

Labor Certification

There are certain employment-based immigrant visas, also known as green cards, that require proof there is no qualified US citizen or legal permanent resident who can fill the position being offered to the foreign beneficiary. The process of demonstrating this to the US government is known as permanent labor certification, or PERM. The purpose of the PERM application process is to ensure that there are no US citizen or legal permanent workers able, willing, qualified and available to accept the job at the prevailing wage for that occupation 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 US citizen and legal permanent resident workers.

Those workers applying for employment-based immigrant status under the EB-2, EB-3 and EB-4 categories are all required to first file a labor certification with the US Department of Labor (DOL) before they may file their applications with USCIS.

The Employment

To qualify for PERM, job being offered to the foreign national must be for a full time, permanent position. Also, the job requirements must adhere to what is customarily required for the occupation in the US and may not be tailored to the foreign national's qualifications.

How to Apply at the DOL

The employer must complete an Application for Permanent Employment Certification on ETA Form 9089. This application may be completed and submitted online or may be mailed in hard copy to the DOL. However, according to the DOL, applications submitted electronically will be processed faster than those submitted in hard copy. Because of this, electronic submissions are considered to be the norm for PERM applications.

In the application, the employer must describe the job duties, educational requirements, training, experience, and other special capabilities the employee must possess to do the work. In addition, the foreign worker's relevant education and work experience must be provided. The application also requires a detailed description of the recruitment conducted to find a qualified US citizen or permanent resident worker.

There is no supporting documentation to be submitted with the Form 9089. However, this evidence, such as recruitment information, etc., must be retained by the employer for a period of no less than 5 years. If the DOL conducts an audit, the employer is required to provide this documentation.

Applications submitted by mail must contain the original signatures of the employer, foreign worker, and the person who prepared the application (if the application was prepared by a legal or other representative). Applications filed electronically must be signed as soon as the application is certified by the DOL in order to be valid.

Prevailing Wage

Prior to filing the application form, the employer must request a prevailing wage determination from the State Workforce Agency (SWA) having jurisdiction over the proposed area of intended employment. The employer is then required to include the following information provided by the SWA on the ETA Form 9089: the prevailing wage, the prevailing wage tracking number (if applicable), the SOC/O*NET (OES) code, the occupation title, the skill level, the wage source, the determination date, and the wage expiration date.

Recruitment

Except for applications involving college or university teachers selected pursuant to a competitive recruitment and selection process, Schedule A occupations, and shearers, all applications must include an attestation that the required recruitment was conducted prior to filing the application.

Documentation of recruitment is not to be submitted with the application, but must be maintained in a file that will be available to the DOL in the case of a request or an audit. The required recruitment differs for professional occupations and nonprofessional occupations.

Professional Occupations

If an occupation requires a bachelor's degree or higher, the employer must recruit under the standards for professional occupations set forth in 20 CFR 656.17(e)(1). These standards are outlined below.

Mandatory Recruitment Steps

The mandatory recruitment steps include placing a 30-day job order with the SWA who has jurisdiction over the area of intended employment and two Sunday print advertisements. These steps must be conducted at least 30 days, but no more than 180 days, before the filing of the application.

The newspaper or professional journal where the advertisements are placed must have a general circulation in the area of intended employment and must be appropriate to the occupation. The publications must be likely to generate response from qualified US workers. The ads must appear on separate Sundays; ads placed in two different publications to run on the same day will not satisfy this requirement. If the job is located in a rural area that does not have a newspaper with a Sunday edition, the employer may use the edition with the widest circulation in the area of intended employment. If the job requires experience and an advanced degree, and a professional journal would normally be used to advertise the position, the employer may place an ad in the professional journal instead of one of the Sunday newspaper ads.

The print advertisements must specify the employer, instruct job applicants to respond or send resumes to the employer, have a detailed description of the job opportunity, specify the

geographic area of employment, not contain a wage rate lower than the prevailing wage rate, not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089, and not contain wages or terms and conditions of employment that are less favorable than those offered to the foreign worker. It is advisable to keep original copies of the newspaper or journal pages as proof that the ads ran and contained all the required information.

Additional Recruitment Steps

In addition to the mandatory recruitment steps for professional occupations outlined above, the employer must also select three additional recruitment steps. Only one of the additional steps may take place within 30 days of filing the application. None of the steps may have taken place more than 180 days prior to filing the application. The additional steps include:

- Job fairs
- Employer's website
- Job search website other than the employer's
- On-campus recruiting
- Trade or professional organizations
- Private employment firms or placement agencies
- Employee referral program with incentives
- Campus placement offices
- Local and ethnic newspapers
- Radio and television advertisements

Nonprofessional Occupations

For all other occupations not normally requiring a bachelor's or higher degree, employers must recruit under the requirements for nonprofessional occupations at 20 CFR 656.17(e)(2). These requirements include placement a 30-day job order with the SWA who has jurisdiction over the area of intended employment and two Sunday newspaper advertisements. These steps must be conducted at least 30 days but no more that 180 days before the filing of the application.

The newspaper or professional journal where the advertisements are placed must have a general circulation in the area of intended employment and must be appropriate to the occupation. The publications must be likely to generate response from qualified US workers. The ads must appear on separate Sundays; ads placed in two different publications to run on the same day will not satisfy this requirement. If the job is located in a rural area that does not have a newspaper with a Sunday edition, the employer may use the edition with the widest circulation in the area of intended employment. If the job requires experience and an advanced degree, and a professional journal would normally be used to advertise the position, the employer may place in ad in the professional journal instead of one of the Sunday newspaper ads.

The print advertisements must specify the employer, instruct job applicants to respond or send resumes to the employer, have a detailed description of the job opportunity, specify the geographic area of employment, not contain a wage rate lower than the prevailing wage rate, not contain any job requirements or duties which exceed the job requirements or duties listed on the

ETA Form 9089, and not contain wages or terms and conditions of employment that are less favorable than those offered to the foreign worker. It is advisable to keep original copies of the newspaper or journal pages as proof that the ads ran and contained all the required information.

The PERM regulations do not bar employers from conducting more recruitment than is specified for the occupation. Therefore, the DOL recommends that if an employer is uncertain whether an occupation is considered professional or not, he or she should conduct the recruitment for a professional occupation.

Recruitment Report

Once the recruitment period is complete, the employer must prepare a recruitment report in which it categorizes the legal reasons for rejection of US citizen and legal permanent resident applicants and provides the number of such applicants rejected in each category. The recruitment report does not have to identify the individual workers who applied for the job opportunity. If there were no applicants for the position, the report should state as much. This report must be retained in case of an audit or any other request for documentation from the DOL.

Notice of Filing

All employers filing PERM applications must post a notice that the application will be filed for at least 10 consecutive business days. The last day of the posting must be at least 30 days prior to filing the application so as to allow an appropriate amount of time for those wishing to submit any information about the application to the DOL.

The notice must include all the information provided in the advertisements, as outlined above. The notice must also include the address of the appropriate Certifying Officer for the area of intended employment. Addresses for the National Processing Centers and Certifying Officers, including a chart of the states and territories within their jurisdiction, can be found on the DOL's website.

If the employer normally recruits for similar positions in the employer's organization through in-house media, then the employer must publish the notice of filing in its in-house media in accordance with the employer's normal procedures for recruitment of similar positions or for 10 consecutive business days, whichever is longer.

This notice of filing cannot be counted as one of the recruitment steps.

How to File at USCIS

Once the labor certification has been certified, the employer can file an immigrant petition for the foreign worker with US Citizenship and Immigration Services (USCIS) on Form I-140. The employer must submit the certified ETA Form 9089 with the I-140 application, as well as the appropriate fees and supporting evidence.

Schedule A Occupations

Schedule A is a list of occupations for which the US Department of Labor has determined there are not sufficient US workers who are able, willing, qualified and available. In addition, Schedule A establishes that the employment of foreign nationals in such occupations will not adversely affect the wages and working conditions of US citizen workers in similar positions.

Occupations listed under Schedule A include:

1. Physical Therapists
2. Professional Nurses
3. Sciences or arts (except performing arts)
4. Performing arts

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, in duplicate with USCIS and not with the Department of Labor or a SWA.