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October 3, 2018

## **LETTER OUTLINING BASICS OF EMPLOYMENT-BASED IMMIGRATION**

### **Re: Permanent Residence Applications Based on Labor Certification**

Dear Sir or Madam:

We write this letter to provide you with some information regarding employment-based immigration in the United States and the procedure for employers to sponsor foreign nationals for lawful permanent residence.

In most instances, a foreign national seeking to obtain U.S. lawful permanent residence through employment must be the beneficiary of an approved application for permanent employment certification. This application requires the prospective employer to test the labor market by conducting a pattern of recruitment to determine whether there are any qualified and available U.S. workers who are immediately available to accept the offered position at the prevailing (or average) wage for the area of intended employment.

On December 27, 2004, the procedures for employers to sponsor foreign nationals for employment-based immigration changed as the U.S. Department of Labor (DOL) published the final regulation for the Program Electronic Review Management (PERM) system to streamline the labor certification application. This procedure, which took effect on March 28, 2005, includes the following process for filing a labor certification application.

The U.S. employer is currently required to obtain a prevailing wage determination (PWD) from the National Prevailing Wage Center (NPWC). NPWC will make PWD determinations based upon the job offer, job duties, requirements for the position, and the geographic area in which the job is located.

After obtaining a PWD, the employer is required to post a printed, internal job notice for at least 10 consecutive business days. This notice must be posted between 180 and 30 days before filing

the application. In addition to the job posting, the employer must use its standard in-house electronic and printed methods for advertising the position.

Other recruitment efforts that must be made before filing the labor certification application include placing a job order with the State Workforce Agency (SWA) and placing two Sunday newspaper advertisements. The SWA job order must be placed for a period of 30 days. The Sunday newspaper advertisements must be published in a newspaper of general circulation in the area of intended employment. The advertisements must be printed within 180 days, but no less than 30 days before filing.

Additional recruitment requirements apply to employers seeking to hire someone in a professional occupation, which is generally one that has been listed by the DOL. If the occupation qualifies as professional, the employer must undertake three recruitment steps in addition to the steps outlined above. The three steps must be chosen from the list provided in the regulations. The following venues are permissible for additional recruitment for professional positions: (a) job fairs; (b) the employer's website; (c) job search website other than the employer's; (d) on-campus recruiting; (e) professional or trade organizations (*i.e.*, placing an advertisement in their newsletter or journal); (f) private employment firms that conduct recruitment; (g) an employee referral program that provides incentives; (h) campus placement offices; (i) advertisement in local and ethnic newspapers; (j) radio and television advertisements; and (k) webpage advertisements that are posted in conjunction with one of the mandatory print advertisements. All three additional steps must take place no more than six months before filing the application; however, only one of the three steps can take place within 30 days of filing.

In order to prepare the advertisements, the employer must take care to draft an accurate description of the job as well as the skills, education, and experience required in order to satisfactorily perform the duties. The advertised requirements for the position must meet two criteria. First, the skills, education, and/or experience must be the actual skills, education, and/or experience required to satisfactorily perform the duties of the position. That is, we cannot require that applicants possess certain skills or experience simply because the beneficiary of the PERM application possesses those skills or experience.

DOL has established guidelines for different occupational categories and these guidelines determine the amount of education and experience that can be required for a given occupation. Requirements that exceed the range established by DOL are considered "unduly restrictive," meaning that the sole function of these requirements is to reject U.S. workers who are otherwise qualified for the position. An employer, however, may require experience and education in excess of the range established by DOL by showing "business necessity," which means that the requirements bear a reasonable relationship to the occupation in the context of the employer's business, and are essential to perform, in a reasonable manner, the job duties as described by the employer.

Second, the beneficiary of the PERM application must have possessed the skills, education, and/or experience being required prior to joining the employer. The employer, however, can require experience or skills obtained on the job if the employer can show that the position in which the skills and experience were acquired is sufficiently different from the position being

applied for in the PERM application. A position is “sufficiently different” if the job duties are at least 50 percent different. An employer may also be able to justify “on the job experience” if it can be demonstrated that it is infeasible to train a U.S. worker.

After the advertisements and job orders are placed, the employer will receive résumés from interested applicants. The employer must review those resumes to determine if there are any qualified and available U.S. workers who are willing to accept employment at the prevailing wage. Upon completion of this resume review and evaluation, and before submitting the labor certification application, the employer must prepare a recruitment report for its internal files. The report must document the recruitment steps undertaken and the results achieved. It must include the number of individuals hired and if applicable, the number of U.S. workers rejected, summarizing the lawful job-related reasons for their rejections. It is lawful to reject a U.S. worker for the position if he or she does not meet the employer’s stated minimum requirements. It is not lawful to reject a U.S. worker if he or she can obtain the required skill(s) after a reasonable period of on-the-job training. The employer must sign the recruitment report and retain all supporting documentation, including evidence of the advertisements and the resumes received in response to the recruitment effort, for a five-year period starting from the date of filing the labor certification application.

If the employer determines that there are no qualified and available U.S. workers for the offered position, then the recruitment has been completed and the Labor Certification Application, Form ETA-9089, can be submitted electronically. If the application is not selected for an audit, DOL will certify (approve) it after more than six months from the date of filing. If the application is selected for audit, the application is likely to be approved after over one and a half years from the submission of the audit response. These are approximate time frames based on recent trends, and they may vary from year to year. A certified application must be immediately signed by the employer who will then submit the certified and signed application along with the immigrant petition to U.S. Citizenship and Immigration Services (USCIS) to sponsor the foreign national for an immigrant visa.

If an application is selected for an audit, the employer will receive an audit letter from the certifying officer (CO) of DOL asking the employer to provide certain documentation and specifying a reply date of thirty days from the date of the audit letter. If the reply date is not met or if the CO does not provide the employer with an extension, then the application will be denied. An audit can be triggered randomly or based on information provided in the employer’s PERM application. Please also note that a PERM application may be selected for Supervised Recruitment. This would require the employer to again conduct recruitment under the close supervision of the DOL. All resumes from U.S. worker applicants will be forwarded to the DOL, which will then refer them to the employer.

Keep in mind that if the PERM application is certified and the employer wishes to proceed to the next step, filing the employment-based immigrant petition (Form I-140) with USCIS, the beneficiary will be required to provide documentation to establish that he or she met the advertised requirements for the position on the date that the PERM application was filed. Accordingly, the beneficiary of the PERM application will be required to provide copies of college degree(s) with transcripts and employment confirmation letters that discuss the beneficiary’s role within the company and the skills used in carrying out specific duties. It is important to note that the Form I-140 petition must be filed within 180 days from the date of the

PERM application certification. There are no exceptions to this 180 day deadline, unless a new I-140 petition is being filed after the previous I-140 was filed timely within 180 days. This may happen when there is a new successor in interest entity after a corporate reorganization or where a new petition is being filed in a new visa category.

To file the immigrant visa petition, the employer must also establish that it has the ability to pay the beneficiary of the PERM application at least the prevailing wage as determined by the formal PWD requestor the offered wage, which may be higher than the prevailing wage. To meet this threshold requirement, the employer must provide copies of its corporate tax returns or an audited financial statement for the year when the labor certification was filed and subsequent years too. If the employer has more than 100 employees, USCIS may accept a letter from the employer certifying that it has the ability to pay the proffered wage.

The beneficiary of the approved PERM application is permitted to file his or her applications for adjustment of status (the application that grants permanent residence known as Form I-485), advance parole (travel document) and employment authorization concurrently with the employer's immigrant petition. The beneficiary's dependent family members (spouse and children) may also file concurrent applications for adjustment of status, advance parole and employment authorization. In order to file the applications for adjustment of status, advance parole and employment authorization, each applicant will be required to submit: (1) a certified copy of his or her long-form birth certificate that lists his or her full name and the full names of both parents or provide substitute documents as prescribed in the *Foreign Affairs Manual* of the Department of State; (2) original medical examination report completed by an authorized civil surgeon; (3) copies of the biographic and visa pages of his or her valid passport; (4) copy of the most recent Form I-94, Arrival Departure Card; (5) copy of all marriage and divorce decrees; (6) copies of the federal income tax returns for the principal applicant, with Form W-2, for the preceding three years; and (7) six passport-style color photographs of each applicant. In lieu of adjustment of status, the beneficiaries can also opt to process their green cards at the U.S. consulate in their home country. Some beneficiaries may not be eligible for adjustment of status if they have failed to maintain status, especially if they have violated status for more than 180 days since their last admission to the United States.

Do note, though, that in the event of a backlog in the employment-based priority dates, the beneficiary and family members will not be able to file concurrent I-485 applications. They will need to wait until their priority date becomes current before they can file these applications. Similarly, they will also not be able to proceed overseas for consular processing of their green cards until their priority date becomes current. Please feel free to contact me for additional information concerning the importance of priority dates and their impact on the "green card" process.

I hope you find the above information helpful in proceeding with the PERM application. If you have any questions, please do not hesitate to contact me.

Thank you for your kind consideration of this matter.

Very truly yours,  
Gadi Zohar, Esq.