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- An employer is obligated to pay at least 100% of the prevailing wage specified in the SWA’s PWD. The “5% rule” was eliminated effective March 8, 2005.
- There are now 4 wage levels used by SWAs in making PWDs.
- There are standardized procedures for employers to submit employer-provided wage data that the SWA must consider in making a PWD.

Job offer requirements explained in greater detail

- While many of the same concepts and policies relating to job offer requirements have been retained by PERM, the final rule does impact the following areas:
  - Actual minimum requirements and alternate experience requirements
  - The Dictionary of Occupational Titles (DOT) is replaced by O*NET as the source of occupational standards

Revocation of labor certifications

- After issuance, a labor certification may be nullified as follows:
  - By DOL, if it finds that certification was not justified
  - By DHS or DOS, if either agency or a court makes a finding of fraud or willful misrepresentation of a material fact.

11.1.2 TRANSITION FOR PRE-PERM CASES

11.1.2.1 Backlog reduction

DOL established two centralized Backlog Processing Centers to carry out the duties of the SWAs and regional certifying centers, to process of pre-PERM labor certification applications that were filed with SWAs and postmarked prior to March 28, 2005.

Philadelphia

ETA/DFLC Backlog Processing Center
U.S. Department of Labor
1 Belmont Ave., Suite 200
Bala Cynwyd, PA 19004
Ph. (484) 270-1500
Fax (484) 270-1600

Dallas

ETA/DFLC Backlog Processing Center
U.S. Department of Labor
700 North Pearl Street
Suite 400 N
Dallas, TX 75201
Ph. (214) 237-9111
Fax (214) 237-9135
After the backlog has been taken care of, the Backlog Processing Centers will be eliminated and all labor certification cases will be processed at the national processing centers.

11.1.2.2 Administrative transition to PERM

Under PERM SWAs are no longer involved in the labor certification process, with the exception of providing prevailing wage determinations. All pre-PERM cases are now being adjudicated by two National Backlog Processing Centers.

No special treatment for Special Handling cases

DOL did not make any provisions for treating special handling cases differently from reduction in recruitment cases. Employers with long-pending labor certification applications may receive “45-day” letters from DOL asking them to confirm their intent to pursue the case and asking for confirmation of certain employer data. Employers must mail their response by the deadline date indicated on the letter or the case will be closed.

11.1.2.3 Optional conversion of a pre-PERM case to PERM

Employers who filed applications prior to March 28, 2005 (other than Special Handling cases for college and university teachers wherein 18 months or more have now passed since the alien’s selection in a competitive recruitment process) may, if a job order had not been placed by pursuant to those regulations, refile those applications under PERM without loss of the original filing date. In order not to lose the filing date, employers must (i) submit a PERM application for an identical job opportunity, after undertaking a full new recruitment that meets PERM requirements, and (ii) withdraw the original application.

- **Caution when refiling for college or university teacher!** An application filed under the prior Special Handling provisions for college and university teachers can not be refiled under the PERM optional special recruiting provision on behalf of an alien selected pursuant to a competitive recruitment and selection process, if eighteen months have passed since the selection of the alien.

For a job opportunity to be considered identical to the original application, the employer, alien, job title, job location, job requirements, and job description must be the same as stated in the original application, including all accepted amendments up to the time the application was withdrawn.

To retain the priority date, applications must be refiled within 210 days of the withdrawal of the prior application.

If you file an application that indicates you wish to retain the original filing date but have not withdrawn the original application, it will still be deemed to be a withdrawal of the original filing date, regardless of whether the request to use the original filing date is approved. It is not possible to keep both applications active.
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Employers must retain the original application for converted cases along with the new recruitment documentation.

20 C.F.R. § 656.17(d)(4)

If keeping the original filing date is not a factor, a new application may be filed which would not need to be identical to the original. Again, full recruitment under PERM would be required.

Why is the priority date so important?

The priority date allows a possible claim to H-1B authorization beyond the usual six-year maximum. The priority date also establishes the foreign national's place in the immigrant visa quota line. There is an annual quota for immigrant visas, and backlogs have developed recently for some Chinese, Indian, and Philippine nationals. These backlogs are expected to increase, especially as increased numbers of labor certifications are processed under PERM. Persons with early priority dates will be eligible to apply for permanent residence sooner than those who apply later. (See the Visa Bulletin, travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.)

Should you recommend converting pending cases to PERM?

Caution when refileing for college or university teacher!

Important Note: an application filed under the prior Special Handling provisions for college and university teachers can not be refiled under the PERM optional special recruiting provision on behalf of an alien selected pursuant to a competitive recruitment and selection process, if eighteen months have passed since the selection of the alien.

The answer to whether applications should be re-filed under PERM will depend on how quickly and effectively PERM is implemented and how quickly DOL processes pending labor certifications at the Backlog Reduction Centers. There are other considerations as well, which would best be discussed with a competent immigration attorney. Here are some guidelines to use while discussing with legal counsel whether to refile under PERM or continue with a currently pending application.

You may wish to re-file under PERM if:

- The Department or School is willing and supportive and will re-advertise and recruit under PERM guidelines.
- The pending case was filed recently.
- The Department or School has recruited for the position in the last six months, thereby possibly fulfilling many of the PERM recruitment requirements.
- The applicant has children nearing age 21.
- The position or employment duties have materially changed from the job description appearing in the original labor certification.

You should perhaps keep your labor certification application in its current track and not re-file under PERM if:

- The Department or School is not willing to do any additional recruitment and advertising.
• The case has already been processed at the state level and has been forwarded to the Backlog Reduction Center, which is likely to expedite final processing of its pending case load.

• The applicant is a physician currently in the three-year H-1B obligation, so that it is not possible in any case to file a permanent residence application in the immediate future.

• The applicant is in the Third Employment-Based Preference category (Bachelor's degree or skilled worker) from China, India, or the Philippines, and needs to retain his/her priority date given the developing quota backlogs from those countries. If DOL determines the job opportunity is not identical to the original labor certification, you could lose the original priority date. EB-2 applicants from these countries may also wish to be cautious about attempting conversion.

• The original labor certification was filed under Special Handling due to teaching duties, although the title and primary job duties may not be those of a faculty member. Conversion would increase the possibility of an audit under PERM.

• You do not have staffing to handle additional labor certification applications and your institution does not authorize the use of outside legal counsel.

11.2 **GENERAL OVERVIEW OF THE ALIEN LABOR CERTIFICATION PROCESS**

The labor certification process consists of prefiling, filing, and post-filing steps. At the most basic level, the employer:

1. complies with all prefiling requirements
2. develops and retains documentation of its compliance with those requirements
3. files the labor certification application (Form ETA 9089)
4. waits for DOL to certify the application, and
5. includes the certified, signed ETA 9089 with Form I-140 filed with DHS

**Resource 11-a** A basic flow chart of the PERM process

The employer must comply with significant prefiling requirements before filing the Form ETA 9089 with DOL. Since the PERM labor certification application is an *attestation* rather than a true *application*, documentation of compliance with the pre-filing requirements is not submitted with the Form ETA 9089,