

2005 Begins a New Era For U.S. Business Immigration

By Robert F. Loughran



2004 may have been the most significant year in history for practitioners, petitioners, and beneficiaries of immigration law. The last few weeks of the year saw several sweeping changes in immigration law and procedure, some of which were expected, others of which were not. One of the most significant developments for employers include the long-awaited publication of PERM, or the "Program Electronic Review Management."

Final PERM Regulations Take Effect March 2005

On December 27, 2004, the Department of Labor published rules that change the process by which foreign workers in the United States may obtain Labor Certification. The effective date of the program, known as PERM, is March 28, 2005. With the publication of the new regulations, the traditional labor certification process will come to an end on March 28th. On that date, the more constrained, generic, PERM will become the exclusive permissible method of testing the job market for minimally qualified U.S. workers.

Long in the planning stages, PERM is designed to provide an efficient, electronic means for screening and approving Applications for Alien Employment Certification (or "labor certification") based solely on employer attestations. The statutory requirements for labor certification applications will be enforced by the DOL through audits and sanctions. According to the final rules, audits will be conducted for quality control on some number of randomly-selected cases, as well as on cases with "problematic data." For those cases not selected for audit, the DOL anticipates a rapid turnaround time, perhaps as few as four to six weeks.

While the proposed adjudication time frame is appealing, employers should be aware that certain PERM provisions will introduce new challenges to those applying for labor certification. First, some of PERM's requirements are more stringent than under the traditional system, particularly its requisites for recruitment, and the lawful grounds for disqualifying U.S. applicants. Under the PERM regulations, employers will be required to recruit for positions prior to filing an Application for Alien Employment Certification. Employers must run a minimum of two print advertisements, with special instructions for particular types of positions. Employers will not be expected to submit documentation of the recruitment process with the initial filing, but they must maintain all supporting documentation for presentation to the DOL in the event of an audit. While State Workforce Agencies (SWAs) will no longer perform the initial review and assessment of the applications, they will continue to provide prevailing wage determinations, which under PERM must be met 100%, not 95% as under the traditional process.

Second, because PERM collapses many positions into fewer, broader titles and descriptions, it will be more difficult under PERM to disqualify applicants who are objectively not qualified for specific job duties associated with actual positions. PERM eliminates much of the specificity with which an employer may differentiate positions. For this reason, employers should review upcoming potential filings and file now, under the traditional process, for those unique positions which will require specific, specialized knowledge or skills.

Third, PERM confers far greater discretion on officers who review applications for labor certification than do the traditional rules. Under the new provisions, "The Certifying Officer ... may ... revoke an approved labor certification, if he/she finds the certification was not justified." Given PERM's more stringent requirements, fewer opportunities for employers to specify job requirements, and greater leeway for certifying officers to deny applications, those who are considering filing for labor certification on behalf of foreign national employees in the future may be well-served to act now.

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AHRMA PROPOSES BY-LAW CHANGE

By Cathy Wodarski

After much discussion, the 2005 AHRMA EC Board have decided to go back to an Annual Membership fee by calendar year. There are several reasons for doing this on a calendar year rather than by anniversary of the month in which a member joins AHRMA as we do now. In brief, we are trying to minimize costs because of having to keep up with each anniversary. This has become a large task for our administrative office not to mention the cost to AHRMA. In addition to this we have gone to new software that allows everyone to go online to pay for his or her membership. This should make it easier for everyone to remember one renewal date on January first of each year. If you should have any questions please feel free to call upon an EC member. We invite all eligible AHRMA members to attend our March meeting to vote on this change to our by-laws.