LABOR CERTIFICATION

INTRODUCTION TO LABOR CERTIFICATION

A labor certification from the United States Department of Labor is a prerequisite to most employer-sponsored immigrant petitions. In 1965, Congress introduced the labor certification requirement into the immigration law in an attempt to protect U.S. citizens and permanent residents from competition from foreign workers in the U.S. labor market. Under the Immigration and Nationality Act, with certain exceptions, any foreign individual entering the U.S. to obtain employment on a permanent basis is inadmissible unless the Secretary of Labor has certified that there are not sufficient U.S. workers who are "able, willing, qualified and available" for the position and that the employment of this individual "will not adversely affect the wages and working conditions" of similarly employed U.S. workers.[i]

From 1978 to 2005, the process of applying for a labor certification was governed by detailed regulations and a legacy of inconsistent administrative law decisions and conflicting regional practices. The process was extensively criticized over the years as cumbersome for employers and applicants, ineffective at protecting the jobs of U.S. citizens and permanent residents, inefficient, and the cause of extremely long adjudication backlogs.

In response to many of these criticisms, the U.S. Department of Labor ("DOL") overhauled the labor certification application process. It published a new set of regulations governing the application process, which it called Program Electronic Review Management (commonly known as "PERM").[ii] The PERM regulations, which became effective on March 28, 2005, preserve the traditional purpose and principles of the labor certification process, but attempt to increase the efficiency and effectiveness of the process by simplifying and shortening the adjudication procedure while raising the standard for approval. In addition, the PERM regulations seek to clarify some previously ambiguous areas within labor certification practice.

This Article will summarize the key steps and issues in the PERM labor certification process.

DESCRIBING THE JOB AND DEFINING THE MINIMUM REQUIREMENTS

The first step in preparing for an application for a labor certification is obtaining a clear description of the job and its duties from the employer. At this stage, it is also important for the employer to identify the minimum requirements that an employee would need to perform the job. These minimum requirements must be listed on the application form and also guide the employer in the recruitment process. The minimum requirements may include education, training, experience and any special skills. However, these requirements may not include items that are not essential prerequisites for the position. The requirements also may not include skills that the employer can teach a new employee within a reasonable period of time.[iii]

In preparing to apply for a labor certification, the employer or its attorney must review the O*NET (Occupational Information Network), the DOL's directory of occupations, to determine which listed occupation most closely resembles the position offered by the employer. Each occupational category in O*NET describes the occupation and lists the relevant tasks, knowledge, skills, abilities, work activities, work contacts, work interests, and work values. O*NET also assigns a "job zone" to each occupation. The job zone, which is derived from DOL's Specific Vocational Preparation ("SVP") level calculation, defines the amount of preparation normally needed to perform a job in the occupation in a normal matter and at an average level of skill.

In addition, O*NET delineates the educational level normally required to perform the job.

In the event that the employer's requirements for the position exceed or differ from those articulated by O*NET as normal for the occupation, the employer must be prepared to justify its requirements by demonstrating the "business necessity" for its requirements. Thus, for example, education or experience requirements that are greater than those listed in O*NET require a business necessary justification.[iv] Another classic example is an employer that requires candidates for the position to speak a foreign language. Unless knowledge of the foreign language is clearly integral to the position (as in the case of a translator), the employer must be prepared to explain in detail, and document, why knowledge of that foreign language is absolutely necessary to perform the duties of that position.

In addition to its standard minimum requirements for a position, an employer may also articulate alternative acceptable requirements for a position.[v] However, if the employee who is the subject of the application qualifies only by virtue of the alternate requirements, and is already employed by the employer, the application must state that any suitable combination of education, training, or experience is acceptable.[vi]

An important restriction on the employer's minimum requirements is that the employee who is the subject of the application, must have met those requirements before becoming an employee of the employer.[vii] Thus, for example, an employer may not require applicants to have three years of software development experience if the employee on whose behalf the application is filed did not herself have three years of software development experience before joining the employer. The DOL's reasoning for this restriction is that this employee was essentially trained by the employer, and the employer could similarly have trained a U.S. citizen or permanent resident with no software development experience to play this role. Thus, the "actual" minimum requirements for the position do not include software development experience.

The PERM regulations allow a few exceptions to this restriction on experience earned "on the job." An important exception to this rule is where the employee gained the experience at a company with a different Federal Employer Identification Number.[viii]

Exceptions are also made where the employee gained the on-the-job experience in a position that is not "substantially comparable" to the position offered in the application. A job is not "substantially comparable" if it requires performance of different job duties at least 50% of the time.[ix] A valid, but rarely used, additional exception to the restriction to experience gained "on the job," is where the employer can clearly establish that it is no longer feasible to train a U.S. worker to perform the duties of the position.[x]

In addition to the restriction on experience gained "on the job," the DOL will also not allow an employer to consider certain education or training as part of the minimum requirements if it was obtained by the employee at the employer's expense. An exception is made where the employer offered similar training to U.S. worker applicants.[xi]

PREVAILING WAGE DETERMINATION

In order to ensure that the offered wage for a position meets or exceeds the prevailing wage for the position in the specific geographic location, the DOL must "determine" the prevailing wage for the position in advance of an application for a labor certification. The employer, or its attorney, requests this determination through a formal "Application for Prevailing Wage Determination" (ETA Form 9141).[xii] Once the DOL receives an application for a prevailing wage determination, it normally turns to its standard wage survey, the Occupational Employment Statistics Survey ("OES") — a survey of average wages for occupations that correlate with those listed in the O*NET — to determine the appropriate wage for the position. Typically, in advance of submitting an application for a prevailing wage determination, the employer will research the offered position in the OES (which is accessible on the Internet at www.flcdatacenter.com/OesWizardStart.aspx) to ensure that the wage that it is offering equals or exceeds the wages which the DOL is likely to determine as appropriate. The survey lists prevailing wages for each of four levels within each position. The DOL utilizes established criteria, which focus on the education and experience required for the position, special skills required, and supervisory duties, to determine the appropriate level. Part of this process also includes comparing the employer's requirements for the position against those listed in O*NET. When appropriate, the DOL will also look to the Davis Bacon Act wage databank, which covers jobs in federal and state construction projects, the McNamara-O'Hara Service Contract Act, which applies to employers of contractors and subcontractors of service contracts with the federal government, and a collective bargaining agreement, which establishes rates of compensation for unionized workers.

In situations where the employer feels that the standard government surveys are not appropriate for the position, the PERM regulations allow the employer to present alternative wage surveys to the DOL as part of the application for a prevailing wage determination. The PERM regulations delineate a number of guidelines to determine whether alternative wage surveys are acceptable to the U.S. Department of Labor.[xiii]

The DOL will issue a prevailing wage determination with a specific period validity, at least 90 days but not more than one year from the date of determination. The regulations require that either the beginning of the recruitment process or the filing of the application for labor certification occur during the validity period of the prevailing wage determination.[xiv]

If the employer believes that the prevailing wage determination is in error, the employer may challenge the determination with a Request for Redetermination or a Request for Review. The employer may also appeal the prevailing wage determination to the Board of Alien Labor Certification Appeals ("BALCA").[xv]

RECRUITMENT FOR THE POSITION

Once the job and its requirements have been defined, the employer can begin recruiting for the position. (Some practitioners prefer to complete the full PERM application form in draft before beginning the recruitment; the order here is a matter of strategy and style.) The purpose of the recruitment is to test the labor market to determine whether there are any "able, willing, qualified, and available" U.S. workers for the job. In order to obtain a labor certification, the employer must demonstrate to the DOL that it has conducted the prescribed recruitment and that no U.S. workers applied for the position, other than those who were rejected for "lawful jobrelated reasons." The required recruitments steps are detailed below:

State Job Order

The employer must place a job order with the State Workforce Agency ("SWA") in the state in which the position will be located.[xvi] The job order must run for 30 consecutive days in the period between 30 and 180 days before the application is filed. Each state has its own form and procedure for placing the job order.[xvii]

Newspaper Advertisements

The employer must advertise the position on two Sundays in the newspaper of general circulation in the area of intended employment.[xviii] [xix] As with the job order, the advertisements must appear in the period between 30 and 180 days before the application for a labor certification is filed.

At minimum, the advertisements must:

- name the employer;
- direct applicants to respond to the employer;
- provide a description of the vacancy specific enough to apprise U.S. workers of a job opportunity;
- indicate the geographical area of employment, including any travel requirements[xx]; and
- not contain wages or terms and conditions of employment that are less favorable than those offered to the employee who is the subject of application.[xxi]

The advertisement does not need to specify a salary being offered for the position, but if a salary is listed, it must meet or exceed the actual wage being offered to the employee (which, in turn, must meet or exceed the prevailing wage rate.) The advertisement may include requirements or duties, but it must not contain any requirements or duties which exceed the job requirements listed on the application form, ETA Form 9089.[xxii] [xxiii]

For positions which require an advanced degree and experience, where a professional journal normally would be used to advertise the job opportunity, the employer may place one of the Sunday advertisements in an appropriate professional journal, rather than a newspaper.[xxiv]

Additional Recruitment Steps for Professional Positions

For "professional" positions – generally, positions that require at least a Bachelor's degree – the employer must select three additional recruitment steps out of the ten options offered by the PERM regulations.[xxv] In a special appendix, the PERM regulations list the professions considered by the Department of Labor to be professional.[xxvi]

Following is a list of 10 recruitment venues provided by the Department of Labor to satisfy the additional recruitment requirements:[xxvii]

- job fairs;
- advertising on the employer's website;[xxviii]

- advertising on job search websites, this includes advertising in web postings generated in conjunction with the newspaper advertisements required by PERM;
- on-campus recruiting;
- advertising through trade or professional organizations[xxix];
- private employment firms[xxx];
- employee referral programs with incentives[xxxi];
- advertising through campus placement offices; local and ethnic newspapers; and
- radio and television advertisements.

Two of the three additional forms of recruitment must take place in the period between 30 and 180 days prior to filing the application. The third form may be conducted in the 30 day period prior to filing the application, but may not be conducted more than 180 days prior to filing the application.

Notice To Employees

In addition to advertising the position to the general public, PERM requires that the employer give notice of the filing of the application to its employees.[xxxii] If a position is subject to a collective bargaining agreement, notice must be given to the appropriate bargaining representative. If the position does not fall under a collective bargaining agreement, notice must be given by posting a printed notice at the location of employment for at least 10 consecutive business days.[xxxiii] The regulations suggest appropriate locations for posting the notice, including locations in the immediate vicinity of wage and hour notices or occupational safety and health (OSHA) notices.

In addition to the printed notice, the employer must publish the notice in all printed or electronic in-house media, in accordance with the employer's normal procedures for recruitment of similar positions. The duration of the notice through in-house media is either ten consecutive business days or in accordance with the employer's normal procedures for recruitment of similar positions, whichever is longer.[xxxiv]

The notice must contain a salary, which meets or exceeds both the prevailing wage and the actual wage being offered to the employee,[xxxv] and all of the items required of advertisements in the newspaper. The notice must also state that notice is being

provided as the result of the filing of an application for a labor certification for the job opportunity and state that any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor. The notice must also provide the address of the Certifying Officer. As with most of the required recruitment process, notice must be provided between 30 and 180 days before filing the application.

Consideration of Applicants

The employer must consider each US worker who applies for the position and determine whether s/he is able, willing, qualified and available for the position.[xxxvi] Under the regulations, neither the attorney (or agent) nor the employee on whose behalf the application is filed may participate in interviewing or considering US workers for the job.[xxxvii] The DOL interprets the restriction on attorneys to include any preliminary screening of applications before the employer does so, unless the attorney is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed. However, the DOL does respect the right of employers to consult with their attorneys(s) or agent(s) during the process to ensure that they are complying with all applicable legal requirements of the process.[xxxviii]

Layoffs

If, within six months prior to the filing an application for a labor certification, the employer had a layoff in the area of intended employment and in the occupation that is the subject of the application (or a related occupation), the employer must document that it notified and considered all potentially qualified laid off U.S. workers for the position and the results of the notification and consideration.[xxxix]

Documentation of the Recruitment The employer must prepare a recruitment report that describes the steps taken in the recruitment and the results of the recruitment, including the number of hires and the number of U.S. workers rejected, categorized by the lawful job-related reasons for the rejection.[xl] For a period of five years from the date of filing the application for a labor certification, the employer must retain the recruitment report and the applicants' resumes, together with documentation of the Notice to employees, the public recruitment steps, and the state job order.[xli] This documentation should include copies of the actual advertisements and clear evidence that demonstrates the beginning and ending dates of each form of recruitment.[xlii]

OPTIONAL SPECIAL RECRUITMENT PROCEDURES FOR COLLEGE AND UNIVERSITY TEACHERS

Employers that are filing applications for labor certifications for college and university teachers may conduct the standard recruitment process, as described earlier. Alternatively, these employers may document that the college or university teacher who is the subjection of the application was selected for the job opportunity in a competitive recruitment and selection process through which he or she was found to be more qualified than any of the United States workers who applied for the job.[xliii]

The employer that utilizes this optional alternative must demonstrate that it engaged in a competitive recruitment and selection process by preparing the following documentation:

- a statement signed by an official with hiring authority outlining the recruitment procedures undertaken, including the total number of applicants for the job and a specific job-related reasons why the individual in question is more qualified than each U.S. worker that applied for the job;
- a final report of the faculty, student or administrative body making the recommendation or selection of the alien;
- a copy of at least one advertisement for the job opportunity in a national professional journal, including the name and the dates of publication. The advertisement must include the job title, duties, and requirements of the position;
- Evidence of all other recruitment sources utilized in the search; and
- a written statement attesting to the degree of the individual's educational and professional qualifications and academic achievements.

Applications filed under this alternative must be filed within 18 months after a selection is made through a competitive recruitment and selection process.

FILING THE APPLICATION

If, after completing the recruitment, the employer can document that no able, willing, qualified, and available U.S. workers applied for the position, the PERM application may be filed. The application form, ETA Form 9089, is typically completed and filed online by the employer or its attorney. In order to access the online system, the employer must register itself as a user at the PERM website, www.plc.doleta.gov. Once the employer registration process is complete, the employer will receive a username, password and PIN number that can be used to access the system and file and monitor applications. The employer can then also assign user rights to

other individuals at the employer or to outside attorneys. Each user of the system obtains his/her own username, password and PIN number.[xliv]

As the form is completed and submitted online and part of the adjudication process is conducted electronically by software, there have been many instances of applications that have been denied due to typographical errors in the data entry or ambiguities in the form itself. The DOL has worked to fine-tune the electronic system, but, nonetheless, has been unable to avoid issuing many automatic denials.

The first decision handed-down by the Board of Alien Labor Certification Appeals on a PERM application addressed this issue of denials based on harmless error. In Matter of HealthAmerica, No. 2006-PER-1 (BALCA Jul. 18, 2006), the Board held that the Certifying Officer improperly denied a request for reconsideration of a PERM application where the employer fulfilled all the PERM requirements, but submitted an application with a typographical error regarding the date of an advertisement. The evidence indisputably demonstrated that the employer ran two Sunday publications as required by the regulations, but the employer failed to provide the correct date of the advertisement on the ETA Form 9089. The Board found that the Certifying Officer's decision to deny the request for reconsideration was "arbitrary and capricious and not supported by any regulatory language, regulatory history or decisional law."[xlv] The Board further held that when adjudicating a Motion for Reconsideration, the CO must consider not only the information on Form ETA 9089 itself, but also the documents contained in the employer's audit file, which support the application even though they are not submitted with the application.

The second of these holdings was later codified in a new DOL regulation, 20 C.F.R. §656.24. However, the continuing application of *HealthAmerica's* first holding is questionable. A 2013 BALCA decision held that the first holding was effectively overruled by 20.C.F.R. §656.11(b), which instituted zero-tolerance for modifications to a submitted application.[xlvi]

The Department of Labor also allows applications to be filed by mail to the Atlanta National Processing Center.[xlvii] However, unlike the electronic system, the National Processing Center will not issue confirmations of receipt for mail-in applications.[xlviii]

Generally, applications filed online are processed more quickly than the applications filed by hand. In addition, the applications filed by hand can contain an even greater margin for error as the data must be manually entered by the DOL personnel into the electronic system, allowing additional opportunities for errors in the data entry.

ADJUDICATIONS AND AUDITS

If an application is approved, the application will be printed and returned to the employer, or its attorney, for signatures of the employer, the individual who is the subject of the application, and the attorney. (Applications filed by mail must be signed before they are filed.[xlix]) That signed application can then serve as the underlying document in the employer's immigrant petition to USCIS on behalf of the individual. However, the approved labor certification is only valid for 180 days.[l]

If the application is denied, the employer is given an opportunity to, within 30 days, request a review of the decision before BALCA or, under limited circumstances, request the Certifying Officer of the processing center to reconsider the decision.[li] In many cases, particularly if the denial results from a DOL error or an easily correctable error on the application form and the recruitment is still within its 180-day validity period, it may be easier and faster to file a new application.

In many instances, before deciding to approve or deny an application, the DOL will choose to "audit" an application.[lii] The DOL can initiate an audit on a random basis or as a result of an issue arising out of the application. In such cases, the DOL will send the employer an "audit letter" identifying certain documentation that must be submitted.

Among other items, the requested documentation will usually include the recruitment documentation that the employer has retained and documentation justifying the "business necessity" of requirements that exceed or differ from that which is "normal" for the occupation.[liii] The Department of Labor will give the employer 30 days to respond with the supporting documentation and any other requested items. Once the requested information is submitted, the Department of Labor may adjudicate the application on the basis of the information it received.

The DOL may also request supplemental documentation or conduct "supervised recruitment," an extensive and exacting process in which the Certifying Officer oversees and directs the contents, location and timing of the recruitment steps.[liv] Generally, DOL requires supervised recruitment when it suspects — due to concerns about the employer's good faith or general knowledge of the industry — that there are more available U.S. workers in the market than the employer's standard PERM recruitment yields. In the supervised recruitment process, resumes are sent to the Certifying Officer before referral to the employer, and the employer must prepare an extensive recruitment report.[lv]

FEES FOR PREPARING THE APPLICATION FOR LABOR CERTIFICATION

Traditionally, attorney fees, advertising fees, and other costs incurred in the preparation of an application for a labor certification could be paid by either the employer, the employee, or a third party. However, under a regulation published in May 2007, with very limited exceptions, all the costs associated with the preparation of an application for a labor certification must be borne by the employer.[lvi] In addition, according to the regulation, evidence that the employer has sought or received an impermissible payment in this regard shall be grounds for an investigation and possibly denial of the application, revocation of the application, or debarment of the employer or its representative from the program.

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The above article was written by Partner Avram Morell, a member of Pryor Cashman's Immigration Group, and is one of the premier attorneys in his field. It was included in the Practising Law Institute's Litigation and Administrative Practice Course Handbook Series in a book titled "Basic Immigration Law 2021: Business, Family, Naturalization and Related Areas" as a reprint after its original inclusion in the "Basic Immigration Law 2020: Business, Family, Naturalization and Related Areas" publication.

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[i] INA §212(a)(5)(A).

[ii] 20 C.F.R. §656.

[iii] 20 C.F.R. §656.17(g)(2)

[iv] It can be difficult to determine the maximum requirements permitted under O*NET, beyond which a "business necessity" justification would be required. While the O*NET job zones are based upon the SVP levels, there are many situations in which the O*NET and SVP level determinations, as interpreted by DOL, are inconsistent. An important area affected by this inconsistency is the determination of 149 14 "normal" requirements for positions classified by O*NET as belonging to job zone 4. A plain reading of O*NET suggests that a job zone 4 position would normally require 2-4 years of experience in the field beyond formal university education. Yet, as of the writing of this article, DOL has taken the position that requirements that go beyond a Bachelor's degree and two years of experience in the field (or a Master's degree with no experience) must have a business necessity justification.

[v] The alternative requirements must be "substantially equivalent to the primary requirements of the job opportunity for which certification is sought." 20 C.F.R. §656.17(h)(f)(i). *See also Matter of Telcordia Technologies Inc.*, 2011-PER-02631 (BALCA Feb. 6, 2013).

[vi] This requirement has its genesis in the Board of Alien Labor Certification Appeals decision in *Matter of Francis Kellogg* 94- INA-465 (BALCA February 2, 1998), and has been codified in the PERM regulations at 20 C.F.R. §656.17(h)(4)(ii). There has been considerable confusion among immigration practitioners regarding the appropriate place on the application form to include this language. Some have suggested Item H.l1, others H.14, and others place it in both locations. At a conference of the American Immigration Lawyers Association in New York City on December 13, 2006, William Carlson, Chief of the U.S. Department of Labor's Division of Foreign Labor Certification, stated that Item H.14 was the correct location. Due to the lack of clear guidance as to where the "*Kellogg* language" should be stated on the application form, the Board of Alien Labor Certification Appeals (BALCA) has held that DOL may not deny an application for omission of the *Kellogg* language. *See Federal Insurance Co.*, 2008-PER-0037 (BALCA February 20, 2009). It is not clear whether DOL has adjusted its adjudication practices in accordance with this decision.

[vii] 20 C.F.R. §656.17(i)(3).

[viii] 20 C.F.R. §656.17(i)(5).

[ix] Prior to PERM, the subject of dissimilar job duties was a very complicated one defined in regulations and in various decisions by BALCA. PERM attempted to simplify the determination of the dissimilarity by reducing it to a simple percentage determination. *See* 20 C.F.R. §656.17(i)(5)(ii).

[x] 20 C.F.R. §656.17(i)(3)(ii). In *Matter of Rooted & Grounded Nursery*, L.L.C., 2010-PER-00253 (BALCA March 11, 2011), BALCA held that the employer relying on the "feasibility" argument must be able to demonstrate not only that it is no longer feasible for the employer to train, but that, in general, it is no longer feasible to train a worker to qualify for the position.

[xi] 20 C.F.R. §656.17(i)(4).

[xii] Until January 2010, prevailing wage determinations were made by the State Workforce Agency ("SWA") of the state in which the position was located. This responsibility was transferred to a centralized unit at the U.S. Department of Labor in Washington, D.C. as of January 1, 2010.

[xiii] 20 C.F.R. §656.40(g). *See* also, "Employment and Training Administration Prevailing Wage Determination Policy Guidance, Nonagricultural Programs", Revised November 2009.

[xiv] 20 C.F.R. §656.40(c). See *Matter of Karl Storz Endoscopy - America*, 201 I-PER00040 (BALCA Dec. 1, 2011), an en banc decision that confirms the plain language of the regulation.

[xv] 20 C.F.R. §656.40(h); §656.41.

[xvi] 20 C.F.R. §656.17(e)(I)(i)(A).

[xvii] There are conflicting BALCA decisions on whether the SWA Job Order is subject to the content requirements of Newspaper advertisements. *See Matter of Chabad Lubavitch Center*, 2011-PER-02614 (BALCA July 29, 2013) and *Matter of IBM Corporation*, 2011-PER-00465 (BALCA Aug. 27, 2013).

[xviii] 20 C.F.R. §656.17(e)(I)(i)(B).

[xix] The DOL has yet to publish formal guidance on the appropriate PERM advertising venue for roving employees. However, the DOL appears to continue to rely on its 1994 DOL Memorandum, "Policy Guidance on Alien Labor Cert. Issues," No. 48-94, (May 16, 1994).

[xx] BALCA emphasized the need to include travel requirements in the advertisement in *Matter of M-I, LLC*, 2011 PER-01256 (BALCA Aug. 23, 2012) and *Matter of Deloitte FAS*, 2011 PER-00342 (BALCA Mar. 29, 2012).

[xxi] The DOL has taken the position that, where applicable, telecommuting benefits must be noted in the advertisement. *See Matter of Siemens Water Technologies Corp.*, 2011-PER-00955 (BALCA July 23, 2013) for a discussion of the way in which a telecommuting benefit can impact the geographic area described in the advertisement.

[xxii] 20 C.F.R. §656.17(f).

[xxiii] In *Noll Pallet & Lumber*, 2009-PER-00082 (BALCA Dec. 16, 2009), BALCA held that a case should be denied where the advertisement, but not the Form 9089, noted the requirement of a "criminal and background check."

[xxiv] The term "professional journal" has been interpreted narrowly. Two April 2011 decisions held that *The Wall Street Journal* and *Computer* magazine, respectively, were not "professional journals" within the meaning of the regulation. *See Matter of HSBC Bank U.S.A., N.A.*, 2010-PER-00655 (BALCA April 18, 2011) and *Matter of iFuturistics, Inc.*, 2010-PER-00631 (BALCA April 21, 2011).

[xxv] 20 C.F.R. §656.17(e)(I)(ii).

[xxvi] Two 2009 BALCA decisions clarify that the additional recruitment steps are required for occupations listed in Appendix A, regardless of whether the employer requires a bachelor's degree. *See Matter of Skin Cancer and Cosmetic Dermatology Center, P.C.,* 2009- PER-00072 (BALCA June 23,2009); *Matter of The Good Shepherd of the Little Ones,* 2009-PER 00105 (BALCA June 23, 2009).

[xxvii] The plain language of the regulation implies that the three additional recruitment steps are not bound by the special requirements noted above for the Sunday newspaper advertisements. However, in *Credit Suisse Securities*, 2010-PER-00103 (BALCA Oct. 19, 2010), BALCA held that advertisements that run as part of the additional recruitment steps must also comply with those special requirements. A more recent case, *Matter of Globalnet Services, Inc.,* appears to disagree with *Credit Suisse*. See 2015-PER-00478 (BALCA February 17, 2017).

[xxviii] In *Matter of EZChip, Inc.,* 2010-PER-00120 (BALCA Jan. 12, 2011), BALCA discussed acceptable methods of documenting website postings. *See also* Office of Foreign Labor Certification Frequently Asked Questions and *Matter of DGN Technologies, Inc.,* 2011-PER-02935 (BALCA April 29, 2013).

[xxix] *See Matter of Prithui Information Solutions, L.L.C.,* 2011-PER-01112 (BALCA Nov. 1, 2013) for a discussion of the definition of a "professional organization.".

[xxx] For discussion of acceptable documentation of recruitment through a private employment firm, *see Matter of Unica Corporation,* 2010- PER-00006 (BALCA Feb. 9, 2011), *Matter of HSB Solomon Associates LLC,* 201 I-PER-02599 (BALCA Oct. 25, 2011), and *Matter of World Agape Mission Church*, 2010-PER-01117 (BALCA Mar. 23,2012).

[xxxi] The appropriate method of documenting an employee referral program has been the subject of extensive discussion and guidance. See Office of Foreign Labor Certification (OFLC), Frequently Asked Questions (FAQ), under Professional/NonProfessional No. 5 available at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm, *Matter of Sanmina-SCI Corporation*, 2010-PER-00697 (BALCA Jan. 19, 2011), and *Clearstream Banking*, 2009-PER-00015 (BALCA Mar. 30, 2010).

[xxxii] 20 C.F.R. §656.10(d).

[xxxiii] Business days may include weekends if the employer is open for business on the weekends. *See Il Cortile Restaurant*, 2010-PER- 00683 (BALCA Oct. 12, 2010).

[xxxiv] *See* PERM FAQ at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm.

[xxxv] *See Matter of Thomas L. Brown, Associates*, P.C., 2009-PER- 00347 (BALCA September 1, 2009). A salary range is also acceptable, however, it is important to note that the DOL currently takes the position that the lowest point of the range must meet or exceed the prevailing wage and the actual wage being offered. In practice, if a salary range is listed on the notice of filing, the same salary range should be offered on ETA Form 9089.

[xxxvi] BALCA has rejected employer assertions that candidates were unqualified where the candidates met all of the requirements listed on ETA Form 9089. *See Matter of Petrobras America Inc.,* 2015-PER-00060 (BALCA January 26, 2017). In addition, if the resume suggests that the candidate may be qualified, the employer should interview the candidate. *See Matter of Xerox Business Services, LLC,* 2013-PER-00092 (BALCA January 27, 2017).

[xxxvii] 20 C.F.R. §656.10(b)(2)(i).

[xxxviii] *See* "Restatement of PERM Program Guidance Bulletin on the Clarification of Scope of Consideration Rule in 20 CFR §656.10(b)(2)", U.S. Department of Labor Employment and Training Administration, Office of Foreign Labor Certification (August 29, 2008).

[xxxix] 20 C.F.R. §656.17(k). Employers who have had a recent layoff in the relevant occupation can expect DOL to carefully scrutinize the way in which they considered laid off U.S. workers for the position. *See Matter of Oracle America, Inc.,* 2015-PER-00308 (May 4, 2017).

In addition, while the regulation only speaks of layoffs by the employer, some expect DOL to also look to industry-wide layoffs as it reviews the sufficiency and thoroughness of employers' recruitment efforts.

[xl] 20 C.F.R. §656.17 (g).

[xli] 20 C.F.R. §656.10(f).

[xlii] In *Matter of A Cut Above Ceramic Tile*, 2010 PER-00224, (BALCA March 8, 2012) (en banc), BALCA held that no documentary evidence of the SWA posting was required, beyond the dates of posting listed on Form ETA 9089.

[xliii] This standard is different than that of the basic recruitment process, in which the employer must demonstrate that it was not able to find applicants who met the minimum qualifications for the position. The fact that this particular candidate was more qualified than others is not normally a factor in the basic recruitment process under PERM. *See* 20 C.F.R. §656.18(b). *See also, Matter of East Tennessee State University*, 2010-PER-00030 (BALCA April 18, 2011), which held that a college or university recruiting for a teaching position may use the "more qualified" standard, even if it is conducting the basic PERM recruitment process.

[xliv] DOL is planning to shift the online labor certification application process to its new web portal, icert, after which attorneys will be able to create accounts, without first being assigned user rights by an employer. However, as of this writing, the original system is still in place.

[xlv] While this decision specifically revolved around the PERM regulations' rules on requests for reconsideration, it highlighted the problems inherent in the electronic system

[xlvi] *See Matter of Sushi Shogun*, 2011-PER-02677 (BALCA May 28, 2013)

[xlvii] Initially, depending on the location of the position, PERM applications were processed at either the Atlanta National Processing Center or the Chicago National Processing Center. In June 2008, DOL centralized the processing of PERM applications in the Atlanta National Processing Center.

[xlviii] OFLC, FAQ.

[xlix] OFLC, FAQ.

[l] 20 C.F.R. §656.30.

[li] 20 C.F.R. §656.24(e),(g).

[lii] 20 C.F.R. §656.20.

[liii] In cases where the beneficiary of the application has an ownership interest in the employer, has a familial relationship with the owners or management of the employer, or is one of a small number of employees, the Certifying Officer may request specific documentation in an audio in order to ensure that the job opportunity is, indeed, available to all U.S. workers. *See* 20 C.F.R. §656.17(1).

[liv] 20 C.F.R. §656.21. *See* PERM FAQS on Supervised Recruitment at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm. The DOL expects the Supervised Recruitment steps to be followed precisely. *See Matter of V & V Paint and Body*, LLC, 2013-PER-00682 (BALCA April 14, 2017).

[lv] DOL has made it known at professional conferences and stakeholders meetings that it has begun requiring supervised recruitment more frequently. Supervised recruitment is more time-intensive and expensive than standard PERM recruitment.

[lvi] 20 C.F.R. §656.12.