

FAQ: PERM Labor Certification Process – Phase 1

The First Step to an Employment-Based “Green Card” -The Labor Certification Process (PERM)

Phase 1: Case strategy, PERM initiation, Job Requirements Determination & Prevailing Wage Determination

There are 3 steps to obtaining a green card based on employment:

- 1) The Labor Certification (LC) through the PERM process;
- 2) The I-140 Immigrant Petition; and
- 3) The I-485 Application for Adjustment of Status (AOS) to obtain Permanent Residence.

The LC is a long and complex process. We divided it in three phases to facilitate the process for our clients. This FAQ covers Phase 1 of the LC which includes developing a strong case strategy and outline; the very important determination of the job title and requirements; employer registrations for PERM and State Workforce Agency; and the subsequent analysis, strategy, drafting and filing of the prevailing wage determination.

What is PERM?

PERM (Program Electronic Review Management) is the system that the U.S. Department of Labor (DOL) uses for employers to conduct and file the LC. The PERM application is a 15 page document which among others outlines all the steps undertaken to test the local job market for qualified workers; describes the requirements of the position and how the foreign national meets the requirements; provides information about the employer; and the offered wage.

Employers must keep documentation of all the recruitment steps, applicants and their backgrounds and lawful reasons for not selecting U.S. workers. This documentation must be submitted to DOL in the case of an audit. We work with our clients to prepare the required PERM and audit file.

Why is the PERM/LC process complex?

The process requires substantive legal knowledge of stringent and always evolving case law, process and requirements. It is also critical to have practical experience dealing with the recruitment process, the timing and terminology. You should hire an experienced immigration attorney if you are interested in filing a PERM/LC.

What does the Marks Gray Immigration Team do for clients during Phase 1?

Among other services, our team will:

- Collect and analyze information and documents about the sponsoring employer, the foreign national and the proposed job;
- Review and analyze the qualifications of the foreign national versus the PERM job requirements including issues relating to the degree, job duties, prevailing wage and others and advise and guide our clients as applicable. For example, a foreign degree evaluation and/or experience letters might be required;
- Research, obtain and analyze recently certified PERM in the job category for case strategy;

FAQ: PERM Labor Certification Process – Phase 1

- Draft, discuss, revise and finalize the full time permanent job description including title, duties and requirements based on the information provided by the clients;
- Guide PERM and SWA registrations;
- Draft, discuss, finalize and file the Prevailing Wage Determination (PWD);
- Guide, discuss, revise and finalize experience letters and/or credentials; and
- Monitor and advise you about changes in law, procedure and processing times that might affect your case processing.

Does a part-time position qualify for PERM labor certification?

No. The job offer must be for a permanent and full-time position. However, note that the LC position is intended to be a future position that becomes active after issuance of the green card. You are not required to work full-time, or for the sponsoring employer, at the time the labor certification petition is filed.

What is the priority date and why is it important?

The priority date is set by the date that the DOL receives the LC filing. This date is very important because it places the foreign national “in line” for an immigrant visa. The priority date determines when a foreign national can file for adjustment of status (AOS), the last step of the green card process. Thus, if the goal is to apply for a green card, it is crucial to begin the PERM process early. If the priority date is not current, the foreign national waits “in line” for the priority date to become current.

Is the employer required to register with the DOL to file a PERM?

Yes. We guide and work concurrently with our clients through this process which can take from a few days to a few weeks.

What is the prevailing wage?

An employer must obtain a Prevailing Wage Determination (PWD) from the DOL before filing the LC. The DOL determines the wage level based on the position’s description and requirements. A concise and objective job description is essential to obtaining the most appropriate PWD. The job description should not include every duty or requirement for the position but the objective and necessary requirements. The higher the requirements, the higher the prevailing wage. The PWD issued by the DOL is expected to reflect the average wage paid to similarly qualified and employed workers in the specific occupation in the area of employment.

The employer must pay the prevailing wage at the time the foreign national receives the green card on the basis of the LC. The employer has to demonstrate that it has the ability to pay the offered wage from the time the LC was filed until the foreign national receives the green card.

Should I use my company’s standard job description and requirements for the PERM application?

We recommend not to do that. DOL will compare your standard job duties and requirements for the position with the job duties and requirements described in DOL’s online Occupational

FAQ: PERM Labor Certification Process – Phase 1

Information Network (O*Net). If your position job description is inconsistent with the O*Net requirements, you might be required to explain the differences and justify them based on business necessity.

Additionally, PERM job requirements should not include subjective determinations, such as “strong” knowledge of a product or skill. Experience gained with the sponsoring employer generally cannot be used to qualify for the PERM position unless the applicant’s prior position(s) with the employer is significantly different from the PERM position. Foreign language requirements should generally be avoided. If a requirement is one that could be gained with a reasonable period of on the job training, this requirement cannot be used as a basis to reject an otherwise qualified U.S. worker.

Can I use special skills and requirements in the job description?

Although special job requirements can be used, they should be used sparingly. DOL might question job description and position requirements that include extensive certifications and technical knowledge. If supervision is not a major part of the position, it might be best not to include it as it skews the PWD.

As to travel requirements, DOL has indicated that travel is sporadic and to conferences should not be included in the job description. A travel requirement might add a point to the PWD.

How do you obtain a Prevailing Wage Determination?

With the input of our clients, we analyze and determine the most appropriate Occupational Employment Category, prepare and file the PWD request with the National Prevailing Wage in Washington D.C.

The PW request must include the job title, job description, area of intended employment, and the requirements for the job (i.e., the O*Net category, education level, years of experience, and any other special requirements).

What can an employer do if it does not agree with the PW determination?

An employer can submit additional information to the DOL and request a reconsideration. However, in most cases the DOL stands by its original determination. Often, it is necessary to reevaluate the requirements of the position and refile the PWD.

How long does it take for the PWD to be issued?

Currently, “clean” PWD (without a Request for Information or “RFI”) are taking 2 to 3 months for adjudication.

How important are the job title, description and requirements to the LC process?

These are key components of the process. The job description and requirements must be carefully drafted as they determine the pool of potential job applicants. They also determine whether the position will meet the technical requirements for a successful PERM application and

FAQ: PERM Labor Certification Process – Phase 1

the level of the PWD. Unreasonable minimum job requirements that are specifically tailored to the foreign national are not allowed and could prompt an audit. For example, including a foreign language requirement can be considered unduly restrictive and trigger an audit.

How long does it take the DOL to process a PERM application?

Currently, “clean” applications (without an audit or other request) are taking 5 to 6 months from filing of the PERM to adjudication. However, also note that the pre-PERM filing process, including obtaining the PWD, is also taking 5 to 6 months. This leads to a total processing time for a “clean” case of about one year. If the PERM case is audited, processing times can extend to 1.5 years or more.

Does the LC expire?

Yes. The LC expires 180 days after it is certified by the DOL. The employer and employee must be ready to file the I-140, Immigrant Petition, within the validity of the LC.

What happens if a LC is selected for an audit?

The employer is required to respond to the audit and provide supporting documentation within 30 days of the request by a Certifying Officer (CO). After the documentation has been submitted, the CO can approve the application, request additional evidence or deny the application. The CO may also require that the employer undertakes additional supervised recruitment. The supervised recruitment involves new recruitment directed by the CO.

Can I withdraw an application if it is selected to be audited?

No. If the application is selected for an audit, the employer cannot withdraw the application and must respond to the audit.

What are the differences and similarities between EB-2 and EB-3 immigrant preference categories?

Unlike the EB-1 First Preference Category, the EB-2 and EB-3 both require the applicant to obtain a PERM LC before applying for the I-140, employment-based immigrant visa.

Whether a petition qualifies for EB-2 or EB-3 depends on the requirements of the position as stated in the LC and immigrant petition. For an EB-2 petition, the position must require at least a Master’s Degree (or foreign equivalent) or a Bachelor’s degree and five years of progressive experience. For an EB-3 petition, the position must require at least a Bachelor’s degree.

Throughout the entire process, we are available to guide you and respond to any questions or concerns that arise. For more information about your Immigration situation or to learn how the Marks Gray Immigration team led by **Giselle Carson** may assist you today, please email ImmigrationGroup@marksgray.com.