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Immigration and Nationality

Law Update

A report for clients and friends of the Firm

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Increased Audits in PERM Applications

The U.S. Department of Labor (DOL) instituted the Program Electronic Review Management (PERM) system in March 2005 in an effort to enhance consistency and efficiency in the labor certification process, the first step of most employment-based green card cases. DOL is responsible for issuing a certification that no willing, able and qualified U.S. workers are available for the job opportunity, thereby allowing the employer to sponsor the beneficiary for an immigrant visa. After completing the necessary steps, the employer submits the PERM application electronically with the required information and attestations. Since applications are filed without documentation, the DOL may issue an "audit" to request copies of the supporting documents. The new procedure replaced both DOL-supervised recruitment and Reduction in Recruitment (RIR) processes. The DOL's PERM regulations streamlined the procedural and documentary requirements for the labor certification process, and reduced the offices responsible for reviewing labor certification applications from 63 (50 state departments of labor and 13 regional certifying offices) to two regional certifying offices. Although PERM went into effect on March 28, 2005, cases pending under the predecessor processes were handled by two DOL Backlog Elimination Centers, whose work was completed on December 21, 2007.

At the same time it introduced the PERM regulations, DOL published a rule on prevailing wage determinations, applicable to both the Labor Condition Application (LCA) program for non-immigrant visa petitions, and the PERM application process. For both processes, it is required that an employer pay at least the prevailing wage for the position offered in the geographical area where the job is performed. The prevailing wage rules are directly related to the fundamental way that the DOL evaluates jobs, and most importantly, how it establishes minimum requirements for occupational categories. The DOL appeared to be prepared to move away from the archaic resources it previously used, including a reduced emphasis on a measurement tool called Specific Vocational Preparation (SVP). The modern DOL resource on jobs and occupational categories is found at the Occupational Information Network (O*Net) Online.

According to the DOL a total of 204,280 PERM applications were received between March 2005 and June 2007. 144,299 applications (77%) were certified (approved), 37,976 applications (20%) were denied and 5,206 applications were withdrawn. Moreover, most PERM applications were processed within 30 to 120 days. However, as the work of the Backlog Elimination Centers waned and those offices were closed, PERM applications have experienced increased DOL scrutiny. The number of audits has skyrocketed, with top audit triggers including random selection, inclusion of a foreign language requirement, the beneficiary's use of on-the-job experience to qualify for the position, an employer layoff in same or related occupation, and minimum job requirements that are determined to be beyond "normal."

Most recent PERM audits, even those that appear to be "random," focus on the employer's minimum job requirements for the position. This type of audit may be triggered even when an employer states the minimum position requirements are normal for the occupation, if the DOL believes that the requirements exceed those defined under the O*NET position summary. The DOL also continues to apply the obscure SVP tool when determining whether requirements are normal for a position. SVP is generally defined as the amount of time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. "Preparation" includes education, training, and essential experience in other jobs. A comprehensive evaluation of SVP is beyond the scope of this article, in part because of the complexity of the topic, and in

part because DOL has not explained precisely the role of SVP today in assessing occupations.

Nevertheless, while the job opportunity's requirements must be those normally required for the occupation and must not exceed the SVP level assigned to the occupation as shown in the O*Net Job Zones, the "business necessity" doctrine may be used to justify requirements found to be not normal for the occupation, or that exceed the SVP. An employer can provide "business necessity" justification through evidence that the job requirements are reasonably related to the occupation in the context of the employer's business, and that the requirements are needed to reasonably perform the job duties. Both job duties and requirements must be associated to the employer's specific business operation to determine whether they are reasonable. An employer's business necessity argument should include an explanation of the job's minimum requirements and the employer's previous hiring practices for the position, and an evaluation that the employer's requirements are consistent with industry standards.

When initiating green card sponsorship for an employee that will include a PERM application, an employer must be aware that part of the preparation should include an evaluation of the company's minimum position requirements as compared to the DOL's O*NET job summary. If the company's requirements exceed the DOL's "normal" requirements, a business necessity argument should be developed prior to the placement of recruitment, or at least prior to the PERM submission, as an audit is virtually assured.

Updates

January 31, 2008 Deadline for Western-Hemisphere Entry Requirements

On December 21, 2007, the Bureau of Customs and Border Protection (CBP) issued a notice in the Federal Register to remind travelers in the Western Hemisphere that, effective January 31, 2008, identity and status documentation must be presented for admission to the U.S. at land and sea ports. The notice explains that U.S., Canadian and Bermudian citizens entering the U.S. at land or sea ports-of-entry must establish their identity and citizenship to the satisfaction of a CBP officer. Effective January 31, 2008, all travelers will be expected to present documents proving citizenship, such as a birth certificate, and government-issued documents proving identity, such as a driver's license, when entering the U.S. through land and sea ports of entry.

Department of Homeland Security Advises of Changes in FBI Name Check Clearance Process

Department of Homeland Security (DHS) Secretary Chertoff recently indicated that the existing backlog of pending Federal Bureau of Investigation (FBI) security checks for immigration benefits would soon largely end. Specifically, a change in the way USCIS and the FBI process name checks would help clear most of the backlog within the next six months, and help prevent such delays in the future. Secretary Chertoff cautioned that some security checks would still be delayed, but that number should represent a much smaller proportion of the total number of checks conducted by USCIS. Security clearances are required to be completed before USCIS grants any petition or application.

USCIS also confirmed that USCIS and the FBI have allocated an additional $15.5 million over the next year to reduce the number of outstanding FBI name checks.

180 Day Deadline for Filing I-140 Petitions based on Approved Labor Certifications

As we have previously reported, the DOL regulations of July 16, 2007, among other changes, required that an approved labor certification be used in support of an Immigrant Visa Petition within 180 days of certification, or it would expire. All labor certifications approved prior to July 16, 2007 must have accompanied an Immigration Visa Petition received by USCIS no later than Friday, January 11, 2008. A labor certification filed within 180 days of its approval in support of an Immigrant Petition remains valid throughout the duration of the green card process.

Social Security Number Issuance for Work-Authorized E and L Spouses

As background, the spouse of an E-1, E-2, L-1A and L-1B worker is permitted to work in the U.S. by virtue of his status. USCIS requires that such spouses obtain an Employment Authorization Document (EAD) to be employed in the U.S., showing that both the principal worker and the applicant spouse be in the U.S. in valid E or L status. The EAD application may take up to 90 days from submission to USCIS. Typically, the Social Security Administration (SSA) will issue a Social Security Number (SSN) only to an individual who can show that he has current work authorization. This resulted in a delay of many months in SSN issuance for an E or L spouse.

During recent discussions between the American Immigration Lawyers Association (AILA) and the SSA, the SSA took the position that an E or L spouse is authorized for employment based on his status, and therefore does not need an EAD to secure an SSN. The SSN should be issued based on an application showing the individual is in the required status. The SSA indicated that USCIS is in agreement with them on this issue, and that USCIS regulations require presentation of an EAD for the I-9 process, but that USCIS is re-considering this requirement for E and L spouses. We will keep you apprised of further updates.

Department of State Starts Accessing Nonimmigrant Visa Petition Information via PIMS

The Department of State (DOS) released a cable in November instructing consular posts on the implementation of a new report entitled "Petition Information Management Service" (PIMS). This new report, issued by the DOS's Kentucky Consular Center (KCC), contains details on approved nonimmigrant visa petitions for statuses such as H, L, O, P, and Q, and provides USCIS approval verification. As a result of the creation and implementation of this new report, effective November 15, 2007, KCC stopped sending electronic copies of approved petitions to consular posts. The DOS cable explains that the "electronic PIMS record created by KCC will now be the primary source of evidence to be used in determining petition approval. . . .[and] for visa processing purposes, only the PIMS record constitutes verification of petition approval."

Traditionally, foreign nationals have been able to present an original Form I-797 approval notice as sufficient evidence of petition approval. However, based on this cable, posts are now required to verify the existence of the petition approval in the Consulate or Embassy's database via a PIMS report. The cable specifies that the I-797 approval notice serves as sufficient proof for scheduling an appointment only.

Moreover, the new cable requires consular officers to send an e-mail to the KCC to verify approval of all petitions they cannot locate on the PIMS report. If the KCC can confirm approval, it will provide the necessary details of the petition to the post within two working days. As you can imagine, this is causing delays for many foreign nationals whose approval information is not readily found at the time of the visa application interview.

Recent experiences at U.S. posts in Canada is instructive. Successful verification was obtained in about 1 in 2 applications. For those cases, processing times did not change. For the 50% of applicants whose petitions could not be immediately verified in the posts' databases, processing times increased by at least two days to allow for KCC verification. We will keep you abreast of all developments in this area to ensure your foreign work force is not unexpectedly caught in this conundrum.

Lastly, please also note that in addition to the above, the cable indicates this new system will collect information on the petitioner, petition, and the beneficiary, as well as track the petitioner's NonImmigrant Visa (NIV) record since 2004 in a greater attempt to fight fraud.

Department of Homeland Security Starts Collecting Ten (10) Fingerprints

On November 29. 2007, DHS initiated a program to capture a full set of ten fingerprints, rather than only two, from international visitors arriving at U.S. airports. The first airport to receive the new 10-fingerprint scanners was Washington Dulles International Airport in Washington D.C. This effort is being carried out to further DHS's US-VISIT program which is designed to capture biometric information of foreign nationals and then compare the data collected against security databases.

It is projected that in early 2008 nine additional airports will receive the new 10-fingerprint scanners, including Boston Logan International Airport, Chicago O'Hare International Airport; Detroit Metropolitan Wayne County Airport; Hartsfield-Jackson Atlanta International Airport; George Bush Houston Intercontinental Airport; Miami International Airport; John F. Kennedy International Airport in New York; Orlando International Airport; and San Francisco International Airport.

Recent BALCA Decisions Instructive on PERM Applications

A recent string of decisions by the Board of Alien Labor Certification Administration (BALCA) have been instructive of what the Board believes is substantive and non-negotiable in PERM applications, and what it believes is frivolous. For example, BALCA determined that an employer who did not have a Federal Employer Identification Number (FEIN) at the time of PERM filing was substantive, and the lack of FEIN disqualified the employer from the PERM process. BALCA also upheld denial of a PERM when the application was filed less than 30 days after the end of the job order. With limited exceptions in the regulations (not including the job order), the PERM may only be filed after a 30 day "quiet period" following recruitment and notice. BALCA did find that the DOL improperly denied a PERM application that was timely filed but did not include the DOL logo.

USCIS Revises Filing Instructions for Form I-130 Petition for Alien Relative

On December 3, 2007, the USCIS began encouraging petitioners filing stand-alone Form I-130 Immigrant Petitions for Alien Relatives to submit the petitions to the Chicago Lockbox instead of a USCIS Service Center. An I-130 Petition filed with the Chicago Lockbox will ultimately be routed to, and adjudicated at, either USCIS's Vermont or California Service Centers. The routing decision will depend on the petitioner's U.S. residence, and the petitioner will receive her receipt notice from the Service Center, not the Chicago Lockbox.

USCIS will not reject an I-130 Petition filed directly with a USCIS Service Center instead of the Chicago Lockbox, but filing with the Lockbox is expected to avoid processing delays. We will keep you updated as to when the revised form and filing instructions are available through USCIS's website.

Building a Better PERM Application Form ETA-9089?

Background

In most cases, before an employment-based immigrant petition can be submitted to USCIS, the employer must obtain an approved Labor Certification from the DOL's Employment and Training Administration (ETA). The DOL must certify to the USCIS that (1) there are no U.S. workers able, willing, qualified and available to accept the job being offered at the prevailing wage for that occupation in the area of intended employment, and that (2) the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

On March 28, 2005 the DOL implemented the PERM system, which re-engineered the old two-tiered labor certification process that had been in place for over 30 years. The PERM system was designed to expedite the labor certification process, including electronic submission of the application. However, the current PERM application Form ETA-9089 has many limitations that occasionally result in inappropriate denials. On August 24, 2007, the DOL proposed and published for comment a *revised* Form ETA-9089, intended to address those design flaws. Final revisions are not expected until April 2008.

What's New with the Form?

The revisions to form ETA-9089 attempt to provide clarity while implementing regulatory amendments published in the Federal Register on May 17, 2007. These changes should reduce incentives and opportunities for fraud and abuse, and enhance program integrity by capturing more accurate information.

The following changes have been made to form ETA-9089:

- A section has been created at the beginning of the form to identify the foreign worker beneficiary of the application. On the current version, the beneficiary's name does not appear until Page 5.

- A box has been added to the "Employer Information" section allowing employers to add a "DBA" (doing business as) name, when applicable.

- The "Job Opportunity Information" section has been extended and given additional clarifying language to allow the employer to list requirements for specific skills, licenses/certificates/ certifications, and other special requirements. Ample space has been added to describe such information.

- Additional space has been added regarding "Worksite Information" to address compliance with advertising, posting notice and prevailing wage requirements for an employee who works out of his home, or does not work in one location for at least 50% of the time, or who does not have a specific worksite address. However, due to the complex format and insufficient guiding language, further changes are expected.

- The section on the position's minimum requirements has been rearranged to create a better flow and understanding of the actual job opportunity. The section used to describe alternative requirements will now appear directly after the primary requirements. Further changes are anticipated to ensure clarity in the requirements.

- A section has been added to allow an employer to affirm its willingness to accept any suitable combination of education, experience or training in cases where the foreign worker qualifies for the job opportunity based solely on the employer's alternative requirements. Currently, an employer must add special language to the application. Further changes are expected as there is a need for clarification.

- The Sub-Section on "Business Necessity" has been re-organized and expanded to identify cases where the job requirements exceed those assigned to the occupation as shown in the O*NET job summary and SVP, as well as cases where the job opportunity involves a combination of occupations. Additional clarifying instructions have also been provided.

- Additional language has been added in the sections relating to "Recruitment Information." However, because the proposed additions contain unnecessary multi-choice selections that may be confusing to employers, further changes are expected.

- A section has been added to allow the beneficiary to detail comprehensive information regarding completion of training in cases where training is required for the job opportunity.

- The sections relating to "Declaration of Preparer" and "Employer Declaration" have been expanded to allow the addition of a substitute preparer and substitute employer, respectively, in cases where the preparer or employer identified on the original filing is no longer available or authorized to sign.

Conclusion

The proposed revisions to the PERM Form ETA-9089 are certainly not as drastic as the implementation of the PERM system in March 28, 2005. Instead, the revisions to the form alter how the employer may attest that it has complied with the PERM pre-qualifying requirements. The revisions to form ETA-9089 are a welcome step forward towards addressing long-existing problems, reducing confusion and making the application more user friendly. What remains to be seen is the way the processing centers will review the new form and adjudicate cases.

We will keep you posted on this and related issues.

David Grunblatt
973.274.6021 – dgrunblatt@proskauer.com

Christine Alber
973.274.3243 – calber@proskauer.com

Mazal Gavrielov
973.274.3235 – mgavrielov@proskauer.com

Erica Loomba
617.526.9737 – eloomba@proskauer.com

Jorge Lopez
973.274.3208 – jlopez@proskauer.com