

Department of Labor Suspends Prevailing Wage Determinations Causing Delays and Obstacles for Green Card Labor Certification (PERM) Cases

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The Department of Labor Office of Foreign Labor Certification (OFLC) National Prevailing Wage Center (NPWC) has temporarily suspended processing prevailing wage determinations, redeterminations, and Center Director Reviews, until further notice. The suspension will have the most dramatic impact on the PERM labor certification program for green card cases.

What triggered the suspension?

The NPWC has temporarily stopped issuing prevailing wage determinations because it has been mandated by a federal court order to recalculate approximately 4,000 prevailing wages for the H-2B temporary non-agricultural worker program using revised wage methodology provided in a [new August 1, 2011 federal rule](#). NPWC estimates that it will be able to complete this daunting task by October 1, 2011. As such, the NPWC has dedicated all its center resources to comply with the order, and has stopped working on other case types.

What is the impact for employers?

Without a valid prevailing wage determination issued by the NPWC, an employer can not file a PERM labor certification for a foreign national employee, the first step of most employment based green card processes. Under the regulations, to file a PERM application, an employer must have received a prevailing wage determination that is valid when it conducted its first recruitment, OR in the alternative, have received a valid prevailing wage determination that is valid at the time of filing the PERM application.

Prevailing wage determinations can be valid for no longer than 1 year, and no less than 90 days. Further, to ensure current labor market conditions are tested, the Department of Labor requires that all pre-filing recruitment advertisements which relate to a valid prevailing wage determination be completed over a 180-day period. Thus, the receipt and timing of prevailing wage determinations are critical when developing a successful strategy for a PERM application.

For current cases in the recruitment phase of the labor certification process that do not have prevailing wage determinations, employers and employees face the possibility of not being able to file the PERM application. For new cases in the green card planning stages, employers and employees will also face significant delays. The suspension of prevailing wage determinations can be costly to employers because of potentially wasted recruitment advertisements, and may affect an employer's ability to seek H-1B extensions for some employees.

The Department of Labor has not yet addressed how it will handle these issues for employers.

However, a recent Board of Alien Labor Certification (BALCA) decision may provide a more expansive regulatory interpretation of the prevailing wage rule, 20 CFR 656.40. In *Matter of Horizon Computer* (5/25/11), BALCA held that "the regulatory history of PERM indicates that the Employment Training Administration did not intend that the Employer's first recruitment step begin during the validity period, only that *some* recruitment step be initiated during that time [...] regulatory history and fundamental fairness preclude an interpretation of 20 CFR 656.40 to require that the Employer's first recruitment step be initiated during the PWD validity period."*(emphasis added)*

When will NPWC resume issuing prevailing wage requests?

The NPWC has not issued a date certain when it will resume prevailing wage processing. While the reach of the prevailing wage suspension is serious for U.S. employers and foreign nationals, the Department of Labor has not published a formal press release or announcement on their website. Instead, with little fanfare, the NPWC has begun issuing emails in response to prevailing wage inquiries that advise employers that prevailing wage processing will resume only once the Department of Labor is in full compliance with the federal court order requiring the H-2B prevailing wage redeterminations.

The team at Proskauer appreciates that the uncertainty around prevailing wage determinations will result in many concerns for employers and employees alike. We welcome you to contact one of our attorneys with any questions.