



Business Immigration

Late Spring 2005 An Update

PERM gone wrong!

The DOL's new PERM program – What's Wrong With The System?

Our Office has been deluged by calls from candidates who want to know if we have tested the PERM [Program Electronic Review Management] based Labor Certification process. Have you received any approvals? Can you file under EB2? Have any of your cases been denied? What is the prevailing wage for a Programmer Analyst in New Jersey? Can I still file under RIR? ... However, one unanswered question seems to linger after most routine questions have been answered – What's wrong with PERM? Why has there been a spate of denials despite the Department of Labor touting the program as being a panacea?

The Department of Labor (DOL) amended the labor certification process and implemented a new system (PERM) which became effective March 28, 2005. The new PERM system is similar to the old process in that it continues to require that an employer document that there are no U.S. workers, able, willing, qualified and available for a position. However, under the new system, it is mandated that all recruitment efforts comply with certain pre filing requirements namely, 2 consecutive Sunday advertisements and an internal Job Posting for all positions. Moreover and more importantly, the Employer must place a Job order with the local State Workforce Agencies (SWAs), for a period of 30 days. The DOL instituted this new step to allow the Department to corroborate the entire recruitment process. In addition to this, Employers are now required to document 3 addi-

tional forms of recruitment for all professional positions.

PERM utilizes two National Processing Centers intended to streamline the labor certification program. The new system also allows applications to be filed electronically, although mailed applications will still be accepted and undergo the same considerations. Obviously, electronic filing gives employers a variety of benefits. Once an employer has registered online, they can save common information (e.g. employer name, address, etc.) to be automatically entered into applications, create sub-accounts for attorneys or agents, save incomplete portions of an application for later retrieval, and ultimately submit the application to the National Service Center. Given this, one would have hoped that the new electronic registration process would be automatic. No such luck. The process of registration has had some employers fuming. Some called to report that the system had sought additional information to identify their company and that the system had reportedly rejected their initial attempts to set up an account.

Interestingly, our office started to get several emails on or around March 28, 2005 – with no nametag, or other identifying information except that an Employer had set up a sub account for us. We then immediately contacted the Department to let them know that without such identifying information it would be impossible for us to iden-

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tify our clients from one another. The Department agreed to accept our request as a suggestion. Subsequent sub-account emails have properly identified the client and allowed us to keep track of the ones that have registered for PERM processing. It goes without saying that it takes time and effort to properly implement a new system, especially when that system is electronic. The PERM system has already created a great deal of uncertainty due to both unforeseen kinks and some errors in the logic used to design such systems.

DENIALS

There is no telling how many applications have been denied by the system, but the initial euphoria of quick approvals in 45 to 60 days is gone. Horror stories of applications being rejected, as soon as they are filed, have left nonimmigrants and their employers feeling numb and helpless. In several cases, the system has arbitrarily denied cases without providing any reasonable justification. It is our understanding that the Department of Labor (DOL) is aware that some of the denials were issued in error, and is working to correct the problem. The DOL has since re-programmed the system and is now running the previously denied applications through the system again. The erroneous denials will be moved for analyst review, while applications properly denied will be issued new denial letters with explanations and a new thirty (30) day period for appeal. The DOL estimates the new notices will go out in early July.

Some of the denials have not been issued in error but are the result of the system's input requirements. For instance, applications that use a P.O. Box address for the employer's address will be denied. The DOL requires a physical address in an effort to reduce fraud. Denials have also resulted from applications filed by Attorneys who created the account on behalf of their client. The DOL tracks IP Addresses and the employer must first register and then create a sub-account for an attorney to avoid problems. Additionally, the DOL suggests the following when registering:

- Use the company's principal address
- Avoid d/b/a names
- Use the E.I.N. that the company used when it filed its Articles of Incorporation

REFILE OR NOT?

Applications filed under the earlier RIR/Regular Labor Certification process will not automatically convert to the PERM system. However, they will continue to be processed according to the regulations in effect at the time of the filing at the Backlog Processing Centers in Dallas or Philadelphia. An application submitted prior to PERM can be withdrawn and re-filed under the new system without losing the initial priority date. However, the new application must satisfy PERM's regulations and if the re-filed application is not identical, the priority date could be jeopardized. We believe, the decision to re file is best made on a case by case basis. For instance, loss of the priority date could impact an applicant's ability to request a 7th year extension on their H-1B and should be considered when making a recommendation.

CONCLUSION

The DOL has not given the exact number of approvals issued, but has indicated the first approvals were sent in late May. Clearly, the uncertainty behind obtaining approvals and the unpredictability associated with the system has stifled initial processing of applications. Kidambi & Associates, P.C. has adopted a wait-and-see policy with respect to the actual filing of PERM applications. We are, however, in the process of filing several applications, but our clients, fortunately, have not been the victims of any early denials. Under the circumstances, we believe in working closely with our clients to develop a PERM policy that will lead to success. In the meantime, we are maintaining a close watch on the program, to identify potential pitfalls and problem areas, and recommend possible solutions. Please contact our office at info@kidambi.com for any immediate questions/concerns regarding this process.

Information for this Article was researched and compiled by Mr. David Carson and Ms. Maier Negugogor, both second year students at the Quinnipiac University School of Law, and legal interns at Kidambi & Associates, P.C., Summer 2005.

