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Five Rules For Creating An "Audit Proof" PERM Case

by Becki L. Young

As you may know, PERM (Program Electronic Review Management, labor certification) is the first step in the employment based green card process. In the current economic climate the Department of Labor, which reviews PERM applications, has increased its scrutiny (and its audit rate) significantly. If your PERM case is audited, you can expect this will add several years to the green card process.

Here are my five rules for creating an "audit proof" PERM case:

Rule #1: A quote from Benjamin Franklin: When in doubt, don't.

PERM is not intended for every situation, only those where there are no US workers "able, willing, qualified, and available" to fill the offered job. Think twice in the current economic situation about whether this is really true. If it isn't, you should not be filing a PERM.

Rule #2: If you spend more time in the beginning of the case, you will spend less time in the end.

Planning the recruitment and ad text is the most important aspect of the PERM case. You need to really understand the unique attributes the employee brings to the table. What skills/ knowledge/ experience do they have that is not available in the US labor force? While you do not want to tailor your advertising to the employee, you do need to understand what is unique about that worker and makes him/her stand out from the field.

Make sure you have all your documents in order before proceeding. You should request the prevailing wage and compile all documentation of the foreign worker's qualifications before starting the case. Once you have completed the recruitment, you should make sure you have assembled all required documentation of recruitment before you file.

Rule #3: Plan for audit triggers.

Business necessity: If you include foreign language requirements, or requirements that exceed the SVP (specific vocational preparation, or what the Department of Labor has determined is required in terms of education and experience to do the job), you are likely to be audited and asked to prove the business necessity of these requirements. Avoid them if possible.

Experience gained with the sponsoring employer: If you require experience that the sponsored worker has gained with your company, you are likely to be audited and required to prove that this experience was "not substantially comparable" to the offered job. Avoid this requirement, if possible.

Rule #4: Be consistent and review carefully.

Make sure all recruitment documents (prevailing wage determination, posting, newspaper, job order, etc.) have the same language. Be sure the salary is expressed in the same manner on all the documents. Be sure to review the ads for errors before submitting the application. If the newspaper makes a mistake and you do not catch it, you will be out of luck.

Rule #5: Understand the requirements for ad content and timing.

Both the advertisements and the job site postings must include the employer's name, and must specify the area of intended employment. The posting notice must also list the address of the Certifying Officer at the Department of Labor.

With regard to the timing of recruitment, the general rule is "no greater than 180 days and no less than 30 days prior to filing," with one exception: one of the additional steps required for recruitment for professional occupations may be conducted within 30 days prior to filing. However, no steps may occur more than 180 days prior to filing. The two Sunday advertisements must be placed on two different Sundays which may be consecutive. Either the recruitment must begin or the application must be filed during the validity of the prevailing wage determination.

These rules are intended to give employers a basic understanding of the current PERM processing situation; however, due to the complexity of the PERM process and the extremely difficult adjudications climate we now face, employers should not attempt to file a PERM case without the assistance of a qualified immigration lawyer.

(This column has been adapted from a presentation given at the Fall 2009 American Immigration Lawyers Association D.C. Chapter Conference on November 16, 2009).

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