

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

Phase 2: PERM Advertising and Recruitment

Before filing the PERM Labor Certification (LC) with the Department of Labor (DOL), employers are required to complete very specific advertising and recruitment steps for the job at issue. The goal of this phase is to show that no qualified U.S. workers are available for the specific position.

This FAQ covers Phase 2 which includes: selecting advertising channels; developing an advertising timeline; preparing, posting and monitoring advertising; keeping detailed evidence of at least six different and required advertisings; screening, consideration and interviewing of qualified applicants; lawful rejection of applicants; and determination of whether to proceed with PERM filing.

What recruitment steps are required under PERM for professional positions?

It requires employers to place two Sunday prints ads in a newspaper of general circulation, place a 30-day online job order, post an internal notice of filing, and undertake three additional recruitment steps.

What are the three additional recruitment steps for professional jobs?

Permissible additional recruitment locations/ media include:

- Job fair;
- Employer’s website;
- Job search website other than the employer’s;
- On-campus recruiting;
- Trade or professional organizations;
- Private employment firms;
- Employee referral program, including very identifiable incentives;
- Campus job placement office, if the job requires a degree but no experience;
- Local and ethnic newspapers; and/or
- Radio and television advertisements.

The language of these ads must meet DOL’s very specific criteria. The results of this recruitment process are the evidence that there are no willing, able and minimally qualified U.S. workers for the position.

What recruitment documentation is the employer required to keep?

The employer must have a recruitment report describing and providing evidence of the recruitment undertaken and its results. It must include the number of rejected U.S. workers and the lawful job-related reasons for their rejection. It must contain evidence of all the recruitment steps, such as newspaper tear sheets, screenshots of websites, and copies of applications received in connection with the recruitment steps.

How long does the employer need to retain the recruitment documentation?

For five (5) years from the date of filing of the application.

What are the requirements of the Sunday print ads?

These must be two consecutive Sunday advertisements in the newspaper of general circulation in the area of intended employment. The ad must list the name of the employer, the geographic area of employment, a description of the position specific enough to apprise U.S. workers of the job opportunity and direct applicants to send resumes to the employer.

What are the requirements of the 30-day Job Order?

This Job Order is placed with the State Workforce Agency (SWA). For PERM purposes, the Job Order must run for a minimum of 30 days.

What is involved with the Notice of Filing?

This Notice is posted internally at the worksite for ten consecutive business days. It must contain the salary for the position or a salary range. The notice should include a contact person and very specific language and format.

If the position is a union position, does the employer need to provide the Notice of Filing to a bargaining representative?

Yes, the bargaining representative of the employees in the same occupational classification for which the application is being filed must be given notice. If there are no bargaining representatives, then an Internal Job Posting must be made.

Do I need to include the wage rate in the advertisement?

No, the wage that will be paid to the employee does not need to be included, except for in the Notice of Posting. If a wage is included, it cannot be lower than the Prevailing Wage rate.

What happens after the advertisements are placed?

If the employer receives applications related to the advertisement, the employer needs to evaluate the applicants and contact those who appear to be minimally qualified for the position as soon as possible. Applicants may only be disqualified for lawful reasons. Employers are only required to consider “U.S. workers.”

Applicants who appear to meet the minimum qualifications should be contacted and possibly interviewed by phone or in person. Employers must show good faith effort in contacting applicants. Delaying contact to potentially qualified applicants could result in the denial of the PERM application.

If there are minimally qualified applicants willing to accept the position if offered to them, the PERM process need to be discontinued at that time and alternative options should be explored.

What are lawful reasons to disqualify applicants?

Every case is different, but below are some lawful and job-related reasons for rejecting a candidate:

- Not having the education or work experience required;
- Not willing to relocate to fill the position;
- Not willing to accept the job position’s salary;
- Failing to attend or respond to an interview letter;
- Poor work references;
- Not being a U.S. worker; and/or
- No longer being interested in the position.

Who is considered a qualified U.S. worker for purposes of a labor certification?

A U.S. worker is defined as a U.S. citizen, permanent resident or other specially authorized alien (such as asylum or refugee) who satisfies the minimum job requirements of the position and is willing to take the position under the conditions and terms described in the labor certification application. Nonimmigrants in H-1B, L-1, O-1 and many other nonimmigrant statuses are not considered qualified U.S. workers for PERM purposes.

What happens if there are no minimally qualified applicants?

Then, we can proceed with the filing of the PERM application.

How much does the advertisement cost?

It varies. But, it typically starts around \$1,500 and up depending on the rate charged by the newspaper of general circulation (which is a required ad). A job posting in a large metropolitan area will generally cost more than a job posting in a rural locale.

Why do we have to advertise if already found the employee we want (the foreign national)?

From the DOL perspective, the position is open because the employee is in a temporary and finite visa status such as an H-1B, not a permanent position. Additionally, the employer is required to show that there are no U.S. workers willing, able, and qualified for the position.

How long is the PERM recruitment period?

There is no mandatory length of time for the recruitment period. In practice, we can generally complete all recruitment activities within 45 days. After the recruitment is completed, we need to wait at least 30 more days to file the PERM application.

If a position requires a certain level of work experience, can experience gained with the petitioning employer be used?

Experience gained with the petitioning employer can only be used if the experience was gained in a position that is not “substantially comparable” to the position involved in the LC. A position is “substantially comparable” if 50% or more of the duties of the two positions are the same. For example, if a Software Engineer who spends 100% of her time developing software is promoted to Sr. Software Engineer in which she spends 20% of her time managing and 80% of her time developing software, the two positions are “substantially comparable” and her experience as a software engineer cannot be used. However, if the proposed position is substantially different (more than 50%), the experience gained with the employer should be explored.

When considering an applicant, if the job requires four skills and the job applicant lacks one of those skills, can that applicant be lawfully rejected?

It depends. Lack of certain skills may not be enough to lawfully reject an otherwise qualified U.S. worker. The employer needs to explore and evaluate whether the U.S. applicant could perform the job with a reasonable amount of on-the-job training in the lacking skill(s). What is reasonable will depend on the particular employer and the job opportunity.

What does the Marks Gray Immigration Team do for clients during Phase 2?

Among other services, our team will:

- Identify and recommend recruitment channels;
- Communicate, analyze, plan and strategize with recruitment channels on advertising; language, timeline of posting and costs;
- Plan and strategize with the employer on advertising channels and timeline;
- Place all ads and gather documentary evidence of the process;
- Guide and facilitate employer's registration with the SWA;
- Monitor all recruitment steps and prepare evidence of same;
- Prepare recruitment summary report including recruitment activities, recruitment results, and detailed applicant analysis;
- Prepare employer guide for evaluating applicants and applicants' chart; and
- Create audit file index and prepare content.

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 immigrationteam@marksgray.com.