

## Immigration News and Updates

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January 5, 2005

### Travel Abroad

Under U.S. law, U.S. citizens are required to travel to and from the U.S. with a **valid U.S. passport** - even if they also have a passport from another country. Airlines are actively enforcing this law concerning U.S. passport requirements. If you are a U.S. citizen and do not possess a valid (unexpired) U.S. passport, the airlines will not allow you to board a flight to the United States - even if you possess a valid passport from another country. To avoid disruption of your travel plans, please make sure your U.S. passport is up to date!

### New Labor Certification Application Process: PERM

On December 29, 2004 the regulations for the the Program Electronic Review Management ("PERM") were finally published. This new labor certification system will go into effect on March 27, 2005. This means that we will be able to file Labor Certification Applications under PERM on March 28, 2005.

PERM will allow on-line filing of Labor Certification Applications , with possible adjudication within 60 - 90 days. Similar to the Reduction in Recruitment (RIR) program, PERM requires employers to recruit in advance of filing the application. The PERM regulations require employers to conduct mandatory and alternative recruitment steps. Employers of professionals are required to place a job order with the State Workforce Agency, run two (2) newspaper advertisements in Sunday papers and conduct three (3) additional types of recruitment from a supplemental list of recruiting methods. Evidence of such recruitment must be kept on file in case of a possible audit or request by a Dept. of Labor Certifying Officer. The Dept. of Labor does not require submission of the evidence with the initial application.

The new PERM rules also permit employers to require a foreign language for the position as long as the employer can demonstrate that the language was not merely for the convenience of the employer or its customers, but is required based upon the nature of the occupation or the need to communicate with a large majority of the employer's customers or contractors.

The Department of Labor allows an employer to withdraw a previously filed application and re-file under PERM. The Dept. of Labor has informed us that their aim is to maintain the priority date of the previously filed application , in non-RIR cases where no recruitment has occurred. No regulations regarding conversion of cases exist. In the case of Reduction in Recruitment ( RIR ) filings, the previously filed RIR application can be withdrawn and a new PERM case can be filed but priority dates cannot be maintained. This means that the filing of a new application under PERM will result in a new priority date for those cases.

As you may know, the American Competitiveness in the 21st Century Act (AC-21) allows an H-1B nonimmigrant to extend her /his status beyond the six (6) year-limitation if a labor certification was filed 365 days prior to entering the

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sixth year of her/his H-1B nonimmigrant status. Foreign nationals whose RIR applications are filed 365 days before they enter their 6th year of H-1B status are thus permitted to extend H-1B status in one year increments until there is a final adjudication on their Green Card. PERM has not provided regulations or guidance regarding the effect of a withdrawal and refiling under PERM for AC-21 7th year extension cases. Therefore, we would advise against withdrawing any RIR applications that may establish a priority date to be used for extending H-1B status for individuals past the maximum six year period. In those cases, we would advise filing an entirely new labor certification application under PERM -- without withdrawing the previously filed application. To do so would require a new non-identical open position that the individual would be qualified to fill. A new filing would require the employer's assistance with recruitment under the specific provisions of the PERM regulations.

### **Processing for Pending Labor Certification and Processing Times**

As you may know, the reengineering of the Labor Certification and PERM system have changed the way state workforce agencies process Labor Certification Applications. Most state workforce agencies have already received instructions and are in the process of forwarding all Labor Certification Applications (standard and RIR) to two national processing centers (in Atlanta and Chicago). The state workforce agencies will no longer accept Labor Certification Applications but will forward all applications directly to the national processing centers. As of January 1, 2005, state workforce agencies will only forward cases to one of the designated processing centers, provide prevailing wage determinations, and process H-2A and H-2B applications. We will not obtain notification from the U.S. Department of Labor regarding the actual location of pending applications until later this month, and updated processing times are expected sometime in mid-March.

National Processing Centers will process applications on the basis of "first-in, first-out", regardless of the location where a case was originally filed. The Dept. of Labor believes this is a fair and equitable approach to all applicants, and will to the extent possible transfer backlogged cases to two temporary backlog reduction processing centers (in Philadelphia and Dallas) where the oldest cases will be processed first. These backlog reduction centers are scheduled to process all backlogged cases within the next two years. Then, these centers will be closed down, as the Dept. of Labor foresees all other cases will be processed by one of the two national processing centers.

As a result, employers are faced with two options:

Employers may submit a standard Labor Certification Application with state workforce agencies, and then wait until it is forwarded to one of the national processing centers.

Or, employers can wait until March 28 and file the application electronically under PERM. Employers must keep in mind that PERM is more streamlined than the current application process and eliminated the 5% prevailing wage differential. PERM regulations follow the December 18, 2004 Omnibus Appropriations Act for FY 2005 (H.R. 4818), which requires employers to pay the prevailing wage (100%) for all H-1B applications and all Labor Certification Applications. As a result, it may be more difficult to obtain certification of PERM applications in some cases.

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Remember to contact your Congressional representative to inform how these changes and new regulations are affecting your business.

For more information about this, or other U.S. immigration issues, please contact our Miller Canfield Immigration Practice. This message is for general information only and should not be used as a basis for specific action without obtaining further legal advice.