



Latest Trends in PERM Labor Certifications

By Pam Prather

A PERM labor certification is typically the first step in an employer-sponsored permanent residency application. Having handled labor certifications for over 15 years, we've seen this process go through many changes. This article will explore the latest trends in the PERM labor certification process.

Processing Times

It was in early 2005 when the traditional 'paper filed' labor certification process changed to the electronic PERM system. The Department of Labor's goal with PERM was to decrease labor certification processing times from many years to less than a few weeks. Unfortunately, however, PERM labor certification processing times increased from a few weeks to well over a year by the middle of 2010.

Some practitioners say it now "feels like the good ole' days of 2005", because normal processing of PERM applications is currently taking 2-4 months. Many cases are being certified in weeks or even days. It's very satisfying to see this system work as they promised it would almost six years ago. This is tempered, though, by the fact that audited cases are taking at least two YEARS to process. It looks like one area is being sacrificed for another.

Kellogg Language

We've come across a few other interesting items regarding the PERM process. The "Kellogg language" has been a source of confusion since it was first introduced. Some practitioners have taken to including the phrase in every application they file. Others hesitate to include it unless there are multiple combinations of education, training or experience listed on the application.

A general rule of thumb is that when answering "Yes" to H.8. (Is there an alternate combination of education and experience that is acceptable?), you definitely need to include the Kellogg language. When answering "Yes" to H.10. (Is experience in an alternate occupation acceptable?), you probably should as well. Only when answering "No" to both, can you consider leaving the magic phrase out.

Of course, when determining your PERM strategy, you have to balance the benefit of alternate requirements (and therefore using the Kellogg language) with the risk of having too many applicants qualify under an infinite list of "other combinations".

"Who's Driving the Bus?"

An ongoing challenge for PERM practitioners is the "who's driving the bus" question. This is especially true now when cases filed under the Employment-Based Three Preference Category (EB-3) are taking close to 10 years! Even the most sophisticated of potential immigrants now asks us to file their

applications in the Employment-Based Two Preference Category (EB-2) because they have a Master's degree and the processing is faster.

Over and over again, through the many years we've been practicing immigration law, and through all the various incarnations of the Labor Certification process, we have had to explain to employers and employees alike that it's the POSITION that determines the preference category, NOT the employee's qualifications. One of the first things we do when accepting a new case is to emphasize the fact that the employer must be in charge of this process, and input from the employee/beneficiary can only be minimal. All parties involved must be clear on the fact that the employer determines the requirements for the position.

If the position itself requires an advanced degree, or a Bachelor's degree plus 5 years of progressive experience, then the labor certification can be filed under the EB-2 category. Employers should analyze their employees' EB-3 cases to see if their position has sufficiently changed over the years to allow for an "upgrade" to EB-2. However, always keep in mind who's driving the bus!

Conclusion

Compared to recent years, there are trends in the PERM process that are very encouraging, such as the significant decrease in processing times for normal cases. However, processing of audit and appeal cases is taking longer. There are tools such as the Kellogg language at our disposal, but it is still difficult to explain special circumstances on the 9089. Employees will always want a higher preference category, but employers are learning to take control of the process while maintaining fairness and consistency. Let's hope that the positive trends continue and the other areas in PERM improve in the years to follow.

To learn more about the latest trends and best practices in the PERM labor certification process, sign up for our next web seminar.

Webinar: *Latest Trends in PERM Labor Certification Process*

Date: Wednesday, March 2, 2011

Time: 12:30 PM - 1:00 PM EST

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