# OVERVIEW OF THE PERMANENT RESIDENCE PROCESS THROUGH ALIEN PERMANENT LABOR CERTIFICATION – 'PERM'

## INTRODUCTION

Applying to acquire U.S. permanent residency within the U.S. system of employment-based preference categories and priority dates is a process currently done in two or three major steps within different timelines according to the category. For those categories most frequently used in the academic environment, the process may be illustrated by the **Employment–Based Permanent Residency General Process Estimated Time Chart for categories commonly used at The UTHSC-H**, found at http://www.uth.tmc.edu/intlaffairs/Forms/documents/E-BPRGeneralProcessTimeChartforCategoriesUsedatUTHSC-H.pdf

Several employment-based categories may be an option for purposes of sponsoring a nonimmigrant foreign national for U.S. permanent residence based on full time employment with The University of Texas Health Science Center at Houston. To qualify for lawful permanent residence in the U.S. on the second or third employment-based preference categories, a foreign national must normally have not only a full time, permanent job offer from a U.S. employer but also an individual *Alien Labor Certification* from the U.S. Department of Labor.
Unless the USCIS waives the job offer requirement and the foreign national obtains a national interest waiver or the field of employment is listed as a 'Schedule A' occupation per 22 C.F.R. Part 656, an individual labor certification is required. Such employment-based petition is always filed by the employer or the employer's attorney.

U.S. Employers that want to sponsor a foreign national for lawful permanent residency based on permanent employment in the United States, must go through a multi-step process:

I. **Permanent Labor Certification**. The employer files an Application for Permanent Employment Certification -Form ETA 9089- to The Department of Labor, Employment and Training Administration. Labor Certification can be granted or denied.

II. **Immigrant Petition for Alien Worker**. The employer (sponsor or petitioner) wishing to bring the applicant to the United States to work permanently must file **USCIS Form I-140** on behalf of the applicant (or beneficiary). When a Department of Labor is required, this application can only be filed after the alien labor certification is granted.

III. **Adjustment of Status**. The State Department must give the applicant an immigrant visa number, even if the applicant is already in the United States. When the applicant receives an immigrant visa number, it means that an immigrant visa has been assigned to the applicant. The status of a visa number can be checked in the Department of State's Visa Bulletin. If the applicant is already in the United States, he or she must apply to adjust to permanent resident status after a visa number becomes available. If the applicant is outside the United States when an immigrant

visa number becomes available, he or she will be notified and must complete the process at his or her local U.S. consulate office.

## I. What is PERMANENT LABOR CERTIFICATION?

Alien Labor Certification is granted by the Department of Labor after it makes two essential findings:

- That there are no sufficient U.S. workers in the geographic area of employment who are able, willing, qualified, and available to accept the particular job in question; and
- That employing a foreign worker in the given occupation will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Effective March 28, 2005, a new Permanent Electronic Review Management System (PERM) went into effect to streamline the processing of labor certifications. The Alien Labor certification under PERM is an attestation-based process, where the employer or the employer's attorney files its labor certification application (Form ETA 9089) with DOL. Through this system, the employer does not need to submit documentation with its application. However, an employer can be audited either randomly or pursuant to specific factors identified by DOL. Therefore, although it is not filed with the ETA 9089, documentation must be developed and retained on file for five years from the date of filing, in case of an audit. The date the labor certification application is accepted for processing is known as the filing date and is referred to by USCIS and the Department of State as the priority date.

The **PERM process** involves several parties and a number of pre-filling, filling, and post-filing tasks:

### Parties involved:

- Employer :
  - Approves the decision to sponsor foreign national through labor certification process
  - Formulates job offer: duties, minimum requirements, and wage
  - Requests prevailing wage determination from the State Workforce Agency (Texas Workforce Commission).
  - Conducts a recruitment process that complies with DOL regulatory requirements
  - Develops and retains documentation shown regulatory compliance, including a written report that identifies the legal reasons why a U.S. applicant was not selected
  - Prepared Form ETA 9089 and files it with appropriate National processing Center
- State Workforce Agency:
  - Upon request from the employer, the State Workforce Agency office having jurisdiction over the place of employment, render a prevailing wage determination (PWD) over the job in question
- National Processing Center. One of the Two National processing Centers (in Atlanta and Chicago) under the DOL Employment and Training Administration Division:
  - Conduct audits on selected filings

- Approves the labor certification only if:
  - The job opportunity is for a full-time, permanent job
  - What the employers pays meets or exceeds the prevailing wage determined for the occupation in the area of intended employment.
  - There was a bona-fide job made available to U.S. workers.
  - Job requirements adhere to what is customary in the occupation and the job was not tailored to the foreign worker's qualifications.
  - No U.S. worker had the ***minimum*** qualifications needed to do the job, or, in the case of college and university teachers ("Special Handling"), there were no U.S. workers better or ***more*** qualified than the alien.

## Steps in the Labor Certification process:

Prior to filing Form ETA 9089 with DOL, the foreign worker and its employing department must take the following steps when considering sponsorship for permanent residence based on a job offer from The UTHSC-H:

### A. Preliminary phase:

**1. Approve the decision to sponsor foreign worker though labor certification**

1.1. **Review** the "***UTHSC-H Guidelines for Sponsorship of Permanent Residency***" along with this "***Overview of the Permanent Residency Process through Alien Permanent Labor Certification - PERM".*** **Consult with the Office of International Affairs (OIA)** to ensure understanding of the commitments required from the employing department when sponsoring an applicant for permanent residence, based on a labor certification process for a full time, permanent job offer by UTHSC-H.

1.2. **Decide** whether the Office of International Affairs or an external legal counsel -from a list of attorneys authorized by the UT System- would prepare a particular labor certification application on behalf of the institution. Whether or not an attorney is hired to process the application, if the petition is based on a permanent employment opportunity with The University of Texas Health Science Center at Houston, the institutional policies must be met and the Immigration petition document (Form I-140) must be signed by the Director of the Office of International Affairs. Under no circumstances should an attorney be retained until the Director of the Office of International Affairs has secured appropriate administrative written approval to sponsor an immigrant application.

1.3. In all cases, **provide to the Office of International Affairs written institutional administrative approval** signed by the department Chairman, Division Head, and/or Dean or higher officer supporting sponsorship for employment based permanent residence application.

1.4. **Provide to OIA a PERM labor certification sponsorship agreement memo**, signed by the department Chairman and the Principal Investigator or immediate supervisor as appropriate.

**B. Pre-Filling of Form ETA 9089 with DOL:**

2. **Job description / Offer.** The sponsoring UTHSC-H department develops and provides a job description, following institutional approval practices, that includes:
   - Job duties according to standard job description for the job title, if one exists.
   - Minimum requirements for the job, including ***minimum*** education, training, experience, and other special requirements. As the employer, the institution must be prepared to document that the requirements are in fact the actual minimum requirements and that has not hired the alien or other workers with less training or experience for jobs substantially comparable to the job in question.

   Both job duties and job requirements –skills, knowledge, abilities, and conditions of employment, must be normally required to satisfactorily perform work in the occupation.

3. **Prevailing Wage Determination.** The Office of International Affairs requests prevailing wage determination (PWD) form the State Workforce Agency (SWA) –Texas Workforce Commission (TWC)- based on draft provided by sponsoring department. This PWD must be valid at the time of filing ETA 9089 or at the time the employer begins required recruitment. Validity period is usually 90 to 180 days.

4. **Advertisement and Recruitment.** Under PERM, an employer conducts recruitment during the 30 to 180 days prior to filling the labor certification application. The recruitment steps do not have to be consecutive but may be conducted simultaneously:

   4.1. **Notice of filing:** Notice of filing a labor certification must be posted for 10 consecutive business days at the location of employment in a conspicuous place where U.S. workers can readily read it AND in all in-house media (electronic or printed) in accordance with normal procedures the institution uses for recruitment of similar positions. The employer must give notice of filing a labor certification to current employees. Additionally, the employer must notify laid-off workers if within 6 months of filing the employer has laid off employees in the same occupation. For all labor certification applications, the notice must: 1) State that the notice is being provided as a result of the filing of a labor certification application for the relevant job opportunity; 2) State that any person may provide documentary evidence to the DOL Certifying Officer; 3) Provide the address of the Certifying Officer (Atlanta National center at: U.S. Department of Labor, Employment and Training Administration, Atlanta National Processing Center, Harris Tower, 233 Peachtree Street, Suite 410, Atlanta, Georgia 30303, Phone: (404) 893-0101, Fax: (404) 893-4642); and 4) Be provided between 30 and 180 days before filing (ETA 9089). In addition to those notice requirements, for schedule A occupations, the notice must contain a description of the job and rate of pay. The rate of pay does not have to be included in the notice for applications filed for college and university teachers under special filing provision of 656.18.

   4.2. **Recruitment**: Under PERM all employers must conduct recruitment ***before*** filing the labor certification application with DOL. However, the type of occupation impacts the recruitment requirement as follows:

      4.2.1. **'Schedule A' Occupations** are subject to prevailing wage and notice requirements, but are *exempt* from recruitment requirements. A process under 20 C.F.R. 656.15 must be followed. An employer must apply for a labor certification for a Schedule A occupation by filing an application with the appropriate DHS office, and not with an ETA application processing center.

4.2.2. **'Special Handling'.** Occupations that require **college or university classroom teaching duties** benefit from special recruitment and documentation requirements standards. For college and university teachers only, the employer is allowed to select the foreign worker if he/she is ***more*** **qualified** than U.S. workers applicants rather than having to select the applicant with the ***minimum*** requirements. The employer can also choose between two recruitment and documentation options: a standard process under 20 C.F.R. 656.17 or a **'special handling'** process under 20 C.F.R.656.18, which allows the employer to use the results of its **own competitive recruitment process** that resulted in the selection of the foreign worker, provided the labor certification is filed **within 18 months** after the foreign worker was selected.

4.2.3. **Standard Professional Occupations.** These include all occupations where a bachelor's degree or higher is the minimum requirement. For all professional, occupations other than Schedule A and College or University Teachers, the employer must demonstrate that was unable to find U.S. workers with the ***minimum*** requirement of the job. Mandatory recruitment steps under 656.17 for professional occupations include:

4.2.3.1. A <u>30-day SWA job order</u> serving the *area of intended employment*, which must remain open for a period of 30 days. The start and end date of the job order serves ad documentation of this step. To comply with the "between 180 and 30 days prior to filing" requirement, the 30-days job order must end at least 30 day prior to filing the labor certification (Form ETA 9089).

4.2.3.2. <u>Two print advertisements</u> in two different Sundays in two newspapers of general circulation in the area of intended employment. If the job requires experience and a advanced degree, a professional journal would normally be used to advertise the job opportunity. An add in a professional journal most likely to bring responses from U.S. workers could be used <u>in lieu of one</u> of the Sunday advertisements. An electronic professional journal may not be used to meet this requirements which states that *two print* advertisements are required. Both ads must be posted not sooner than 180 days and not later than 30 days prior to filing ETA 9089.

The advertisements must contain the following elements: 1) Name of employer; 2) Location where applicants should send resumes or report to; 3) Description of the vacancy; 4) Geographic area of employment; 5) If wage rate is included, it may not be lower than the prevailing wage, nor a wage range whose lower bracket is lower than the prevailing wage; 6) Job requirements or duties which do not exceed those to be listed in ETA 9089; and 7) The add must not contain wages or terms and conditions of employment that are less favorable than those offered to the foreign national. Advertisement for positions which recruitment is usually handled by the Human resources department should be coordinated with this department. While employers have the option to place broadly written advertisements, employers must prepare a recruitment report that addresses all minimally qualified applicants.

4.2.3.3. <u>Internal Notice</u> (see Notice of Filing above).

4.2.3.4. <u>Three separate additional recruitment steps</u>, (out of a list of 10). All three additional steps must be taken place no more than 180 days prior to filling but no more than one additional step may be taken within the 30 day period prior to filing ETA 9089. Three additional steps may be chosen from the following: 1) job fairs; 2) Employer's web site; 3) Job search web site other than the employer's; 4) On-campus recruiting; 5) Trade or professional organization; 6)

Private employment firms; 7) Employee referral program with incentives; 8) Campus placement office; 9) Local and ethnic newspapers, and 10) radio and TV advertisements.

4.2.3.5. Interviewing applicants and rejecting U.S. workers. The employer must evaluate all applications and resumes received. Rejection of U.S. workers can only be done under the following standards: for Special Handling applications, U.S. workers can be rejected only if the are less qualified than the foreign worker. For standard application, U.S. workers may be rejected only if they do not meet the minimum qualification. Additionally, there are other regulatory requirements for interviewing and rejecting applicants: 1) Neither the agent or attorney of the agent, nor the foreign worker can play any role in the interview or evaluation process; 2) The interviewer must be the person who normally interview applicants for job opportunities as such offered to the foreign worker.

4.3. **Documentation and Reporting.** Employers must prepare a recruitment report that describes the recruitment steps undertaken and the results achieved. This report must be signed by the employer and retain in case of an audit, along with other supporting documents.

4.3.1. For **special handling** occupations, the employer must develop and retain the following documents to demonstrate its competitive recruitment and selection process:

- A statement, signed by an official who has actual hiring authority from the employer outlining in detail the complete recruitment procedures undertaken; and which must set forth:
  - The total number of applicants for the job opportunity,
  - The specific lawful job-related reasons why the alien is more qualified than each U.S. worker who applied for the job. Rejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers.
- A final report of the faculty, student, and/or administrative body making the recommendation or selection of the alien, at the completion of the competitive recruitment and selection process;
- A copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements (the add must be placed in a national *print* professional journal; this requirement cannot be met through electronic journal);
- Evidence of all other recruitment sources utilized; and
- A written statement attesting to the degree of the alien's educational or professional qualifications and academic achievements.

4.3.2. For **standard professional occupations,** the employer must develop and retain the following documents to describe the recruitment steps undertaken and the results achieved:

- Documentation of the 30-day SWA job order;

- Original tear-sheet of the two advertisements placed in newspaper or in a newspaper and in a journal. It should identify the source of the advertisement.
- Documentation of the three additional recruitment steps the employer took;
- Copies of applicants resumes;
- Signed recruitment report that describes the recruitment steps undertaken and the results achieved from each source, the number of hires, the number of U.S. workers rejected, categorizes by the lawful job related reasons for such rejections.

4.4. **Retention of Documents**. Employers are no longer required to provide supporting documentation with the labor certification filing. However, the employer must develop an audit file to be retained for five years. The employer must maintain documentation of the recruitment and be prepared to submit documentation in the event of an audit or in response to a request from a DOL Certifying Officer. The employer may be required to produce the following evidence:

4.4.1. Wage determination received from the SWA

4.4.2. Documentation of compliance with the internal notice requirement: copy of physical posting with dates and location of posting recorded and copies of print-outs of internal media used to distribute the filing notice.

4.4.3. Documentation related to the job offer or the foreign worker qualifications for the job: documentation that shows the foreign worker minimum requirements at the time of hire; and documentation that addresses any alternative requirements or experience gained with employer in a position that is not substantially comparable.

4.4.4. Documentation of recruitment efforts for special handling cases filed under 656.18 for college and university teachers (see 4.3.1 above)

4.4.5. Documentation of recruitment efforts for standard professional cases filed under 656.17 (see 4.3.2 above)

4.4.6. Copy of signed and certified Form ETA 9089

## C. Filing the Labor Certification with DOL:

DOL Form ETA 9089 is the basic application for labor certification. The form:

- Specifies job duties, minimum job requirements, and working conditions
- Specifies the prevailing wage rate and its source
- Describes the employer's recruitment efforts
- Describes the employee's qualifications for the job
- Contains attestations that the employer has complied with regulatory requirements associated with the filing of the form
- Must be signed by both the employer and employee

The ETA 9089 can be completed and filed online, or can be completed offline and then filed by mail.

*In 2009 however, "the Department of Labor Office of Foreign Labor Certification (OFLC) plans to implement a new portal system called iCERT for LCA and PERM filings. The iCERT system will require employers or attorneys to create a user account, from which they will be able to file both LCAs and PERM applications. LCA functionality will be added first, followed later by PERM functionality. The implementation time line as of February, 2009, is as follows: LCA Form 9035: April 15, 2009 - OFLC begins receiving new LCA forms for processing through iCERT, but also continues to receive LCAs through the existing online system. May 15, 2009 - LCAs can be filed only through the iCERT system. OFLC disables the existing online system, but keeps it online for case status checks and LCA withdrawals. PERM Form 9089: July 1, 2009 - OFLC begins receiving new PERM forms for processing through iCERT, but also continues to receive PERM applications through the existing PERM OnLine system. August 1, 2009 - PERM applications can be filed only through the iCERT system. OFLC disables filing functionality in the existing PERM OnLine system, but keeps it online for case status checks and PERM application withdrawals" (NAFSA resource page: http://www.nafsa.org/am/the_icert_portal_system )*

Schedule A occupations. Employers filing I-140 petitions under Schedule A for physical therapists, professional nurses, and aliens of exceptional ability in the sciences or arts must complete and sign a Form ETA 9089. However, this form does not need to be submitted to the DOL for certification, but rather include a signed and uncertified form with the employer's I-140 immigrant petition filed with the USCIS -Nebraska Service Center-.

By signing Form ETA 9089 at item N, the employer agrees to the certifications and declarations found at that section, which are also the 10 attestation items listed in the regulations at 20 C.F.R. § 656.10(c)(1)-(10) .

These 10 attestations can be divided into 4 different categories:

1. Attestations regarding the wage to be paid (items 1-4)
2. Attestations regarding the employer's compliance with ancillary areas of law (items 5-7)
3. Attestations regarding the bona-fides of the job offer (items 8 and 10)
4. Attestation regarding the availability of U.S. workers (item 9)

The signed ETA 9089 should be kept with all other required documentation regarding recruitment and posting for five years.

**II. The Immigrant Petition for Alien Worker – Form I-140.** The second step in the permanent residency application process requires that the employer file an immigrant visa petition through the USCIS based on a particular employment-based preference category. The categories that usually require the PERM labor certification are EB-2 and EB-3. The EB-2 preference requires an Advanced Degree (MS, PhD) or Exceptional Ability (higher degree of expertise). The EB-3 preference category is mainly for professionals with a BS degree and for skilled workers. At this stage, it is necessary to document the foreign worker's qualifications for the position: educational and employment history, transcripts, and credentials; immigration documents showing past and current status if in the U.S., as well as the employer's ability to pay the foreign worker the wage offered at the time the labor certification was filed. The entire permanent residency process requires a U.S. employer willing to sponsor the foreign worker for a position for which a qualified U.S. worker was not found. However, sponsorship of a foreign worker for permanent residency does not constitute an employment contract. Because Texas is a right to work state, employers may terminate employment at will for any lawful reason and employees may resign at will.

**III. Adjustment of Status – Form I-485.** The final step in seeking status as a permanent resident of the U.S. is to either apply to the U.S. Citizenship and Immigration Services for "adjustment of status" on USCIS Form I-485 or to apply for the immigrant visa through Consular processing at the U.S. Consulate abroad, usually at the home country or country of last permanent residence. The legal action of filing an application for adjustment of status with the Department of Homeland Security in the Unites States or filing for an immigrant visa abroad with the Department of State belongs to the foreign national. The employer has no legal standing on that process, except to provide the petition approval or receipt notice (USCIS Form I-797) and to confirm prior or offered employment. Therefore, the Office of International Affairs does not assist individuals in preparing or filing this application. Applicants are strongly advised to contract with a qualified private attorney who is Board Certified in Immigration and Nationality Law to prepare and file these applications on their behalf.

As of July 31, 2002, filing the I-485 can now be done concurrently with the I-140 immigrant visa petition or after the I-140 has been approved, contingent upon the availability of immigrant visa numbers in the employment based category for which the I-140 is approved. (For information about immigrant visa number availability, visit the U.S. State Department web page at http://www.travel.state.gov/visa/frvi/bulletin/bulletin_1360.html**.** However, the Office of International Affairs only handles the filing of the I-140 petition. Individuals who plan to file concurrently Forms I-140 and I-485 will need to let the Office of International Affairs know so that OIA can coordinate this effort with the attorney selected and hired by the employee.