

Notes from DOL Focus Group

On 3/11/05, the Department of Labor conducted a focus group to review the form and filing process for the PERM labor certification program, which takes effect 3/28/05. Representatives of AILA's Labor Department Liaison, PERM Implementation and Business Immigration Committees participated. While much of the program was devoted to getting user feedback on the process, some information was also conveyed. Below is a summary of some of the key points that emerged.

Miscellaneous Questions

- For a job order to be valid, you must have gone through the SWA. A direct posting to America's Job Bank is not sufficient, but if you went through the SWA's on-line job order placement system (which may, in turn, have put the job onto America's Job Bank), that should meet the regulatory requirement.
- DOL hopes to complete the transfers of the existing cases to the Backlog Reduction Centers (BRCs) by the end of the fiscal year (9/30/05). Its goal to complete processing of the backlog is 24 to 30 months.
- DOL will look into what to do about SWAs that are not issuing receipts for filings under the current system.
- The certified labor certification will come to the attorney/agent if there is one, with a cc to the employer.
- To convert a previously-filed labor certification application to PERM under the re-filing provisions, the two applications must be "identical". Yet, due to variations from region to region and state to state, some contents of previously-filed applications cannot be transferred to the new ETA Form 9089 in identical form. DOL is looking at this problem. But, in the meantime, one possible strategy is to amend the previously-filed application in response to the 45-day letter from the BRC.

Registration

- A major difference between the LCA system and the PERM electronic filing system is that PERM *requires* registration (registration is optional under LCA). In many ways, the PERM system is much more comparable to the H-2A system than the H-1B system.
- *Only* the employer can register—*not* the attorney. Once the employer is registered, it can set up sub-accounts for the attorney(s) handling its immigration

work, but the employer is considered responsible for the labor certification. One corporation can have multiple registrations.

- Each attorney will need to have a sub-account in his or her own name—no law firm sub-accounts (although there is a space to name the firm). The system will not provide the ability for attorneys to share documents with one another.
- The employer will submit the registration information, which will be verified and then the PIN number emailed back. If there is a verification problem, DOL will come back with questions.
- The employer cannot submit applications online (or set up sub-accounts for attorneys) until the PIN number is issued.
- There also is a verification process for applicants that are individuals rather than corporations (i.e., for household employee labor certifications).
- DOL views this as a paradigm shift to make the employer more pro-active in the labor certification process and thus more accountable. Employers will be required to attest to certain terms and conditions in order to register. (DOL indicated that it will provide AILA with a copy of the terms and conditions so that attorneys can counsel their clients about them.)

The Electronic Process vs. The Mail-in Process

- Applications filed by mail will be re-input into the same system as the electronically filed applications. Thus, all the rules and limitations of the electronic system will apply to mailed-in applications as well.
- Applications filed by mail that are incorrectly completed will be rejected, and not treated as actually filed. On the electronic system, the system will advise you when you've made an error that makes the application non-submittable.
- Mailed-in applications must be signed first. Electronically filed applications are signed when the certified labor certification is returned. Return is by hard copy.
- The date of filing for electronically filed is when you successfully press the Submit button. The date of filing for mail-in is when it is stamped in.
- You will be able to track the progress of your electronically filed application online.
- On electronically filed applications, there will be a confirmation screen that should be useable as a receipt. (It appeared that the screen did not include the beneficiary's name. DOL is checking into fixing this so that the beneficiary's name appears.)

- The confirmation screen will not note whether this is a re-filing of an earlier filed non-PERM application, because there is an approval process to convert the old application to a PERM application under the re-filing provisions.
- To help guard against fraud, DOL will be able to trace the electronic path of e-filed applications.
- There will be no ability to further annotate entries on the electronic form. As the mail-in form will be input as an electronic form, anything that would cause the form to be rejected in electronic filing will also cause rejection in the mail-in process.
- You will be able to save drafts and print out drafts and final documents.
- You can paste in from word processing programs.
- There are provisions for the situation where the employer has more than one employee with the same name.
- Fields that are required will be so noted on the form.

Individual Questions on the Form

- In response to a question about how to handle question I-26-A (whether laid off U.S. workers were notified and considered for the job opportunity) where laid off workers were not contacted because they were known not to be qualified, DOL indicated that the provisions of the regulations can be read into the questions where those provisions are not stated explicitly.
- Question F-4 (skill level) can be left blank if a non-OES wage is used. If the OES-based prevailing wage determination was issued other than under the March 8, 2005 guidance, that prevailing wage determination cannot be used.
- Alternative fields of study for Question 4-B can be provided under question 7-A. DOL is looking at whether multiple fields of study can be listed in 7-A.
- DOL is checking on how to handle the regulatory provision that says that the application must state that the employer will consider any candidate with suitable education, experience and training, as the form has no place for this.
- Question C-5 (re number of employees) is being changed to drop the “in area of intended employment”. DOL will get back to us as to whether the change means number of employees in the U.S. or number of employees worldwide.

- Part F (prevailing wage information) of the form will note that the section is to be completed based on information provided by the SWA.
- Question A-1-B (asking for the case number on re-filed applications) is being changed to ask for the state where the application was filed if there is no case number.
- The signature lines are being changed to emphasize that signature is under penalty of perjury.