PERM Immigration Program Makes Progress, But How Much?
By
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Now that the Permanent Electronic Review Management (PERM) program is beginning to mature, we see movement in this new system that immigrates alien workers into permanent, fulltime positions in the U.S. When PERM was first announced by the U.S. Department of Labor (DOL), immigration counsel and aliens alike welcomed it ecstatically because of the wait at DOL of up to five years under the old system. That system existed for more than 30 years before PERM started on March 28, 2005.

Labor certification tests the U.S. labor market. When a U.S. employer is unsuccessful in locating a qualified, willing, and available U.S. worker to accept a position and hiring the alien will not adversely affect the wages and working conditions of U.S. workers, a labor certification is certified. PERM revolutionized the system because it is an online application in which the employer attests to a variety of questions consisting of 12 online pages. Before PERM, the application was four pages long. However, even though the old application was shorter, it also required evidence such as copies of ads, rationale for job requirements, sometimes resumes, and the like. Now, the attorney on the employer and/or the employee's behalf does not submit papers with a PERM application unless it is audited. In exchange for the lessened paper load at DOL, DOL promised faster adjudications. The stated goal of DOL is to approve cases in 45 – 60 days. The euphoria engendered by this goal inspired some aliens and attorneys to take action and file PERM labor certifications quickly. Other immigration attorneys have a wait and see approach. Only thirty percent of labor certification attorneys have filed cases four months into the process. Consistent legal advice has become difficult to find in the short term. This is because PERM adjudications have yet to find equilibrium. At first, DOL denied every case nationwide. Then, weeks later, DOL finally began sharing some institutional information with the immigration bar. They denied many cases because of technical issues involved with the filings. Like any new complex computer system, there are kinks in the government program's logic matrix. There is also a learning curve for new attorney users. Once these procedural glitches are resolved, substantive issues will reveal themselves.

Some immigration legal scholars believe that labor certification is the most complex area of immigration law. Will a computer be able to replace the ability of the human brain to make complex, reasoned decisions inherent in labor certification adjudication? It is highly unlikely that a computer will be able to replace the ability of the human brain. If this is the case, PERM may have some significant systemic flaws.

But, the current approval rate is increasing and is approximately 50% as determined by a show of hands in a lecture hall of several hundred attendees during the annual American Immigration Lawyers Association annual meeting in June. Note that practitioners not in the audience were not counted! This increase provides reason for cautious optimism.

Until then, no one knew what the figure will be in the future. DOL has not released any official figures. DOL should provide transparency so practitioners, U.S. employers and foreign born workers can respectively plan their cases, their workplaces, and their lives. Approvals, when they do arrive, are coming quickly, sometimes in as few as five days. Denials often come quicker: sometimes in a matter of minutes. There is no limit on the number of times one can apply for labor certification, so upon denial, it is possible to file again even the same day. As time goes on, more is known about how the system works, and one hopes that DOL will approve more cases.

One gray area is the audit process. The system is still too new to determine how long DOL will need to decide them. There are many specific time frames as part of PERM processing, but the audit is not one of them. Audits will take place for several reasons: where job requirements exceed DOL's view of what is normal, when the alien controls the job, randomly, and to detect intentional misrepresentation. Job descriptions and requirements are often quite unique, so it is possible that DOL will audit many cases that were routinely approved under the old system. One key to avoiding audit is keeping the application simple, such as where clear education and prior experience in the job offer with a different prior employer is possible.

It will take several months or possibly as long as a year to learn the various paths a PERM case can take. Until cases completely proceed through the audit process, we will not know. So far, DOL at first sometimes denies, but is reviewing all denials before June 24, 2005. Either the case is being processed for full review or there will be another denial notice. If a case was denied between June 24, 2005 and July 14, 2005, case status may have also changed. They are approving most of those reviewed denials now. For other cases, decisions once made are final. However, one thing is clear: the more succinct and clear the filing, the easier it will be for the computer to understand and agree with the logic of the case to avoid denial, as well as audit. There's just no way to predict whether the overall approval rate of PERM cases will end up being lower or possibly higher in the future than they were in the past.

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