Labor Department Releases Long-Awaited PERM Rules

by Greg Siskind

Dear Readers:

The US Department of Labor today released the long-awaited PERM labor certification rules for permanent residency petitions. The rules for the new electronic filing system are available online at

http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/pdf/04-27653.pdf and the program will go into effect in late March 2005. We 'll be closely following the implementation of the new system and look forward to hearing feedback from readers.

Today we issue a special newsletter issue covering PERM. We have summarized the 322 page regulation here in a question and answer format that will hopefully allow readers to get an in depth overview without being overloaded with technical language.

Regards,

Greg Siskind

1. What is PERM?
2. When is the new PERM program effective?
3. What will happen to applications filed before March 27, 2005?
4. Can a case be converted to PERM?
5. Why is the DOL introducing PERM?
6. What changes does the new regulation make to the prevailing wage determination process?
7. Are the new rules consistent with the new prevailing wage requirements contained in the Consolidated Appropriations Act of 2005 signed by President Bush in 12/2005?
8. What kind of recruiting is required under PERM?
9. What does the recruitment report need to contain under the PERM rules?
10 How are cases submitted?
11. Where can the electronic form be found? What kind of features will the electronic filing system have?
12. How does an employer submit supporting documentation?
13. Are the standards for approval the same under the new system?
14. What will happen to the State Workforce Agencies?

15. How much faster will the new system be compared to the current processing times?

16. Which cases will be selected for auditing and how will audited cases be handled?

17. Are applications for professional team athletes affected by the PERM regulation?

18. What kinds of changes have been made to the final PERM rules from the proposed rules released in 2002?

19. Are there changes in the penalties sections of the labor certification rules?

20. Which workers can be sponsored for labor certification?

21. The proposed rule did away with business necessity letters. Has that controversial change been included in the final PERM rule?

22. What changes have been made to the rules for people engaged in a "combination of occupations"?

23. Are there changes to the rules regarding requiring a foreign language capability?

24. The proposed rule called for two forms to be submitted to the DOL? Why has this changed?

25. What type of assistance is DOL making available to helping people transition to PERM?

26. What types of changes have been made to the forms proposed in the 2002 Notice of Proposed Rulemaking?

27. What happened to the Schedule B list of occupations that lists the occupations the DOL believes the DOL believes have enough US workers?

28. If 245(i) is reinstated, will PERM be a problem?

29. Are there new rules for household domestic service workers?

30. How will Notices of Findings work under PERM?

31. What is "supervised recruitment" and when will it be required?

32. What happens to cases that present special or unique problems?

33. When must a US worker be accepted during the recruitment process?

34. What happens after the DOL certifying officer makes a decision?

35. Is there a way to appeal a Certifying Officer's negative decision?

36. Is the substitution of alien beneficiaries still permitted under PERM?

37. How long is a labor certification valid?

38. How does PERM change the process for obtaining a copy of an approved labor

1. What is PERM?

PERM is the new labor certification system that will allow employers to file labor certification petitions online. Employers will not need to submit supporting documentation with the cases and will instead retain all documentation for inspection in the case of an audit. A percentage of all cases will be flagged for a more extensive supervised recruitment process, but most will be approved within 45 to 60 days.

State Workforce Agencies will largely be removed from the process with most of the case being managed by two regional US Department of Labor offices. SWAs will still have responsibility for managing prevailing wage determinations.

A complete copy of the PERM rule can be found online at http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/pdf/04-27653.pdf .

2. When is the new PERM program effective?

March 27, 2005 (90 days from the publication of the rule on December 27, 2004)

3. What will happen to applications filed before March 27, 2005?

The applications can be filed under the current rules.

4. Can a case be converted to PERM?

Yes, subject to specific requirements in the new regulations.

With respect to withdrawing and re-filing existing applications under PERM, the DOL has now decided to allow an employer to withdraw the application, re-file under PERM and retain the priority date established in the original application. But the priority date may only be maintained if no recruiting has yet occurred. That basically means priority dates

may only be retained in non-RIR cases where recruiting has not yet begun. And to qualify to retain the priority date, the new filing must take place within 210 days of the withdrawal. However, employers can withdraw RIR and other cases and re-file under PERM and establish a new priority date. Employers should also note that if a case is re-filed under PERM, recruiting done for a previously filed petition cannot be used unless that recruiting would also satisfy the PERM requirements. That 's not likely given the fact that PERM requires the recruiting take place within close proximity to the time a PERM petition is filed.

5. Why is the DOL introducing PERM?

According to the DOL, the current labor certification system has been criticized for being complicated, time consuming and requiring the expenditure of considerable resources by employers. State Workforce Agencies and the Federal government. The new system is designed to streamline processing and ensure the most expeditious processing of cases using the resources available.

6. What changes does the new regulation make to the prevailing wage determination process?

The new rule makes a number of changes to both the H-1B and permanent labor certification process. One that has NOT changed is having employers get prevailing wage determinations from State Workforce Agencies using the SWAs 'own forms instead of a standardized form. Under the proposed rule, a standardized form would have been used. Employers will retain the prevailing wage data and have it available in case of an audit.

SWAs will be able to set a validity period for a prevailing wage determination of between 90 days and one year. Employers are required to file their applications or begin the pre-filing recruitment with the validity period specified by the SWA.

While a labor certification will not be revoked per se if the prevailing wage rises during processing of the case, employers are still required to certify on the new ETA 9089 form that it will pay the prevailing wage at the time permanent residency is granted or the alien is admitted to take up the certified employment.

Based on the new H-1B/L-1 legislation recently signed by President Bush (the Consolidated Appropriations Act of 2005), the DOL will no longer permit employers to pay less than 100% of the prevailing wage rate. Up until now, employers could pay 95% or higher.

The new law also mandates that the DOL develop a four tier scale for determining prevailing wages (up from the current two tier).

Employers will have more power to get SWAs to accept alternative wage surveys. As long as an employer-provided survey meets DOL criteria, the survey should be accepted by the SWA. Davis-Bacon Act and Service Contract Act wage data no longer need be used to determine the prevailing wage rate. However, a DBA or SCA wage rate may be considered prima facie evidence of the prevailing wage.

A controversial provision in the proposed rule relating to wages and H-1B cases was dropped from the final PERM rule. That proposed rule stated that if an employer relied on a wage survey that provided more than one wage rate or level for a particular position, the

employer would be required to pay the H-1B worker at least the applicable wage rate for the level of work as described by the employer. If, during the life of the Labor Condition Application, an entry-level H-1B worker gained experience and the nature of his or her work grew in responsibility, the applicable prevailing wage would be the wage set by the survey for the experienced level. The DOL is now satisfied that the "actual wage" requirement will help ensure that H-1B workers receive wages appropriate to their duties. Also, since an LCA only lasts three years, employers will necessarily have to increase the salary upon an extension of the H-1B.

The PERM rules establish guidelines for employers to dispute an SWA's wage finding. If an employer disagrees with the skill level assigned to its job opportunity, or if the SWA informs the employer its survey is not acceptable, or if there "are other legitimate bases for such a review," the employer may submit supplemental information to the SWA. The SWA must consider one supplemental submission (though submission of an employer-provided wage survey at this point would not be considered to be the single opportunity the employer gets).

If the SWA does not agree with the employer's request, then it must inform the employer of the reasons for its decision. The employer can either then submit a new wage determination or appeal. The appeal would need to be filed within 30 days to the SWA and the SWA will forward the appeal on to the appropriate DOL ETA processing center. A DOL Certifying Officer would then review the case and affirm the wage, modify the wage or remand the matter to the SWA for further action. Employers can then appeal up to the Board of Labor Certification Appeals (BALCA).

7. Are the new rules consistent with the new prevailing wage requirements contained in the Consolidated Appropriations Act of 2005 signed by President Bush in 12/2005? That law requires the prevailing wage to be 100% of the wage determined by the Labor Department instead of the traditional 95%. It also requires that the Department of Labor (DOL) provide at least four wage levels commensurate with experience, education and the level of supervision.

The new rule requires wages paid be 100% of the set prevailing wage. The DOL is working on a new rule to implement the new wage level requirements.

8. What kind of recruiting is required under PERM?

In the six months prior to filing an application, employers are required to place a job order with the State Workforce Agency and run two newspaper advertisements in Sunday papers. Employers of professionals are also required to conduct three additional types of recruitment from a supplemental list of recruiting methods. Documentation of recruitment is not to be submitted with the application, but must be maintained in a file that will be available to the DOL in the case of a request by a Certifying Officer or an audit.

The DOL has added an exception to the Sunday newspaper advertising requirement when an employer can document that a rural newspaper would be appropriate for recruiting but for the fact that the newspaper has no Sunday edition in the area of intended employment. The exception applies only to rural newspapers; if a suburban newspaper has no Sunday edition, the employer must publish a Sunday advertisement in the most appropriate city newspaper that serves the suburban area. Also, the requirement in the proposed rules that

the two Sunday advertisements be 28 days apart has been dropped. The two Sundays can now be consecutive. The only remaining timing requirement is that the two advertisements as well as the job order must be placed more than 30 days but less than 180 days before filing the application.

Under the proposed rule, employers of professionals were required to advertise in professional journals if the job was for a professional. The DOL has now decided to give discretion to the employer in choosing how to advertise. If a journal advertisement is appropriate for the job opportunity, the employer may choose, but is not required, to use a journal advertisement in lieu of one of the Sunday print advertisements.

Employers of professionals are required to conduct three additional types of recruitment based on a list of recruiting methods contained in the rule. The final PERM rule has expanded the list of acceptable recruiting methods from the proposed rule.

The acceptable additional recruiting methods for professionals include

- job fairs

- employer's web site

- job search website other than the employer's

- on-campus recruiting

- trade or professional organizations

- private employment firms

- employee referral program with incentives

- campus placement offices

- local and ethnic newspapers

- radio and television advertising

New methods include 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 they are appropriate for a job opportunity and radio and television advertisements. Furthermore, the rule now clarifies that an online job listing, even if posted in conjunction with a print advertisement, qualifies as an additional recruitment step. The use of a professional or trade organization is still okay, but must be documented by copies of pages of newsletters or trade journal containing the advertisements for the job opportunity. All of the additional steps must take place within six months of filing the case. Employers are no longer required to take a different step each month, though only one of the additional steps may take place within 30 days of filing.

The DOL has dropped the requirement listed in the proposed rules that the wage offer must be included in the advertisement. An employer may include that information, but it is no longer a requirement. If a wage is included in the advertisement, it must be the prevailing wage rate or higher. And if a wage range is included, the bottom of the range

must be at least as high as the prevailing wage rate.

The final rule now requires posting of a job notice for ten consecutive business days in any in-house media as well as using the normal posting.

9. What does the recruitment report need to contain under the PERM rules?

As in the current rules, employers are required to document recruiting results in a recruiting report. The abbreviated recruiting reports permitted under the Reduction in Recruitment rules will no longer be permitted. The reports currently required in regular labor certification cases are closer to the new system.

Employers under PERM will need to prepare a recruiting report that describes recruitment steps undertaken and the result achieved, the number of hires and, if applicable, the number of US workers rejected, categorized by lawful job related reasons for such rejections. The Certifying Officer, after reviewing the employer's recruitment report, may request the US workers' resumes or applications, sorted by the reasons the workers were rejected.

10. How are cases submitted?

Employers for the first time have the option of submitting cases electronically. They can also mail their application to one of two DOL ETA processing centers (depending on their state). The DOL will be requiring a new ETA 9089 Application for Permanent Employment Certification which will be accepted electronically via the worldwide web or by mail.

The proposed rules envisioned a system where applications were faxed to an ETA application processing center. Commenters complained that the H-1B faxback system was plagued with problems and the H-1B web-based application system was the much better model. The DOL agrees and has decided to use the web-based H-1B program as a model. Those employers preferring to file a paper application will still have that option and can submit an application by mail. But the new form will be completed in a manner that makes it machine readable. Faxed applications will NOT be accepted. Note that the DOL is indicating that applications submitted by mail will not be processed as timely as those filed electronically.

11. Where can the electronic form be found? What kind of features will the electronic filing system have?

When the system is up and running, the form will be located at http://www.workforcesecurity.doleta.gov/foreign. The site will include instructions, prompts and checks to ensure applications are submitted properly. There will also be a "frequent filer" system that will allow employers to set up secure files with in the ETA filing system containing information common to any permanent application they file. Every time an employer submits an ETA 9089, the common information will be entered automatically and only the data specific to that application will need to be manually entered.

Once a petition is filed, the form must be printed out and signed by an employer immediately. A copy of the signed form must be maintained in the employer's files and the original signed application must be submitted to support the I-140 immigrant petition

that is submitted to the USCIS.

Electronic signatures are not part of the new system, but the DOL envisions incorporating that feature as soon as a statute is in place governing this form of verification. For now, a PIN/Password system is being used.

12. How does an employer submit supporting documentation?

Actually, an employer will no longer submit supporting documentation with a petition. Instead, such documentation must be maintained by the employer and submitted when requested by a Certifying Officer or when requested as part of an audit.

13. Are the standards for approval the same under the new system?

According to the DOL, the standards will be substantially the same as those used in arriving at a determination in the current system. The determination is still based on whether there are insufficient US workers who are able, willing, qualified and available and whether the employment of the alien will have an adverse effect on the wages and working conditions of US workers similarly employed.

14. What will happen to the State Workforce Agencies?

The SWAs will no longer be the intake point for receipt of labor certification applications and will no longer be the source of recruitment and referral of US workers as they are in the current system. The sole role of the SWAs in the new system will be to provide prevailing wage determinations. Employers will be required to obtain a prevailing wage determination from the SWA before filing the application with the DOL.

15. How much faster will the new system be compared to the current processing times?

The DOL anticipates dramatically faster adjudication for most petitioners due to the combination of pre-filing recruitment, using an automated system for processing applications (even for applications submitted by mail) and the elimination of the SWA's previous role in the recruiting process. Cases not selected for further review should be approved within 45 to 60 days. That's slower than the originally predicted processing time of 21 days predicted in the proposed rule, but still much faster than cases take in the current system (usually anywhere from nine months to three years).

16. Which cases will be selected for auditing and how will audited cases be handled?

The DOL's computers will review applications based on various selection criteria that will allow problematic applications to be identified for audit. Also, some applications will be randomly selected for auditing.

If an application is selected for auditing, the employer will be notified and required to submit specific documentation to verify the information submitted in the ETA 9089. The documentation will be reviewed by an ETA official and either certified or, if the application is incomplete of the documentation does not support the ETA 9089, the application will be denied and the employer will be notified of the reasons. The Certifying Officer will also have the authority to request additional information before making a final determination.

The Certifying Officer also has the option in audited cases of ordering the employer to

conduct supervised recruiting. This might happen, for example, where there are questions arising regarding the adequacy of an employer's test of the labor market. The supervised recruitment process will closely resemble the current traditional labor certification process (as opposed to the reduction in recruitment process). The key difference, however, is that the DOL's Employment and Training Administration will supervise the recruitment instead of the SWA. Just as in the current system, at the end of the recruiting, the employer will be required to submit a recruitment report outlining the lawful job-related reasons why US worker candidates were rejected. The Certifying Officer will then either certify or deny the labor certification application.

17. Are applications for professional team athletes affected by the PERM regulation?

No. The special procedures that have been in place for more than a quarter century for people in team sports will continue. Applications will still be made using Form ETA 750. The DOL will issue a directive in the future discussing these cases.

18. What kinds of changes have been made to the final PERM rules from the proposed rules released in 2002?

According to the DOL, more than 195 comments were received from attorneys, educational institutions, individuals, businesses, SWAs and anti-immigrant organizations. Many of those comments resulted in changes reflected in the final rule as well as prompting the DOL to make plans for future rulemaking.

In this questions and answers document, we try to explain changes that have occurred from the Notice of Proposed Rulemaking to this final regulation. In general, the news is good for employer and immigrants. Many of the more controversial provisions have been dropped or modified to make the process more manageable for employers.

19. Are there changes in the penalties sections of the labor certification rules?

Not really. Several comments suggested that the DOL impose civil penalties for fraud in a manner similar to the H-1B program. The DOL agreed that this comment may have merit, but they indicated that such fundamental changes to the program should be published in a future Notice of Proposed Rulemaking. The major new penalty is the granting of discretion to Certifying Officers to require employers to undertake supervised recruiting for up to two years if there are problems with a labor certification petition. For more information on this, see the question on audit letters.

20. Which workers can be sponsored for labor certification?

One commenter was concerned that the term "worker" in the definitions would be found to include independent contractors. The commenter wanted the definitions to make it clear that only employees and not independent contractors are eligible for labor certifications. The DOL agreed and modified the phrase "full-time worker" to "full-time employee" and a sentence has been added to clarify that labor certifications may not be granted for independent contractors.

The DOL also agreed with an SWA commenter that holders of temporary visas (such as B-1 visitor visas) should be added to the list of persons ineligible to sponsor workers for labor certifications.

21. The proposed rule did away with business necessity letters. Has that controversial change been included in the final PERM rule?

One of the most controversial provisions in the proposed rules was the elimination of the right to include a business necessity letter to justify job requirements not normal for the occupation. The DOL heeded to comments noting that this would part with 25 years of cumulative business necessity experience. The final rule retains the current business necessity standards allowing employers to provide documentation demonstrating that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

The final rule now reinstates a business necessity test for job requirements that exceed the SVP (Standard Vocational Preparation) rating for a particular job. The DOL will utilize the May 16, 1994 Field Memorandum that provided a general associate's degree is equivalent to 0 years SVP; a specific associate's degree is equivalent to 2 years; a bachelor's degree is equivalent to 2 years; a master's degree is equivalent to 4 (2+2) years and a doctorate is 7 (2+2+3). The DOL has also clarified that it will use the O*NET system to judge whether training and experience requirements are normal and not the Dictionary of Occupational Titles.

22. What changes have been made to the rules for people engaged in a "combination of occupations"?

The proposed rules would have eliminated demonstrating a business necessity to justify a "combination of duties" –– now called a "combination of occupations." The final rule continues the status quo. Combination occupations can be justified in three ways:

- the employer can prove it has normally employed persons for that combination and/or
- workers customarily perform the combination in the area of intended employment and/or
- the combination job opportunity is based upon a business necessity.

23. Are there changes to the rules regarding requiring a foreign language capability?

Tied to the decision to retain the business necessity rule, the proposed rule's requirement that a foreign language requirement be supported by a showing that the language was not merely for the convenience of the employer or its customers, but required based upon the nature of the occupation or the need to communicate with a large majority of the employer's customers or contractors. Now that the business necessity rules are being retained, it is enough for an employer simply to prove business necessity as is currently the case. But the rule does indicate that the above stated reason as well as the need to communicate with co-workers or subordinates as potential reasons to justify a foreign language requirement. Safety considerations are also a potentially legitimate basis for a foreign language requirement.

24. The proposed rule called for two forms to be submitted to the DOL? Why has this changed?

The DOL has also listened to comments suggesting that only one application form be

submitted rather than the two called for under the proposed rule. Previously, a separate form was used for prevailing wage information. Those questions are now included on the consolidated form except that employers will also have to request a prevailing wage with the SWA using the state's form. The determination from the SWA will need to be retained in the employer's records.

25. What type of assistance is DOL making available to helping people transition to PERM?

Commenters suggested the DOL provide assistance in completing the forms via the creation of a toll-free number, an instruction handbook and detailed instructions on the Internet. The DOL plans on doing all three, but indicated that this might not be ready by the March launch date.

26. What types of changes have been made to the forms proposed in the 2002 Notice of Proposed Rulemaking?

Several changes have been made to various questions on the form originally published with the proposed rule. They include

- Adding a box to indicate the form is being completed in connection with a Schedule A application (those cases are still submitted directly with USCIS)
- Reference is made on the form to the special procedures for college and university teachers
- The phrase "Education or Training: Highest Level Required" is changed to "Education and Training: Minimum Level Required."
- Employers can now list in an "Other" box the need for a specific technical degree.
- The form now asks employers to specify either a specific wage or a wage range (as long as the low end of the range is still higher than the prevailing wage).

Are there any changes to the Schedule A rules for nurses and physical therapists?

The final rule clarifies in Schedule A nurse cases that a nurse must not just have passage of the CGFNS examination, but also must possess a CGFNS Certificate which indicates that the nurse has passed an appropriate English examination and has their educational credentials evaluated by CGFNS. The DOL indicated that it did not realize that just passing the CGFNS examination did not include the other items included in the CGFNS Certification process. The final rule now also allows passage of the NCLEX examination, possessing the CGFNS certificate, or holding a full and unrestricted (permanent) license to practice nursing as being enough.

27. What happened to the Schedule B list of occupations that lists the occupations the DOL believes the DOL believes have enough US workers?

The DOL has eliminated this list because their experience indicates that it has "not contributed in any measurable protection to US workers."

28. If 245(i) is reinstated, will PERM be a problem?

When Congress briefly brought back 245i (a provision in the law which allows certain applicants for permanent residency to pay a penalty fee to excuse status violations) in 2001, immigration lawyers had to act quickly to file cases to establish a priority date to qualify applicants for 245i which would only cover applications filed in the first four months of that year. While the Reduction in Recruitment labor certification method is usually preferred by applicants, the RIR pre-filing recruitment requirement meant that establishing a priority date before the 245i deadline would be a problem. So many people filed traditional labor certifications in order to get a priority date quickly set. Some have commented that doing away with an option for a traditional filing will be a problem if Congress one day again brings back 245i for a period of time. The Labor Department has acknowledged this concern, but has decided not to alter its plan for requiring pre-filing recruiting in all labor certification cases.

29. Are there new rules for household domestic service workers?

The rules are basically unchanged, but some of the questions on the ETA 750 form are not included on the ETA 9089 Form. Instead, employers must be prepared to provide documentation if they are audited or otherwise requested to provide additional information. The DOL dropped the current requirement that domestic workers have a year of experience in the profession when they drafted the proposed rules. They have reinstated that requirement in the final rule. The logic is that people in other fields were using this category to get to the US but had no real intention to work in the field once here. This requirement does not correlate to thee minimum training and/or job experience required to perform the job and should not be shown as a requirement for the job opportunity. In other words, US workers don t need a year in the field. But the immigrant worker does.

30. How will Notices of Findings work under PERM?

Notices of Findings (NOFs) are currently issued when the DOL determines that there is a problem with the labor certification application. NOFs are not provided for under the new rules and are instead replaced by an audit letter. Audit letters will be sent if the DOL believes that there may be a problem with the case or if the case is randomly selected foro auditing. An audit letter will do the following:

- state the documentation that must be submitted by the employer;
- specify a date 30 days from the date of the audit letter by which the required documentation must be submitted (that s longer than the 21 days included in the proposed rule);
- advise that if the required documentation has not been sent by the required date, the application will be denied

Certifying Officers have the discretion to extend the response time by up to 30 days. This is also a change from the proposed rules.

COs also have the authority to request further information or to require the employer to conduct a supervised recruitment. But the DOL believes that since employers should be retaining all the information that would be requested in a file subject to inspection,

responding in a timely manner should be manageable.

The DOL has decided not to specifically list the factors that will trigger an audit letter in order that the process not become too predictable and open to abuse. It also dropped a provision from the final rules that would have automatically triggered a presumption of material misrepresentation if an employer fails to respond in a timely manner to an audit letter. Nevertheless, the CO has the discretion to require companies to undergo supervised recruitments in all cases filed for up to two years when the employer fails to respond in a timely manner to an audit letter.

31. What is "supervised recruitment" and when will it be required?

Supervised recruitment is a type of labor certification process that closely resembles the current regular labor certification process. Supervised recruitment consists of advertising the job in publications and using text approved by a Certifying Officer. Ads in newspapers must be placed for three consecutive days, one of which must be a Sunday or, if directed to advertise instead in a professional, trade or ethnic publication, the advertisement must be published in the next edition. The ads direct applicants to send their resumes to the CO for referral to the employer and must include a job number and address designated by the CO. The advertisement also needs to describe the job duties and requirements and list a wage higher than the prevailing wage.

COs have broad discretion to require a supervised recruitment in any cases where the CO deems it appropriate. The DOL anticipates that a decision to require supervised recruitment will usually by based on labor market information.

The final rule also now places time limits for various stages of the supervised recruitment process. The employer must supply a draft advertisement a proposed place of publication of the advertisement to the CO for review and approval within 30 days of being notified that supervised recruitment is required. The employer must provide the CO with a detailed recruitment report within 30 days of the CO's request for the report. And an employer must provide any other documentation or information within 30 days of a CO's request or the CO will deny the application.

The recruitment report in a supervised recruitment case must

1. identify each recruitment source and document that each recruitment sourced named was contacted;

2. state the number of US workers who responded to the employer's recruitment;

3. state the names, addresses and provide resumes (other than those sent to the employer by the CO) of the US workers who applied for the job, the number of workers interviewed and the job title of the person who did the interviewing; and

4. an explanation of the lawful, job-related reason(s) for not hiring each worker who applied (not hiring a worker will be unacceptable if the worker can acquire the skills needed to perform the job duties during a "reasonable" period of on-the-job training.

32. What happens to cases that present special or unique problems?

Under the current rules, the regional DOL offices can refer applications presenting special or unique problems to the National Certifying Officer of the DOL and they can direct certain types of applications be regularly handled in the national office. The DOL did not provide for a similar authority in the proposed rule, but has decided to retain this authority in the final PERM rule.

33. When must a US worker be accepted during the recruitment process?

A certifying officer will deem a US worker qualified for the job being certified when the worker is "able, willing, qualified, and available for and at the place of the job opportunity." The US worker must be able to perform the job in a normally accepted manner and as customarily performed by other US workers similarly employed. The worker can also not be rejected if they are unable to perform the job but can be trained to do the job in a "reasonable period of on-the-job training."

In the case of a university or college teacher, however, the US worker's qualifications must be at least as strong as the immigrant worker's qualifications.

34. What happens after the DOL certifying officer makes a decision?

If the CO decides that the labor certification should be granted, the officer will send the certified application and complete Final Determination to the employer or the employer's attorney or agent indicating that the next step is to file the form along with an immigrant petition to the Department of Homeland Security.

If the CO decides the case is to be denied, a Final Determination form will also be sent which will

- state the reason for the determination;
- quote the request for review procedures;
- advise that failure to request review within 30 days will forfeit various appeal rights;
- advise that if a request for review is not made within 30 days, the denial shall become the final determination of the DOL;
- advise that a new application may be filed at any time ; and
- advise that a new application in the same occupation for the same worker cannot be filed while a request for review is pending with the Board of Alien Labor Certification Appeals.

If the CO finds that the employer failed to produce required documentation, the documentation was inadequate, finds that a material misrepresentation was made, or finds it otherwise appropriate, the employer may be required to conduct supervised recruitment in future labor certification filings for a period of up to two years from the date of the Final Determination.

35. Is there a way to appeal a Certifying Officer's negative decision?

Yes. Employers (and only employers) will have 30 days to file a request for review with the

Board of Alien Labor Certification Appeals (BALCA). That's an increase from the 21 days called for in the proposed rule (and this is consistent with the increase from 21 days to 30 days in various other places in the final rule). But unlike the current system, BALCA's authority to remand a case to a Certifying Officer for further consideration or fact-finding and determination has been eliminated.

36. Is the substitution of alien beneficiaries still permitted under PERM?

Yes. While the DOL is concerned about a "black market" developing for labor certifications and is studying future regulatory solutions to address the problem, it will for now rely on the measures in the current rule designed to ensure the bona fide intentions of the employer.

37. How long is a labor certification valid?

Just like the current rules, labor certifications under PERM are valid indefinitely. The validity date begins on the date the labor certification is date-stamped as being submitted or, in the case of a Schedule A petition, the date the application is filed with the Department of Homeland Security.

38. How does PERM change the process for obtaining a copy of an approved labor certification?

Under the current rules, an employer, alien or agent may request a copy of an approved labor certification only through the Department of Homeland Security or via a Consular Officer. Complaints about the inordinately long time it takes for either one of these two methods has led DOL to add a third way to get a copy. Now a DOL Certifying Officer may issue a duplicate labor certification to a Consular or DHS officer at the request of the employer or the employer's attorney. The request must be directed to the CO who approved the case, it must contain information that an application has been filed at DHS or DOS and must include a Consular Office or DHS tracking number.

39. Can the DOL invalidate or revoke an approved labor certification?

An approved labor certification may be revoked by DOL as well as by DHS or the State Department upon a determination of fraud or willful misrepresentation of a material fact involving the labor certification application.

If fraud or willful misrepresentation becomes known to DOL before a final labor certification is issued, the DOL may notify the DHS or DOS, as appropriate. If 90 days pass without the filing of a criminal indictment or information, or receipt of a notification from DHS, DOL Office of Inspector General, or other appropriate authority that an investigation is being conducted, the DOL may continue to process the application. If the DOL learns, however, that a criminal indictment or information has been filed in a court, processing on the labor certification will cease until the judicial process is completed. If the court finds no wrongdoing, then the DOL will proceed with the application on its merits. If the court finds wrongdoing, the application will be invalidated.

The DOL may also revoke an approved labor certification if a Certifying Officer finds that the certification was not justified. The CO would send the employer a Notice of Intent to Revoke which contains a detailed statement of the grounds for the revocation and that there is a 30 day time period allowed for the employer's rebuttal. After receiving the

rebuttal from the employer, the CO must inform the employer of a decision within 30 days. If the labor certification is revoked, the DOL will notify DHS and DOS of the decision.

40. How long must documents be retained for PERM labor certification cases?

Copies of applications for permanent employment certification filed with the Department of Labor and all supporting documents must be retained by the employer for five years from the date of filing the ETA-9089.

41. How are lay off situations treated under the new rules?

Under the proposed rule, if there was a layoff by the employer-applicant in the area of intended employment within six months of filing the application, either in the occupation for which certification is sought or in a related occupation, the employer must document that is has notified and considered all potentially qualified laid-off US workers of the job opportunity involved in the application and the results of the notification. A "related occupation" is any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is sought. The final rule adopts this, but also clarifies that the employer-applicant is required to document it has notified and considered only those workers it laid off, not those workers laid off by other employers. But in the case where a company is directed to complete supervised recruitment, the Certifying Officer may take notice of industry layoffs in directing the employer to make additional recruiting efforts.

When an employer has laid off workers, stricter requirements on proving bona fide efforts to recruit US workers may come into play. The final rule now defines "layoff" to be an involuntary separation of one or more workers without cause or prejudice. The definition includes, but is not limited to, personnel actions characterized by an employer as reductions-in-force, restructuring, or downsizing.

42. Are there any changes to the rules regarding when family members can be sponsored by employers for labor certifications?

The proposed rule provided that, if the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners and the immigrant worker, the employer must furnish documentation that would allow the Certifying Officer to determine whether the job has been and is open to US workers. That has been carried over to the final rule and now the ETA 9089 form has also been altered to ask the question of whether the worker is one of a small number of employees in the area of intended employment. The DOL is of the opinion that if a worker is one of only a few employees, the job may not be open to a US worker. The rules have adopted the standard from the BALCA case Modular Container Systems (89-INA-228, July 16, 1991) which requires that the Certifying Officer review the totality of the circumstances and require the following types of documentation:

- a copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
- a list of all of the company's officers and owners, their titles and positions and a description of the relationships to each other and to the worker;

the financial history of the company including the total investment by each officer, owner and the worker.

the name of the company official with primary responsibility for interviewing and hiring applicants and the names of company officials with influence over hiring for positions for which labor certification is sought.

if the worker is one of ten or fewer employees, the employer must document any family relationship between the employees and the alien.

43. How has the DOL changed the rules with respect to listing job duties?

The final rule also now addresses the question of unduly restrictive job DUTIES. Employers who seek to get around the restrictive requirements rules can not simply list job duties in a restrictive manner in an attempt to eliminate US workers. The job duties must be consistent with the O*NET job zones assigned to the occupation and duties not consistent with O*NET must now be supported by business necessity.

44. What is the new standard for alternate experience in labor certification cases?

The proposed rule would have eliminated the use of alternative experience requirements as a means of qualifying for the employer's job opportunity. The DOL agreed with comments that there may be legitimate instances when alternate job requirements, including experience in a related occupation, can and should be permitted in the permanent labor certification process. The DOL is adopting the criteria set forth by the Bureau of Alien Labor Certification Appeals in the case Matter of Francis Kelloag (94-INA-465). Kelloag held that the employer should accept any and all experience that would reasonably prepare an applicant for the position and not permit an employer to accept only the specific related experience the alien might have, without regard to whether the other experience would prepare the applicant for the position in question. Alternative requirements and primary requirements must be substantially equivalent to each other with respect to whether the applicant can perform the job duties in a reasonable manner. When an employer's alternative requirements are substantially equivalent but the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, the alternative requirements will be considered unlawfully tailored to the alien's qualifications unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

45. The DOL's proposed rule would have made it nearly impossible to get credit for work experience gained with the sponsoring employer? Has the DOL softened this position in the final rule?

Under the proposed rule, employers would be prohibited in all cases from requiring any experience gained by the worker while working for the employer in any way, including work as a contract employee or for an overseas company. The DOL agreed with comments that if two jobs with the same employer are truly distinct, US workers are not denied training opportunities unfairly gained by foreign nationals with the same employer. Foreign workers, including those working as contractors, are not being trained on the job when they are gaining experience in a truly different job. The final rule allows employer to show

the alien was hired in or contracted to work in a different job for the employer, but the employer must prove the job in which the alien gained the experience is not substantially comparable to the job for which certification is being sought. A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50% of the time. Employers can document this by providing job descriptions, the percentage of time spent on various duties, organizational charts and payroll records. Employers can also accept experience gained with that employer when it can demonstrate that it is no longer feasible to train a worker to qualify for the position. According to the DOL, this exception which exists in the current rules has only rare been requested.

The proposed rule adopted a very broad definition of "employer" for purposes of determining when a worker could get credit for experience and when the experience could not be counted since it was gained with the sponsoring employer. The proposal defined "employers" to include predecessor organizations; successors in interest; and a parent, branch, subsidiary or affiliate, whether located in the US or another country. The DOL admitted the definition of "employer" was too broad and now is simply defining an employer as "an entity with the same Federal Employer Identification Number."

46. Are there any fees associated with the new PERM rule?

No. The proposed rule had a section describing how fees would be collected in anticipation of Congress passing legislation to allow for the collection of fees. The final rule does not provide for the collection of fees because Congress never passed a bill allowing for this. But the DOL still reserves the right to collect program fees within the rule should Congress act. The rules also make it clear that SWAs cannot charge to issue prevailing wage determinations.

Gregory Siskind (gsiskind@visalaw.com) is a partner in the law firm of Siskind, Susser, Haas and Devine (www.visalaw.com), which has offices in the United States and around the world. He is an active member of the American Immigration Lawyers Association (AILA). He is a member of the American Bar Association (ABA), where he currently serves as Chairman of the Law Practice Management Publishing Board and on the Governing Council of the Law Practice Management Section. He was one of the first lawyers in the country (and the very first immigration lawyer) to set up a website for his practice and he was the first attorney in the world to distribute a firm newsletter via e-mail listserv. He is a co-author of *The J Visa Guidebook* published by LexisNexis Matthew Bender, and the author of *The Lawyer's Guide to Marketing on the Internet*, published by the ABA. He graduated magna cum laude from Vanderbilt University and received his law degree from the University of Chicago.