

Permanent Labor Certification Program

Final Regulation

Frequently Asked Questions

April 7, 2005

Effective Date

Question: As of March 28, 2005, will all previously filed labor certification applications be converted and/or processed under PERM?

- ☞ No, labor certification applications filed prior to March 28, 2005, will not be automatically converted and/or processed under PERM. Applications filed under the regulation in effect prior to March 28, 2005, will continue to be processed at the appropriate Backlog Processing Center under the rule in effect at the time of filing. As of March 28, 2005, applications (Form 750) will no longer be accepted under the regulation in effect prior to March 28, 2005, and instead new applications (Form 9089) will need to be filed under PERM at the appropriate National Processing Center. Only if an employer chooses to withdraw an earlier application and refile the application for the identical job opportunity under the refile provisions of PERM will a previously filed application be processed under the PERM regulation.

Standards/Changes

Question: What provisions have changed in the new system?

- ☞ This is a brief list of some of the changes. They are covered in greater detail in the particular topic areas below.

Schedule A, Professional Nurses: A Commission on Graduates of Foreign Nursing Schools (CGFNS) Certificate rather than merely passage of the CGFNS examination is required to qualify an alien for Schedule A certification.

Schedule A, Professional Nurses: Passage of the National Council Licensure Examination for Registered Nurses (NCLEX—RN) examination is a means by which to qualify the alien for Schedule A certification.

Schedule B: Schedule B has been eliminated.

Filing

Registration

Question: Can an attorney, agent or law firm register to use the Permanent On-line System?

- ☞ No, only an employee or owner of the employer entity may register to use the Permanent On-line System because employers must make the attestations required for the permanent application process and a PIN will only be assigned to an employer. The registration must be submitted by an individual with actual hiring authority for the employer. The individual listed under the "Employer Contact Information" section of the registration page must be the individual with actual hiring authority for the employer and cannot be the attorney or agent. During the registration process, the employer may create sub-accounts for attorneys or agents. We will cancel or deny registrations submitted by non-employers. Submission of a permanent labor certification application using a PIN assigned to a non-employer will be grounds for denial or revocation of a permanent labor certification.

NOTE: To withdraw or delete a registration account (as in a situation where the original registration was set up showing an attorney or representative as the "user" and/or where the contact person for the employer is not a person with actual hiring authority), please e-mail PLC.HELP@dol.gov, provide the user name and password, and request the account be deleted. At that point, the person with actual hiring authority can re-register with the correct information.

Refile

Question: Should an employer withdraw an earlier application and refile under PERM?

- ☞ The Department of Labor does not provide counsel as to questions of this nature. However, employers are reminded refiled labor certification applications must conform to the provisions of the PERM regulation.

Attestations

Attorney/Agent

Question: What role does an attorney or agent play?

- ☞ Employers may have agents and/or attorneys represent them, however, the employer is required to sign in Section N of the Application for Permanent Employment Certification, ETA Form 9089, that the employer has designated the agent or attorney identified in Section E to represent it, and by virtue of its signature, is taking full responsibility for the accuracy of any representations made by the attorney or agent. In signing, the employer acknowledges that to knowingly furnish false information in the preparation of the application form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both under 18 U.S.C. §§ 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. §§ 1546 and 1621.

NOTE: An attorney or agent is not permitted to register to use the Permanent On-line System for the employer. Only an employee or owner of the employer entity may register. Nor is an attorney or agent of either the alien or the employer permitted to participate in interviewing or considering U.S. workers for the job offered the alien. The agent or attorney may only participate if the agent or attorney is the employer's representative, i.e., the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.

Recruitment

Notice of Filing

Question: For how long must the employer publish a notice of filing in the employer's in-house media?

- ☞ If the employer normally recruits for similar positions in the employer's organization through in-house media, then the employer must publish the notice of filing in its in-house media in accordance with the employer's normal procedures for recruitment of similar positions or for 10 consecutive business days, whichever is of longer duration.

Question: Could the publishing of the notice of filing in the employer's in-house media be counted as one of the additional steps required in the recruitment for professional occupations provision?

- ☞ No, posting of the notice of filing on in-house media, including an "Intranet," can not be counted as an additional recruitment step, as it is believed that potential job applicants would only view the notice as a legal or information notice, not as an advertisement for a job opportunity, and would not apply.

Question: Must the notice of filing contain the rate of pay for an application filed on behalf of a college or university teacher selected in a competitive selection and recruitment process?

- ☞ No, a rate of pay does not need to be included in a notice of filing for an application filed on behalf of a college or university teacher selected in a competitive selection and recruitment process. However, the notice of filing must include the required advertisement information in § 656.18(b)(3), i.e., the job title, duties, and requirements as well as the information specified in § 656.10(d)(3).

Advertising

Question: What are the sequencing or timeframe requirements for the various additional recruitment steps?

- ☞ Beyond the standard "no greater than 180 days and no less than 30 days prior to filing" there are no further timeframe requirements. The only sequencing requirement is that the two Sunday advertisements must be placed on two different Sundays which may be consecutive.

NOTE: There is one exception to the standard 30 – 180 days prior to filing timeframe: One of the additional steps required for recruitment for professional occupations may be conducted within 30 days prior to filing. However, no steps may have taken place more than 180 days prior to filing.

Question: Why must the advertisement medium be different in order for advertisements to be counted as additional steps? For instance why is it not permissible to count advertisements on two separate web sites as two steps or to place a third advertisement in the same newspaper of general circulation rather than using a local or ethnic publication and have it count as an additional step?

- ☞ As with all the recruitment requirements, the purpose of requiring the employer to use three additional recruitment steps is to ensure that the greatest number of able, willing, qualified, and available U.S. workers are apprised of the job opportunity. It should be noted that each of the steps may target slightly different applicant populations. Using at least three of the additional steps normally used by businesses to recruit workers is a

means of apprising a greater number of U.S. applicants of the job opportunity and more adequately substantiates an employer's claim there are no available U.S. workers for the job offer.

Question: Is the employer permitted to use an electronic national professional journal?

- ☞ No, the employer can not use an electronic national professional journal. The employer must use a print journal whether to satisfy the provision permitting the use of a journal as an alternative to one of the Sunday advertisements or to satisfy the provision requiring an advertisement in a journal under optional special recruitment procedures for college and university teachers.

Job Order

Question: Should the employer seek the information required regarding the placement of job orders from the State Workforce Agency (SWA) in the area of intended employment?

Yes, the employer should seek any information required regarding job orders from the SWA. If an employer is not clear on how to place a job order, the employer should check with the SWA responsible for the area of intended employment. Placement of job orders with a SWA must be in accordance with each SWA's rules and regulations. In other words, SWAs place labor certification job orders the same way they place any other job order.

Prevailing Wage

Question: Is the employer permitted to use a wage range as opposed to a single wage rate in advertisements for the job offer?

- ☞ Yes, the employer may advertise with a wage range as long as the bottom of the range is no less than the prevailing wage rate.

Question: What is meant by "domestic worker applicants" in the provision on actual minimum requirements?

- ☞ For purposes of § 656.17(i)(3), the provision on actual minimum requirements, the term "domestic" is being used as an alternative for "United States."

Question: What is meant by “contract employee” under the employer's actual minimum requirements provision?

- ☞ For purposes of the actual minimum requirements provision, the term “contract employee” is intended to include all persons contracted to work for the employer. The broad use of the term under the actual minimum requirements provision is intended to ensure the provision applies to experience gained working for the employer by the alien, whatever the alien’s employment status.

Schedule A

Question: Is it true that the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination is not acceptable as a means of obtaining a labor certification for professional nurses under Schedule A?

- ☞ Yes, the passage of the examination alone is not acceptable; the alien is required to have a CGFNS Certificate. A CGFNS Certificate documents that, in addition to having passed the nursing skills examination, the alien has demonstrated English language proficiency and CGFNS has made a favorable evaluation of the individual’s nursing credentials.

Question: What documentation must the employer file when seeking a Schedule A labor certification for a professional nurse?

- ☞ The employer must file, as part of its labor certification application, documentation the alien meets one of three requirements: the alien has a Commission on Graduates of Foreign Nursing Schools (CGFNS) Certificate, the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX—RN) exam, or the alien holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment.

NOTE: Unlike the filing requirements under other PERM provisions, for Schedule A occupations, the employer is required to submit the applicable documentation when the employer files the application with the appropriate Department of Homeland Security office.

Household domestic service workers, bookkeepers, laborers, etc.

Question: Does PERM have a provision similar to, or the same as, the Schedule B provision in the regulation in effect prior to March 28, 2005?

- ☞ No, the former regulation's Schedule B provision has been eliminated; there is no similar provision in PERM.

Question: If Schedule B under the regulation in effect prior to March 28, 2005, has been eliminated and there is no longer a waiver provision for those occupations listed in Schedule B such as household domestic service workers, bookkeepers, laborers, etc., does that mean employers are not permitted to obtain a labor certification for those occupations?

☞ No, the elimination of the former regulation's Schedule B and its waiver provision does not prevent employers from seeking labor certifications for the occupations listed in Schedule B. To the contrary, employers are free to file applications under the provisions of PERM, as appropriate, for occupations found in the former regulation's Schedule B and are not required to obtain a waiver in order to do so.

College and University Teachers

Question: Does the use of an electronic national professional journal satisfy the advertisement requirement under the college and university teachers' special recruitment and documentation provision?

☞ No, use of an electronic national professional journal does not satisfy the optional special recruitment provision's advertising requirement. The employer must use a print publication.

Question: Must the notice of filing contain the rate of pay for an application filed on behalf of a college or university teacher selected in a competitive selection and recruitment process?

☞ No, a rate of pay does not need to be included in a notice of filing for an application filed on behalf of a college or university teacher selected in a competitive selection and recruitment process.

Certifying Officer Review and Board of Alien Labor Certification Appeals (BALCA)

Question: For prevailing wage appeals, when does the 30 day clock start running to file an appeal of the State Workforce Agency (SWA) determination?

☞ The 30 days to file an appeal to the Certifying Officer begins on the date that the SWA makes a final decision on the case. If the employer submits supplemental information (as permitted one time), the 30 days begins after the SWA considers and makes a decision on the supplemental information.