication of an advertisement in a newspaper or professional journal;
2. Posting of a Notice concerning the job opportunity in the employer place of business;
3. Posting of a job order with the State Workforce Agency serving the area of intended employment.

The following specific key recruitment requirements should be noted:

- > recruitment must be conducted at least 30 days, but no more than 180 days, prior to filing the application for labor certification;
- > PERM does not provide a list of acceptable publications for recruitment. Employers are therefore cautioned to advertise for the position offered in a major daily newspaper with the widest circulation in their city / region.
- > Employers should select newspapers (or journals for certain professional-level positions) that are most likely to bring responses from able, willing, qualified, and available U.S. workers. The employer must be able to document that the newspaper and/or journal chosen is the most appropriate to the occupation and the workers likely to apply for the job opportunity.
- > Generally, the newspaper advertisements must be placed on two different Sundays , at least 30 days but no more than 180 days prior to filing the application. The Sundays may be consecutive.
- > The level of detail which must appear in the newspaper and/or journal advertisements is not clearly explained under PERM. The employer is required, however, to demonstrate that the advertisement as published would sufficiently apprise available workers of the job opportunity. At a minimum, employers should describe the position offered, the name of the employer, the location of employment, the means to contact the employer, and other critical details.
- > Employers have a duty to prepare a recruitment report following publication of the advertisement. The more general an advertisement published, the larger the number of unqualified applicants which are likely to apply. All minimally qualified applicants for the job opportunity must be assessed and addressed in the employer recruitment report. Thus, it is wise to draft an advertisement which is not too specific, but not overly broad or general.

### **PREVAILING WAGE ISSUE:**

In the past, employers filing applications for permanent alien labor certification were required to show that the wage offered to the alien was at least 95% of the state published prevailing wage for the position offered. (ie. If \$100,000 was the prevailing wage for the occupation in the state of intended employment, employers had to offer the alien at least \$95,000 to be in compliance with the previous prevailing wage rules).

Under PERM, employers must now offer the alien at least 100% of the published prevailing wage in the state of intended employment. Further, under PERM employers are now required to obtain a prevailing wage determination from the State Workforce Agency **prior** to filing an application for labor certification. This prevailing wage determination must be maintained by the employer for a period of five (5) years following submission of the application for labor certification.

PERM also changes the former two-tier skill level structure used in prevailing wage determinations to a four level structure. Simply put, the prevailing wage issue has been made far more critical and complex under PERM and significant energy and thought needs to be put into this issue now in order to succeed under PERM.

## **AUDIT PROCESS / REVOCATION OF APPROVALS:**

The DOL has intentionally omitted an explanation of the new audit procedure from the final PERM regulations. DOL officials have informed us that the criteria to be used in case audits was purposely not included in the regulation in order to retain the flexibility to change audit criteria, as needed, for example, to focus on certain occupations or industries when information indicates program abuse may be occurring. The audit process is intended to be somewhat secretive and random. We are advised by DOL that sufficient resources will be in place to ensure that large numbers of audits do occur. Thus, it is critical for employers to follow the PERM regulations concerning program compliance and document maintenance.

In addition to new audit powers, PERM confirms that the DOL may revoke previously approved labor certifications at any time if the approval is found not to be justified. It would appear from this power of revocation that program audits could take place months or years after labor certification approval. Revocation could follow if a case approval was not justified, whether based on unintentional or wilful conduct of the employer. DOL has the power to revoke in cases of fraud, misrepresentation, obvious errors, etc.... As no time limit for revocation has been imposed, it is conceivable that an alien could lose their U.S. permanent resident status (or even citizenship) years after approval of a labor certification if that approval was found to be questionable in any way. It is therefore critically important to ensure that all PERM filings are in total compliance with the regulations.

## **IMPACT OF PERM ON EXISTING CASES:**

Effective March 28, 2005 the State Workforce Agencies and the federal regional offices of the Department of Labor which were processing labor certification applications began to transfer these pending cases to a DOL backlog reduction center. Also, effective March 28, 2005 the State Workforce Agencies can no longer accept new applications for permanent alien labor certification. All new cases must now be filed under PERM. Existing cases transferred to the backlog reduction center will continue to be processed under the previous rules and regulations.

The DOL backlog reduction center is currently sorting through the hundreds of thousands of pending labor certification applications which have been received in the past few weeks. Slowly, these cases are being entered into the backlog reduction center system and "45 day notices" are being mailed out to employers and attorneys of record for the employers. These notices for the most part are simply an attempt by the DOL to ensure that cases which it has received in the backlog reduction center are still "active". Employers receiving 45 day notices are asked to check a box to confirm whether they are still interested in proceeding with the applications for labor certification under the traditional system. ***It is critical for you, as our client, to forward any and all 45 day notices you may receive in your office to us for review and counsel. We are advised that the DOL is not forwarding these notices to the attorney of record in every case. In many cases, employers are being contacted directly. If you are an employee with a pending labor certification application, we urge you to speak to your employer Human Resources and/or Legal Department to warn them that the DOL may send a notice concerning your case directly to them. You should ask the employer to then give this notice to you so you can remit it to us for review and counsel.***

Please be advised that we are taking a proactive approach respecting the 45 day notice issue. We have e-mailed and/or written the DOL backlog reduction center in each and every pending client case seeking a status update and reminding DOL that we are the attorney of record. To date, the DOL has been very slow to respond. We will of course contact all of our clients individually to discuss options concerning the 45 day notices once we are in receipt of same.

Please note carefully that pending cases which have been sent to the DOL backlog reduction center may be "converted" to PERM filings in certain instances. Whenever the employer has engaged in a pattern of recruitment prior to labor certification filing under the old system, which meets the new strict PERM standards, conversion may be possible. Very few of the cases we have filed will be eligible for conversion under PERM. Clients may, however be interested in filing new applications under PERM. This scenario will be addressed briefly below.

### **NEW CASE FILINGS UNDER PERM:**

The DOL backlog reduction center is currently estimating that it will take them between 20 and 30 months to "clear" all of the pending cases which it has received in its office from the States and federal regional DOL offices. This is a ballpark time frame estimate for clearance of **all** pending cases. This is not necessarily a time frame which will apply to your pending case. The DOL continues to work on cases on a priority date basis. In other words, for those cases which have been pending for many months or years with a State or federal DOL office, the backlog reduction center will be required to process those cases ahead of any new or recent filings. We expect that many of our clients' cases will be processed rather quickly by the DOL, particularly those that had been awaiting final processing through a DOL regional certifying office prior to transfer to the backlog reduction center. Please note that at this time, we cannot accurately predict how quickly the DOL will get to your case. We understand this uncertainty is a concern for you. We will update you directly once specific case time frame estimates are made available by the DOL.

Given this uncertainty, if you are interested in filing a new application for labor certification under PERM to ensure that your case is processed within a reasonable and predictable time frame, please contact me directly. Please note that the application and recruitment process are more complex under PERM than they were under the former system. Further, the support and participation of employers continues to be a critical part of the process. Prior to contacting our office to commence a new application under PERM, we suggest that individual clients speak with their HR Managers or other employer contact to ensure that they continue to be supportive. Naturally, we would be pleased to handle any questions you may have regarding new case filings prior to your meeting with your employer.

### **Legal Fees:**

If you do elect to proceed with a new case filing, we will be extending a discounted legal fee of \$2,000 CAD to all of our clients with existing cases in the system. This fee will cover preparation of a new PERM application only and does include applicable taxes or recruitment expenses. Similarly our PERM legal fee will not replace previous fee agreements which provide for the billing of the second-half of legal fees upon approval of either the application for labor certification or the I-140 Immigrant Petition. This fee will simply cover the preparation of a new filing for you under PERM, as well as all of the counsel and advice related to prevailing wage issues, recruitment, withdrawal of old cases, etc.....

We hope this Memorandum is of assistance to you in understanding PERM and its impact on your existing case or future filing(s). Again, please contact me directly to discuss the specifics of your case and whether a new PERM filing should be considered.

Yours very truly,

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