



7 Tips For Nabbing A Permanent Labor Certification

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Law360, New York (March 12, 2015, 3:50 PM ET) -- The road to winning a permanent labor certification is filled with possible pitfalls, from a faulty job description to incorrect advertising. Below, Law360 offers seven tips to keep Labor Department officers happy when helping your client hire a permanent foreign worker.

Submit a Flawless PERM Application to DOL

Since the whole point of the permanent labor certification process is to assure DOL that hiring a foreign employee won't take jobs away from U.S. workers or hurt their wages, the agency isn't "looking to be your buddy," as one attorney put it.

The first line of defense, then, is to be familiar with the Program Electronic Review Management, or PERM, request regulations — check out 20 C.F.R. Part 656 for some light reading on that — and to make sure your application is free of mistakes and typos, said William Stock, the First Vice President of the [American Immigration Lawyers Association](#).

"You really have to understand the regulations, and you have to understand that the first hurdle is to file a letter-perfect application," Stock said. "And that there is zero interest on the part of the [Department of Labor](#) in forgiving even very small mistakes."

To ensure that your application is error-free, Stock recommends making a checklist of all the PERM requirements, including the mandated recruitment steps for U.S. workers. At his firm, for example, this checklist is reviewed twice — once by a senior paralegal and once by an attorney, he said.

Patiently Coach Employers Through the Recruitment Process

Before filing the permanent labor certification application for the foreign employee, companies are required to try to recruit U.S. workers for the job.

However, employers and human resources staff may not know that DOL looks for certain recruitment practices, meaning they need extra coaching from immigration attorneys.

For example, glossing over the resumes of U.S. candidates often isn't enough, because if someone is rejected based on a resume, the employer must be able to show that there wasn't a reasonable possibility the candidate could have met the job requirements, Stock said. If there's uncertainty over whether someone has the skills for a job, the employer may need to follow up with an interview to be on the safe side.

"In some ways, some of the most difficult cases for employers to appreciate in this process are very generic resumes, which don't indicate specifically what the person has done," said Stock. "From the Department of Labor's point of view, that is a resume that shows the person could have relevant experience, and you have a duty to investigate them."

Gregory Palakow, chair of the immigration and homeland security group at [Archer & Greiner PC](#), said telling clients that the process needs to be done slowly and carefully is key — contrary to the speedy impulses of some energetic start-ups. He recommends working with employers to hammer out a detailed, accurate job description, as well as to make sure they're willing to pay the prevailing wage and go through the lengthy PERM process.

"If you can make your clients audit-proof through a great job description matched up with a great qualified working visa worker, you can probably avoid an audit altogether and probably have a successful PERM," said Palakow.

Don't Get Too Clever With Job Requirements

When crafting a job description, you don't want to make it too loose, but loading it up with superfluous requirements is sure to trigger an audit from DOL, attorneys say. This is because the agency's certifying officers may suspect that you're trying to build a job around a visa worker you already have in mind, or are seeking to weed out U.S. candidates from the job.

Some key audit triggers requiring excessive education or experience for the job, or stating that a foreign language is a requirement for the position, according to Palakow.

“Sometimes the client will think, ‘That’s a really good idea, this worker speaks Pakistani, so we’ll make a certain dialect a requirement and that will rule out all these other applicants,’” Palakow said. “That’s a terrible idea — guaranteed to be audited.”

Requiring that the job candidate “live-in” with the employer, which is more common for chef, maid or nanny jobs, is also an obvious audit trigger, he said. Palakow added that he’s found it’s also a bad idea to include experience earned with the sponsoring employer as part of the minimum job requirements.

“That’s a big no-no,” Palakow said. “So, if the job requires 5-7 years in C++ in a certain type of programming, the candidate better have earned at least five of those 5 to 7 years elsewhere, for another employer.”

Remember: Consistency Is King

Consistency across all materials involved in the permanent labor certification process is key, according to attorneys. They recommend keeping the same details in everything from your job advertisements to your prevailing wage determination requests and the PERM form itself so as not to raise any eyebrows at DOL.

“If the way the job is described on the labor certification application form itself isn’t exactly consistent with the ads, that can cause a problem,” said William Coffman of [Mintz Levin Cohn Ferris Glovsky](#) and Popeo PC.

Attorney Bill Stock echoed this advice and added that if inconsistencies start to creep in, you’ll need to compare your listed requirements to make sure they aren’t substantially different from one another.

Use Audits As a Chance To Strengthen Your Case

If DOL has questions about your application, the agency will likely send you an audit letter, asking for more information on your recruitment efforts. Amanda Neher of Larrabee Albi Coker says it’s important to advise clients that an audit could happen, as they occur in roughly 30 percent of PERM cases.

When you get an audit letter, that’s your chance to review your case for weaknesses and submit any documentation that you think might be helpful, even if DOL’s certifying officer didn’t specifically ask for it, said Stock.

"The important thing to do when you get an audit letter is to review every possible issue that could come up and realize that this is your one chance to create the record on which the decision is going to be made," Stock said.

For instance, even if DOL hasn't asked you to justify extra job requirements, you may want to explain why they're a business necessity, he said. Or if it's unclear when a job posting went online, you may want to submit an affidavit from the person who posted the item, attesting to its accuracy.

Similarly, if you realize your client has made an error in advertising for the job — like placing advertisements on the same Sunday, which is prohibited by DOL rules — you can correct that mistake before the recruitment period runs out, Palakow noted.

Give Yourself A Head-Start By Noticing Audit Patterns

According to multiple attorneys, DOL shifts its focus on what will trigger an audit or denial over time. For example, for a while the agency was focusing on whether companies had properly notified their workers of positions eligible for employee referral programs, said Coffman.

Currently, DOL's officers are focused on resumes from workers applying to the job and employer justifications for why those applicants couldn't have acquired the necessary skills with reasonable on-the-job training, Neher said. In recent years, officers have also been asking for fuller or signed recruitment reports, according to Board of Alien Labor Certification Appeals decisions.

By keeping track of what audit letters are asking for, attorneys ensure that clients are complying with DOL focal points and reduce the chance of being audited. Lawyers should also keep track of BALCA decisions to get a sense of what other employers are being audited over and what the board feels is reasonable grounds for a PERM denial.

Don't Get Sloppy With Record-Keeping

Whether your application is audited or you're gearing up for a denial appeal at BALCA, it pays to have detailed records to support your case, attorneys say.

"If you do get audited, you want to have those records so that you can disprove

the reason for the certifying officer refusing to certify the job,” Palakow said, emphasizing that “spreadsheets are your friend.”

He said that his firm often tells clients to approach DOL and [U.S. Citizenship and Immigration Services](#) as they would another exacting government agency: the [Internal Revenue Service](#). But as long as clients don’t throw DOL any curveballs, they should come out with an approved PERM application, Palakow noted.

“Be compliant with the requirements [and] follow exactly how they tell you describe the job and advertise the job,” Palakow said. “This is not a creative area of law. You want to be like a tax lawyer.”