

GETTING A GREEN CARD THROUGH EMPLOYMENT - THE “BLOOD AND GUTS” OF THE PERM LABOR CERTIFICATION PROCESS:

**By David Nachman, Esq. and Michael Phulwani, Esq. – U.S. Immigration and
Nationality Attorneys at the Nachman Phulwani (NPZ) Law Group with Offices in
NY, NJ and Mumbai, India.**

While there are many ways to get the green card in the U.S., the most common one in the employment-based arena is using the PERM Labor Certification Process. A permanent labor certification issued by the Department of Labor (DOL) allows an employer to hire a foreign worker to work permanently in the United States. In most instances, before the U.S. employer can submit an immigration petition to the Department of Homeland Security's [U.S. Citizenship and Immigration Services \(USCIS\)](#), the employer must obtain a certified labor certification application from the DOL's Employment and Training Administration (ETA). The DOL must certify to the USCIS that there are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

To improve the operations of the permanent labor certification program (PERM), ETA published a final regulation on December 27, 2004, implementing a new, re-engineered permanent labor certification program, effective March 28, 2005. This new electronic program has improved services to our various stakeholders. As of March 28, 2005, ETA Form 750 applications were no longer accepted under the regulation in effect prior to March 28, 2005, and instead new ETA Form 9089 applications had to be filed under the new PERM regulation at the appropriate National Processing Center (NPC). Applications filed under the regulation in effect prior to March 28, 2005, continued to be processed under the rule in effect at the time of filing at an appropriate Backlog Elimination Center until such time as the backlog was eliminated. Where an employer chose to withdraw an application filed under the regulation in effect prior to March 28, 2005, and still in process, and to refile an application for the identical job opportunity under the re-file provisions of the PERM regulation, the employer was permitted to use the previously filed ETA Form 750 application filing date.

DOL processes Applications for Permanent Employment Certification, ETA Form 9089, with the exception of Schedule A and shepherd applications filed under 20 CFR §656.16. The date the labor certification application is received by the DOL is known as the filing date and is used by USCIS and the Department of State as the priority date. After the labor certification application is certified by DOL, it should be submitted to the USCIS service center with a Form I-140, Immigrant Petition for Alien Worker. The certification has a validity period of 180-days and expires if not submitted to USCIS within this period.

The PERM process is very detail oriented and it is important to be sure that the individual that prepares the PERM application be intimately familiar with the nuances that can impact the favorable or unfavorable outcome of the case. For example, if an India Citizen has a three year degree, it is critical to explain the equivalence in detail. Also, it is very important, from the outset of the case to undertake an analysis as to whether or not the employer will have the “ability to pay” the Federally Mandated Prevailing Wage.

There are numerous steps that have to be undertaken in connection with the PERM Labor Certification Process. Those steps are as follows:

1. **Application.** The employer must complete an Application for Permanent Employment Certification, [ETA Form 9089](#). A completed application will describe in detail the job duties, educational requirements, training, experience, and other special skills the employee must possess to perform the work, and outline the foreign worker's qualifications.
2. **Signature requirement.** Applications submitted by mail must contain the original signature of the employer, foreign worker, and preparer, if applicable, when they are received by the NPC. Applications filed electronically must, upon receipt of the labor certification issued by ETA, be signed immediately by the employer, foreign worker, and preparer, if applicable, in order to be valid.
3. **Prevailing wage.** Prior to filing ETA Form 9089, the employer must request and obtain a prevailing wage determination from the National Prevailing Wage Center (NPWC). The employer is required to include on the ETA Form 9089 the NPWC provided information: the prevailing wage, the prevailing wage tracking number, the SOC (O*NET /OES) code, the occupation title, the skill level, the wage source, the determination date, and the expiration date.
4. **Pre-Filing Recruitment Steps.** All employers filing the ETA Form 9089 (except for those applications involving Schedule A occupations and shepherders filed under 20 CFR §656.16) **must** attest, in addition to a number of other conditions of employment, to having conducted recruitment prior to filing the application. When filing under 20 CFR §656.17, the employer must recruit using the standards for professional occupations set forth in 20 CFR §656.17(e)(1) if the occupation involved is on the list of occupations published in Appendix A to the preamble of the final PERM regulation. The occupations listed have been deemed to be professional occupations, as they normally require a bachelor's or higher degree. For all other occupations not normally requiring a bachelor's or higher degree, employers can simply recruit under the requirements for nonprofessional occupations at 20 CFR §656.17(e)(2). Employers are not prohibited from conducting more recruitment than is required by the regulations. The employer must prepare a recruitment report in which it categorizes the lawful job-related reasons for rejection of U.S. applicants and provides the number of U.S. applicants rejected in each category. The recruitment report does not have to identify the individual U.S. workers who applied for the job opportunity;

however, if requested by the Certifying Officer, the employer must submit the resumes.

5. **Audits/requests for information.** Supporting documentation may not be filed with the ETA Form 9089, but the employer must provide the required supporting documentation if the employer's application is selected for audit or if the Certifying Officer otherwise requests it.
6. **Retention of records.** The employer is required to retain copies of applications for permanent employment certification and all supporting documentation for five years from the date of filing the ETA Form 9089. For example, the NPWC prevailing wage determination documentation is not submitted with the application, but it must be retained for a period of five years from the date of filing the application by the employer.
7. **Online filing.** The employer has the option of filing an application electronically ([using web-based forms and instructions](#)) or by mail. However, DOL strongly recommends that employers file electronically. Not only is electronic filing, by its nature, faster, but it will also ensure the employer has provided all required information, as an electronic application can not be submitted if the required fields are not completed. Additionally, when completing the ETA Form 9089 online, the preparer is provided prompts to assist in ensuring accurate data entry.

The employer can access a customer-friendly Web site (www.plc.doleta.gov) and, after registering and establishing an account, electronically fill out and submit an Application for Permanent Employment Certification, ETA Form 9089.

Registration. To better assist employers with processing the Application for Permanent Employment Certification, the electronic Online Permanent System requires employers to set up individual accounts. An employer must set up a profile by selecting the appropriate profile option in the Online System. By completing an Employer Profile, the employer is able to:

- Save time by pre-populating its general information.
 - View the status of its labor certification applications online.
 - Update its profile information online.
 - Track newly submitted labor certification applications.
 - E-mail saved labor certification applications to others within the company.
 - Add new users to its account.
 - Withdraw labor certification applications no longer needed.
8. **Filing by mail.** Employers can submit paper applications to the Atlanta NPC. The address and contact information are provided on our Contact Information page.
 9. **Approvals.** If the Atlanta NPC approves the application, the ETA Form 9089 is signed by the Certifying Officer and returned to the employer/employer representative who submitted the application.

If you and/or your employer is interested in filing a PERM Labor Certification, please feel free to contact the U.S. Immigration and nationality Lawyers at Nachman Phulwani Zimovcak (NPZ) Law Group at info@visaserve.com or by telephone at 201-670-0006 (x100).