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**Winning PERM Strategies and Key PERM Issues in
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Winning PERM Strategies and Key PERM Issues in 2017

By Ester Greenfield and Rebecca Massiatte

In this article, we touch on a wide variety of issues in handling PERM cases: good faith in selecting PERM recruitment methods; tips for advising employers on how to conduct the consideration of applicants; and a sample of hot PERM topics, including reliance on FAQs and travel requirements, the latest word on durational requirements, procedural suggestions for BALCA appeals; and RFIs. Also discussed are updates in documenting the beneficiary's education (Bachelor's plus five years) for I-140 EB2 approval as well as our experience in distinguishing between fatal and non-fatal PERM errors. We attach a few appendices with checklists and tools that have proven useful in our practices. This article is not intended to be an introductory guide to PERM. There are many other sources that provide basic information about the PERM process. Instead, we intend to give the reader our best selection of issues you need to recognize in the ever-changing landscape of PERM.

I. Good Faith in Recruitment Methods

The mandatory recruitment required in a labor certification process for a professional position is outlined in 20 CFR § 656.17(e). An employer is provided with the opportunity to format the desired recruitment sources based on the regulatory requirements and should, in good faith, seek to emulate the standard recruitment practices as normally exercised and as the regulations afford. In an effort to demonstrate "good faith" in the labor certification process, the employer ought to consider its normal recruitment practices and analyze to what extent the recruitment steps that are required for labor certification should mirror the employer's normal recruitment practices (to the extent allowed). For example, if an employer requires all applicant's for non-labor certification positions to apply via the employer's career center or other similar career site that posts open opportunities on the company website, then the employer ought to consider utilizing a similar application process for the position at issue in labor certification.

Recruitment should be planned to ensure the timely consideration of applicants to demonstrate an employer's good faith throughout the labor market test. The regulations do not define with precision the amount of time afforded to reach out to an applicant during the labor certification process; however, a company's standard practices may or may not be appropriate and should be discussed during the planning stages. For example, if an employer's practices are to accumulate applications for a posted position over the course of 30+ days prior to any sort of initial review, it is strongly suggested that an alternate approach be employed for applicants that seek consideration for a position that is the subject of labor certification. Stalling the review of applicants during the labor certification process can be considered bad faith and a basis for denial of an application, especially if the delay impacted a potentially qualified U.S. worker.

The organization of the labor market test, including both mandatory and additional recruitment steps identified, will assist with identifying critical timelines required for the overall labor certification process. Timelines are essential not only for the duration of certain recruitment steps, such as the mandatory job order, but also to keep track of the timeline for observing the mandatory 30 days preceding the filing of the application as well as the maximum 180 days

period that applies to the overall process, from the initiation of the first recruitment step to the filing of the labor certification with the U.S. Department of Labor.

Pursuant to 20 CFR §656.17(e)(1)(i), “[t]he mandatory recruitment steps must be conducted at least 30 days, but no more than 180 days before the filing of the application.” Further, the regulations provide that with the exception of one of the additional three required recruitment activities outlined in 20 CFR §656.17(e)(1)(ii), that “mandatory recruitment steps must be conducted at least 30 days, but no more than 180 days, before the filing of the application.” 20 CFR §656.17(e)(1)(i). None of the “additional recruitment steps” can take place more than 180 days prior to the date that the application is filed. 20 CFR §656.17(e)(1)(ii). Therefore, preparing a timeline for the periods of time that both mandatory and additional recruitment steps take place as well as both the overall 180 day period allowed that includes the target filing window will assist with both planning as well as visualizing the overall process for you and your client. An example of this planning worksheet that can be used/modified to best suit your practice style and preference can be found attached.

Though the regulations provide the basic framework for the labor certification process for professional occupations, among other occupation categories, both the Board of Labor Certification Appeals (BALCA) as well as the Department of Labor’s Officer of Foreign Labor Certification (OFLC) provides guidance by way of decisions and “Frequently Asked Questions” (FAQ), respectively, for the employer and practitioner.

Since the implementation of the current labor certification regulations in 2005, many decisions and FAQs have been published. OFLC FAQ’s can be found here: https://www.foreignlaborcert.doleta.gov/faqs_pdf.cfm, and the BALCA decisions found here: <https://www.oalj.dol.gov/>

The following applicable BALCA decisions provide guidance and perspective concerning the labor certification recruitment process and are included to provide insight on the various topics covered in the decisions and that might be relevant to the practitioner in the course of strategizing and planning in the labor certification process. Specifically, these decisions provide details to consider when selecting the required recruitment sources as well as preparing the required content for each source.

20 CFR §656.17(e)(1)(i)(B): Mandatory Newspaper Advertisements.

The regulations provide the following:

(B) Advertisements in newspaper or professional journals. (1) Placing an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, willing, qualified, and available U.S. workers.

Further, at **20 CFR §656.17(e)(1)(ii)(I), the regulations provide:**

(I) Local and ethnic newspapers. The use of local and ethnic newspapers can be documented by providing a copy of the page in the newspaper that contains the employer's advertisement.

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