

**Anatomy of ETA Form 9089:
A Refresher Course for Program Year Three Labor Certifications, P.E.
(in the PERM Era)**

(The Annual Checkup/Clinical Research)

Prepared by **Steven Clark*** with some help from his friends

This article reviews the PERM ETA Form 9089 and process for filing in light of two years of experience in registering, preparing, and submitting online and mailed PERM applications, and in dealing with the consequences of the submissions as seen through the all-powerful “Decision Matrix”¹ as well as the human reviewer. Although by no means an exhaustive review, this article is intended to examine the issues involved in completing and submitting the form in the wake of over a year of denials, audits, and cases lost in cyberspace. We are deeply indebted to our colleagues who have shared their experiences, frustrations, and even the occasional victory in a variety of fora.

*STEVEN CLARK practices business immigration with Flynn & Clark, P.C. in Cambridge, Massachusetts. He is a graduate of Yale College and Harvard Law School and Past President of the American Immigration Lawyer’s Association (AILA). He co-authored the Chapter on PERM in Mathew Bender’s authoritative treatise *Immigration Law and Procedure* (C. Gordon, S. Mailman, S. Yale-Loehr editors), as well as the lead article in Mathew Bender’s *PERM Guidebook for Labor Certification* with Jane Devlin of Flynn & Clark, P.C. This article is an updated version of his article which previously appeared in *Bender’s Immigration Bulletin*, AILA’s *Stanton Manual on Labor Certification*, the New York State Bar Association’s *New Labor Certification Regulation* and Suffolk University Law School’s *PERM Odyssey*. This version owes its anatomical humor to Angela Ferguson and Elissa McGovern who greatly assisted in updating it.

ANGELA J. FERGUSON is a partner in the Kansas City office of Austin & Ferguson, LLC. The firm is dedicated solely to the practice of immigration law. Ms. Ferguson has served as the Chair of the American Immigration Lawyers Association (AILA) for Missouri and Kansas, 1999-2001 and is currently the Chair-elect. She has served on the national AILA/DOL liaison committee since the birth of PERM by c-section

ELISSA McGOVERN is employed by the U.S. Department of Labor in the Office of Foreign Labor Certification as Policy and Regulatory Manager. Previously she was Of Counsel to the law firm of Greenberg Traurig and spent several years with AILA as its Associate Director of Advocacy for Liaison and as Senior Policy Analyst. McGovern is a graduate of New York University School of Law and a *magna cum laude* graduate of Manhattanville College. Her contributions to this article were made prior to her current employment and do not reflect the policy of the U.S. Department of Labor.

EDWIN R. LITWIN of San Francisco, and MARY GILBERT, Associate with Flynn & Clark assisted in writing and editing this version of this article and their assistance is also acknowledged.

¹ The PERM rule makes no reference to the Decision Matrix, but from time-to-time DOL officials have referred to it (or denied its existence) when explaining seemingly illogical decisions driven by the computerized mechanism which makes the decision in the first instance. A human analyst is required to review all approvals but not all denials.

The discussion below consists of instructions for registering employers for PERM, item-by-item instructions for completing the form, and a summary of issues that have arisen since March 28, 2005.

Part I: Registering For Online Completion of PERM Forms (AKA ... The Initial Office Visit)

No online PERM application commences without the employer first registering its existence in the PERM world. The employer must first go to the PERM Registration Site:

http://www.plc.doleta.gov/eta_start.cfm?actiontype=register and demonstrate its existence and intent to file a PERM application by registering online.

Employers Must Do This From Their Own Computers:

(AKA ... It's like making the initial appointment with the doctor; like your Mother always said, no one can do it for you.)

- The attorney cannot perform the registration for the employer because the Department of Labor (DOL) requires the employer to initiate the process and personally appoint attorneys or agents. The employer must also certify, at the time of filing, that it has a legitimate job opening (discussed below).
- The DOL claims it has the ability to tell through the ISP of the registrant, if the registration is coming from the attorney's computer rather than the employer's computer. DOL states they will deny applications registered by attorneys and, if the DOL later learns that an approved application was based on attorney registration, it will revoke the approved labor certification. At this point there is scant anecdotal evidence of revocation or denials on this basis – but then few dare DOL given the option of filing by mail in cases where the employer has no computer access.
- Nothing in 20 CFR § 656 supports DOL's position that this can only be done from the employer's computer. However, legacy INS rules provide that their forms have the same force as rules, and DOL appears to be taking the same position in an effort to provide authority for its practice of disallowing registration by attorneys. It is certainly the collective experience of those attorneys who registered their employers, against (or before) the explicit instruction of DOL, that cases filed on behalf of those employers were almost uniformly denied, thus triggering most attorneys' first experience with the automated Decision Matrix.²

² DOL has stated unequivocally that it will “cancel or deny registrations submitted by non-employers...[and that] submission of a permanent labor certification application using a PIN number assigned to a non-employer will be grounds for denial or revocation of a permanent labor certification.” DOL's Frequently Asked Questions (hereafter “FAQ”), PERM FAQ set Round #2 (April 7, 2005), at 2, *published on AILA InfoNet at Document No. 05041463 (posted April 14, 2005).*

Employers who do not have a computer have, for the most part, been lost in the PERM process. Their experiences have been mixed. At first most filed by mail which does not require online registration.³ However, in order to access the Decision Matrix, a DOL employee (or, more likely, a contractor) at one of the two PERM Processing Centers has to manually enter the mailed-in form online, necessitating weeks and months of delay. Additionally, any mistakes in the typed-in version of the form have resulted in a slow denial, causing applications to languish and recruitment to go stale. Employers without computers have the option of registering utilizing computers at a public library or other facility, or even at a computer other than their attorney's or agent's. However, the registration process requires an email address and the employer must respond to at least two email inquiries from DOL, so use of a third-party computer may not always be feasible.⁴

Information Needed For the Employer to Register:

(AKA ...Filling out the insurance/payment information in the office.)

- Federal Employer Identification Number (FEIN) (Payroll Tax #). If a company has had several FEINs, advise the employer's representative to use the one the company was assigned when it filed its Articles of Incorporation. If a separately incorporated subsidiary is registering, ensure that the employer uses that subsidiary's FEIN, but do not use a different FEIN if the employer is just an unincorporated division or otherwise not a separate legal entity.
- Avoid "doing business as (d/b/a)" names whenever possible. Instead, advise the employer's representative to use the company's legal name.
- Year of incorporation or year the entity started business.
- NAICS code if known; nature of business if not.
- Company P.O. addresses are not accepted—the employer must use a street address. Advise the representative to use the headquarters address, not the address where the beneficiary will work (which goes elsewhere on the Form ETA 9089).
- Contact information, including names, addresses, email addresses, and phone numbers for attorneys who will prepare forms.
- If the employer's staff will prepare labor certification forms or need their own account to review the attorney's work online, then the employer will need to establish sub-accounts

³ The Mail-In version of the form can be found at: <http://ows.doleta.gov/foreign/pdf/9089form.pdf> .

⁴ DOL has acknowledged that if it receives no response to the emails, its next step is to call the employer's contact as listed on the form to verify. Alternatively, the employer could set up a free email account and authorize a third party to monitor messages from the DOL. Access to an English-speaking contact, however, would be essential for the confirmation to take place telephonically. "Update from AILA's DOL Liaison Committee from AILA Annual Conference" (June 2005), *published on AILA InfoNet at Doc. No. 05071562 (posted Jul. 15, 2005).*"

for each staff member as well and will need to input contact information for such employer representatives.

The Employer Will Be Asked For NAICS Code:

(AKA ...Providing the group policy number from the insurance card.)

- If the NAICS code is known, it should be entered. Note that a company's NAICS code, sometimes called the "business activity code," is normally indicated on its tax forms and it is useful to be consistent.
- If the entity files forms 1040 Schedule C or C-EZ, this will be found on line B. For more information see www.irs.gov/pub/irs-pdf/i104sc.pdf.
- It is also entered as the "business activity code" in U.S Corporation Tax Return Form 1120 and Form 1120a. For more information see page 23 of the return instructions at http://www.irs.gov/pub/irs-pdf/i1120_a.pdf.
- If the NAICS Code is not known, the registration process conveniently provides a drop-down list.
- The employer should select the industry most closely related to the occupations for which it will file labor certifications (if there is more than one relevant code).

The System Will Verify the Employer's Existence:

(AKA ... Dr.'s office staff will verify insurance coverage before providing services.)

DOL will verify the existence of the company, using either IRS information or commercial databases, before accepting a registration.⁵ If it cannot verify the existence of the employer, the system will send a message asking for further documents to complete the existence check including:

- Proof of FEIN, Form SS-4 endorsed with the FEIN. This will not be readily available to many employers, so DOL has agreed to also accept the employer's most recent quarterly payroll tax return;
- Proof of establishment of business entity (business license, state registration, articles of incorporation or similar documents); and
- Proof of physical location (utility bill, tax record, lease/mortgage).

The Processing Center gives an employer 30 days to respond or else the registration is deleted, requiring the employer to re-enter the information. Conspicuously absent from the list of documents to satisfy the existence check is an annual report or SEC registration of a public

⁵ 69 Federal Register 77326, 77329 (December 27, 2004).

company. These may be more credible and far more accessible for a large established public company than the documents required (including Form SS-4 or articles of organization). Members report success, however, with documenting the existence of corporations with SEC Filings and Annual Reports, but the DOL cautions that these types of documents may only be acceptable if they reference the worksite involved in the application. Surprisingly, the PERM software has been unable to verify the existence of large, established companies, so do not underestimate the time it may take to register. When registering a company, large or small, it is essential to do so prior to recruitment; otherwise, vital recruitment could go stale, or it will become necessary to mail in the application. As discussed above, a mail-in application incurs even more risk that the application will be denied for failure to complete accurately, so avoid this risk and register early.

The System Will Assign a Temporary Password:

When the registration is accepted, DOL will email the employer, indicating acceptance. The message will contain the employer's PIN and a temporary password. The employer will be directed to create a permanent password. This may take two to three weeks.

The employer then will get two email messages. The first indicates the registration went through and assigns a temporary password. The employer **must** respond with its own new password. Then DOL sends a second message with a PIN number needed to "save a file." Saving a file is necessary in order to prepare and save ETA Form 9089 or drafts of it on the system. The PIN number is another feature designed to limit fraud and protect program integrity.⁶ A number of employers have had problems because the system sends out two successive messages from the same unknown address and spam filters flag it as spam and send it to the user's spam mail folder. Be on the lookout for this if you think DOL has not responded and do not attempt to repeat the registration process. Re-registering will just clog the system. Advise employers to check spam boxes if the registration confirmation or temporary password has not been received. AOL's spam filters are particularly apt to block registration messages. DOL advises AOL email users to create a free email account, such as those available on Yahoo or Hotmail, for this purpose. Alternatively, employers might be able to turn off some of the spam blocking filters.

- When the employer sets up the permanent password, it must include a letter, numbers, and at least one special character.
- If the employer fails to enter a correctly formatted password within three attempts, the system kicks the employer out and deactivates the registration.
- If this happens, email the address provided and the DOL may reinstate the employer in as little as 20 minutes. However, do not count on a response after normal working hours. These times may vary during peak registration times.

⁶ AILA DOL Liaison Minutes, March 17, 2005, *published on* AILA InfoNet at Doc. No.05040760 (*posted* April 14, 2005); PERM FAQ set Round #4, June 1, 2005, *published on* AILA InfoNet Doc. No. 05060364 (*posted* June 3, 2005).

Creating Accounts for Attorneys and Other Users:

(AKA ... The privacy notification from your medical professionals; please read carefully and sign below.)

Only the employer contact registering the firm will be given authority to create accounts for attorneys and corporate staff and authority to edit employer data (date business commenced, phone numbers, NAICS Code, name of company, etc.) It is important that this data is correct because it will apply to all applications for the employer.

To create a sub-account for an attorney, the employer must log on using the designated PIN and password. The employer can view all filings prepared by attorneys for whom it has set up sub-accounts, but an attorney can view only the applications in his or her sub-account, and cannot view any filings done by the employer or its other attorneys, including those within the same firm. Because DOL wants the employer to be answerable for the process, an attorney will need to have separate user accounts and passwords for each of its client companies. DOL realizes the difficulties this presents in managing multiple passwords, but is insistent on this system. Management of multiple names and passwords by whatever proven systems the attorney has at his/her disposal should be paramount, particularly when the attorney works with staff to draft the application.

Employer's Role in PERM Processing:

(AKA ... Provide a sample in the cup and pass it through the window.)

Once the attorney files the application online, the DOL sends an e-mail to the employer contact listed in Part D to verify that the attorney has been authorized to file the application and that the employer actually has an opening for the position. If DOL does not receive a response by e-mail, the DOL attempts contact by telephone. Finally, if there is no contact made or response received by DOL, the application is denied. The employer must understand the nature of the inquiry to avoid an erroneous denial. The attorney should emphasize to the employer that a prompt response to the DOL's email inquiry is necessary or else the DOL will deny the application. In addition, attorneys should educate the employer about the questions that will be asked and what the answers should be.⁷

Again, the spam filters may hinder the receipt of this DOL inquiry, and care should be taken to ensure that the emails can be received.

⁷ The questions are:

1. Are you, or do you work for, the employer referenced above?
2. Are you aware that an Application for Permanent Employment Certification was filed on your behalf?
3. Do you have an opening for the (job title) in (location)?
4. Are you sponsoring (worker's name) for this position?

The questions should all be answered "yes." Some employers are confused about the correct answer to question #3, since, in most cases, the alien is already employed in the position and employers do not understand that the alien's position is considered "open." Also, the questions are directed to the individual when they are intended to be posed to the employer. The contact should understand that an unequivocal affirmative response is nonetheless mandatory. DOL has misconstrued questions and hesitation as a negative response, so be sure the employer understands the nature and purpose of this inquiry.

The employer must sign the Form 9089 if audited and again after it has been approved. However, the better practice might be to have the parties sign a draft copy prior to filing to assure the attorney and employer agree on the phrasing of the job requirements and all form content prior to filing. Since the file number changes when the case is filed, it will still be necessary to sign again after filing.

Part II: Preparing the ETA Form 9089 – Item By Item (The Physical Examination)

Instructions for the Form:

(AKA ... Please undress and put on this half a gown!)

DOL's Instructions on filling out the form are available online at: <http://www.foreignlaborcert.doleta.gov/form.cfm>. (Click "Instructions for Completing ETA Form 9089.") That link will lead the reader to a listing of specific forms other than the ETA Form 9089, as well as "Forms and Instructions." Click "Forms and Instructions" then click "Instructions for Completing ETA Form 9089." If you click Form 9089 it will take you back to the form itself without instructions. So, save the link in this paragraph and keep it handy if you want DOL's version of the instructions. It is *always* the best practice to start with reading the actual form instructions.⁸ Unfortunately, the Adobe version of the form used for mail in applications contains a link to the instructions, but it is not a live link so you need to cut and paste the above link into your browser.

The form cautions employers that employing or continuing to employ an alien unauthorized to work may subject the employer to criminal, as well as civil, penalties. This can be intimidating to those who employ only an isolated worker, so be prepared to counsel the employer that enforcement has typically been directed at employers of large numbers of unauthorized workers. However, when asked directly in Liaison meetings about the amount of information electronically shared with Immigration and Customs Enforcement ("ICE"), DOL declined to comment.⁹

When to Use This Form:

(AKA ... Put this under your tongue.)

ETA Form 9089 is required for Schedule A cases, as well as basic process labor certification cases and competitive recruitment/selection teacher cases. The rule (20 CFR 656) does not address National Interest Waiver cases where the ETA-750B is still required per 8 CFR § 204.5(k) (4) (ii). Service Centers continue to accept the ETA-750B for National Interest Waiver filings. However, filing a Schedule A case requires using the ETA-9089. When direct filing a

⁸ Note that as of this publication, March 1, 2007, the link to the instructions is not operational.

⁹ "Minutes of the AILA-DOL Liaison Meeting" March 17, 2005, *supra*; Minutes of the AILA-DOL Liaison Meeting, April 27, 2005, *published at* AILA InfoNet Doc. No. 05051768 (*posted on* May 17, 2005).

Schedule A case with the USCIS, use Form ETA-9089 and use the Mail-In version (Click <http://ows.doleta.gov/foreign/pdf/9089form.pdf>). Adobe Writer will be required to fill it out on the computer, but AILA Link contains a fillable version of the form. When filing an I-140 to substitute an alien, USCIS advises to use Form ETA-750 if Form ETA-750 was used to prepare the original application.¹⁰

Tips On How The Online System Works:

(AKA ... Doctor, I have a pain right here....)

You can save an Adobe version of the form using the online system, but unfortunately, this can only be done after the case has been submitted online. So the online system cannot be used to create a mail-in form. You can use your browser to print a copy for review purposes, but it will not contain the actual heading and your printer may cut off a portion of the text on the right side of the form unless you are able to print it in landscape mode. To print out the form the best method is to use the button at the end of the form.

The system has a number of pains and bugs, which AILA has continually brought to DOL's attention. DOL has worked through most of these bugs at the technical level. However, significant substantive "bugs" remain, and the patient still carries the virus. The information in *Information From DOL On PERM Problems*, posted on AILA InfoNet at Doc. No. 05042245 (April 22, 2005) relates generally to how to use the system; other reports posted to the Featured Topic "PERM" section discuss the various "bugs" that have made many among us reach for the aspirin. The system assigns a case number with a T prefix (for temporary) until you hit the submit key. When the application is submitted, the number remains the same with respect to the digits, but the prefix changes: a case number with a prefix of A indicates that it went to the Atlanta Center, and a prefix of C indicates the Chicago Center.

When you are in the middle of preparing an application, you can save as a draft at each step. When you complete the application, be sure to click Submit. If you click "save as draft", the application will not be submitted. If you are unsure whether you submitted or not, search for the case status. If it shows up as Incomplete and with a "T" prefix, you saved it as a draft and did not submit it. If your system is timing out (engaging in sleep apnea) when you are working on an application, DOL advises that chances are that the problem is your browser. This should not be happening with the common browsers (e.g. Microsoft Explorer).

Once the application is processed the status code will change to "in process" or, if auto-denied, a quick "denied." DOL has refused to indicate whether an audit or appeal is pending.¹¹

Specific Items on the Form ETA 9089 (Is a frontal lobotomy *really* necessary?)

¹⁰ AILA Service Center Operations Teleconference on August 22, 2005, AILA InfoNet Doc. No. 05082660 (posted August 26, 2005).

¹¹ Summary of AILA-DOL Stakeholders Teleconference of March 20, 2006, AILA InfoNet Doc. No. 06040661 (posted April 6, 2006).

Item A 1. Are You Seeking To Utilize The Filing Date From A Previously Submitted Application? ¹²

(AKA ... Drop your pants, lean over, and this won't hurt at all.)

The PERM forms gets down to substance in the first instance by asking the employer if it wishes to convert (or to use the DOL language, to re-file) a previously-filed application. Re-filing has been one of the most problematic issues and has been made exceedingly complicated by the unexpected retrogression of EB numbers, in particular EB-3 numbers, and the apparently relatively high rate of denials for harmless error. This has become less important as the Backlog Elimination Centers (“BEC”) start to work their cases. From PERM’s inception, DOL has taken the position that “identical means identical”: same employer entity, same employment address, same alien, same job title, same job requirements, and same job duties.¹³ This is crucial because the DOL will only allow conversion from a pre-PERM case to a PERM case, with retention of the priority date, for identical positions. Only prevailing wage variance is allowed.

- If the SWA has already placed a job order in connection with the previously filed case, you will not be able to refile and keep the priority date and should check “No”.¹⁴
- If you click “Yes”, and the application is identical to the previously filed ETA-750 (along with any amendments), then the prior application will be withdrawn unconditionally.¹⁵ If the PERM filing is denied, you have lost the initial priority date (and case), as well as any priority date set by the PERM case. If the application varies in any respect whatsoever, except with regard to the wage, then the old filing is withdrawn and the employer is not allowed to keep the priority date *even if the PERM filing is approved*. No allowance is made for the fact that the PERM form and regulation may not permit filing the application identically. Maintaining the priority date in an identical case is significant because visa backlogs are expected to continue, particularly in the third preference category. The benefit of an older priority date to a third preference or skilled worker is unmistakable. However, if the case is denied, even for a technicality (which cannot be overturned on appeal), the benefit afforded by PERM is severely diminished by the loss of years of visa eligibility, even though the case might later be refiled and approved.
- Those who elect to retain an old priority date should understand that DOL must locate the prior filing at the BEC, complete its data entry if not already completed, and review the two applications with human eyes to compare to ensure identity. This has caused considerable processing delays on many such re-filing requests. Additionally, with re-filing and requesting to retain the priority date, an audit is probably unavoidable, as the DOL will ask for a copy of the original application.
- The rule does not provide for withdrawal of the pre-PERM application when the PERM application does not request retention of the priority date. DOL does, however,

¹²20 CFR § 656.17(d) (1) (ii) and (d) (2).

¹³ 20 CFR Sec. 656.17 (d) (4).

¹⁴ 20 CFR § 656.17(d) (1).

¹⁵ 20 CFR § 656.17(d) (1) (i).

disapprove of dual filing and there has been considerable uncertainty as to whether re-filing under PERM without requesting retention of the priority date could compromise an application filed prior to PERM. DOL attempted to clarify its procedures in August of 2005:

- Pre-existing (pre-PERM) policy has been to offer the employer the option of withdrawing either pending case when DOL identifies two pending cases. DOL frequently did this when an employer filed a case under supervised recruitment and re-filed under Reduction in Recruitment without withdrawing the supervised recruitment case.¹⁶
- DOL was itself uncertain whether it had the authority to do anything more than to request that the employer withdraw one of the filings at its option.¹⁷ In response to the question of whether the employer should withdraw an earlier application when filing under PERM, the DOL simply stated it does not provide counsel as to questions of this nature and reminds employers that re-filed applications must conform to the PERM rule. This can be contrasted with the strict treatment of questions as to registering an employer on the attorney's website where DOL states the application may be denied, and revoked if approved.
- DOL published a FAQ on August 8, 2005 stating that if dual filings are encountered after publication of the FAQ, and the cases were still pending, the prior case would be automatically withdrawn and only the subsequent case could proceed.¹⁸ This would automatically lift the more favorable priority date. DOL withdrew this FAQ shortly thereafter in response to industry protest and AILA advocacy threatening litigation based on a change of policy without rulemaking as required under the Administrative Procedures Act.
- On or about December 21, 2005, DOL revised and republished the answer to PERM FAQ set Round #5. It reiterated the agency's "long-standing" position that an employer may not have more than one Form 9089 in process under the PERM regulation for the same beneficiary for the same job opportunity at any given time. It established a transition process for easing multiple filings out of the system, with the end result that effective January 19, 2006, if an employer had not withdrawn all but one application, only the last-filed application would be processed, denying all previously-filed cases. After that date, DOL continues to process the FIRST-filed case unless the employer has formally withdrawn it.¹⁹

¹⁶ This policy is the subject of "Region VI SESA/JTPA Memorandum No. 84-97" (May 12, 1997), *reprinted in* Texas AILA Chapter Mailing, Summer 1997, at 104.

¹⁷ This uncertainty is reflected in the cautious wording in the DOL's PERM FAQ set Round #2, *supra*.

¹⁸ http://workforcsecurity.doleta.gov/foreign/pdf/perm_faqs_8-8-05.pdf.

¹⁹ "DOL PERM FAQ set Round #5," reposted December 21, 2005, *published as* AILA InfoNet Doc. No. 05122160 (*posted* December 21, 2005). It is extremely important to keep in mind that an employer cannot file a new application while a request for review is pending with the Board of Alien Labor Certification Appeals (BALCA) for that same alien, employer, and job opportunity. *See* 20 CFR § 656.24(e) (6). As a result, the employer and the employee beneficiary are literally stuck in review for that job opportunity.

- The published DOL position mentions multiple PERM filings, but not where a PERM filing is similar to a prior filing pending at the BEC's and there has been no request to retain the priority date. There is considerable skepticism as to whether DOL has the current capacity to routinely identify prior filings involving the same employer and employee in cases pending at the BEC's, although the likelihood grows as the backlog nears data completion.
- DOL did manage to identify some PERM filings that duplicated cases filed at the BEC's and in a number of instances withdrew the Backlog cases even though the employer had not requested retention of the priority date. However, it has acknowledged this was done in error and reinstated the erroneously withdrawn cases.²⁰ See also AILA InfoNet Doc. No. 06111563 (posted Nov. 15, 2006).
- DOL has also acknowledged that there are valid reasons for having multiple PERM filings for the same position, e.g. where there has been a change in worksite location. While acknowledging that the system will often automatically deny such duplicate filings, it is developing an FAQ to identify situations where a duplicate filing is acceptable. DOL Stakeholder Meeting Minutes, December 11, 2006, item 17, AILA InfoNet Doc. No. 06122066 (posted Dec. 20, 2006).

Item 1.A and Retrogression Roulette:
(AKA ... Physician: First, Do No Harm)

Given the significant backlogs remaining at the so-called BEC's, there is a strong incentive to file, or even re-file a case, under PERM in an effort to attain labor certification on a timely basis and still maintain an earlier priority date. However, the adage of doing no harm applies to re-filing cases, particularly with the complication of retrogression. DOL earlier optimistically predicted it would take 2 to 3 years to process the more than 300,000 cases originally sent to the BEC's.²¹ The agency continues to assert that position, even though acknowledging its tasks in identifying the cases and closing them through adjudication was more severe than anticipated (the addition of 40,000 cases in the four months prior to PERM's implementation alone has been cited as a significant problem in meeting original deadlines).²²

Attorneys are now forced into a guessing game of major proportions, juggling not only the timing of filings and the time remaining in a non-immigrant's allotted time, but also how the case was filed, and in what preference category, not unlike making a major medical decision on the basis of partially-visible X-ray or MRI. We have been told that while there is no separate track for RIR cases at the BECs, that in fact they are being processed first because they are easier to adjudicate. When the SWAs last gave cutoff dates, most states had processed cases through April 2001, leaving a backlog of approximately 4 years for RIR cases. Cases filed in 2001 or 2002 will certainly be processed sooner than those filed in 2004 or 2005. But even this can not

²⁰ <http://www.foreignlaborcert.doleta.gov/times.cfm>

²¹ DOL puts the total at over 363,000. "Summary of Statistical Information Requested from DOL by AILA-DOL Liaison Committee, March 20, 2006" AILA InfoNet Doc. No. 06040660 (posted April 6, 2006).

²² As of this writing, the ETA website for PERM proudly announces that the "**Backlog will be eliminated 9/30/2007.**"

be assumed because RIR cases sometimes are adjudicated in a seeming random pattern. So attorneys are forced (by circumstances or by clients eager to get to the other side of the labor certification) to play guessing games with the timing of getting the approval versus getting to the next step.

If the case was filed in the last year or two and the foreign national is not yet in the sixth year of H-1B status, it may make sense to file under PERM, whether or not you can keep the old priority date, provided the person is subject to the worldwide second employment-based preference.

If, however, the case is subject to the worldwide third preference, where we already have backlogs, then we have to compare the anticipated waiting time for the labor certification with the waiting time for a visa number, and factor in whether the client is more concerned with expediting the labor certification process or the overall permanent resident process.

Now that the worldwide second preference could backlog in the coming fiscal year, it may be necessary to make the same analysis even if in the second worldwide preference.

- In many cases, such an analysis will be moot. The most obvious impact of visa retrogression will be that it will be necessary to file a new labor certification when the job location changes or the employee is promoted. We have enjoyed a measure of flexibility thanks to AC21 because the petition became portable to any job in the same or similar occupation once the I-485 has been pending for 180 days. However, now I-140 petitions will likely be approved and beneficiaries will have to wait for years before they can file the I-485 and then reach that point of portability. Portability will not likely be available where the job has changed years before the I-485 is pending for 180 days.
- Those who need to retain the priority date the most, those from backlogged countries, will not directly benefit from an early PERM decision since the case will in all probability need to be held while awaiting a visa number. However, circumstances may dictate the importance of getting over the prime immigration hurdle (labor certification) and the waiting game for a visa number will be less important. Such individuals may wish to answer “NO” to the question about retaining the priority date so that the old filing remains pending, giving potentially two bites at the apple, particularly where they filed recently or do not anticipate a substantial delay awaiting a visa number.
- A quick PERM decision, coupled with an approved I-140 (which can now be premium processed), will give the foreign national the ability to obtain a 3-year H-1B extension.
- Where there is a risk of a child aging out, it may be beneficial to attempt to retain the priority date and move forward with a PERM filing requesting a retained priority date because the Child Status Protection Act provides no relief from delayed labor certification processing, only delayed USCIS processing. If visa backlogs are not the most pressing issue, then even in age-out situations, it may be smarter to file without requesting retention of the priority date. CSPA provides no relief from visa backlogs prior to filing the application for permanent residence, but requesting a retained priority

date will delay PERM processing and keep your client from getting to the permanent resident filing stage.

The decision to re-file under PERM is not without risks under any circumstances. One should not re-file lightly given the severe retrogression most all preferences categories may be facing.

Back To The Basic Exam – Open Wide And Say “Ahhhh”.....

Item A 1-B: Indicate The Previous SWA Case Number Or State Where Case Was Filed

- It may be helpful to provide the date as well as state of filing to assist in locating the file. Some AILA members have reported difficulty entering alphabetic characters rather than numbers in this field.

Item C 2-3: Employer Headquarters Information

- Do not use the worksite address here. Use the address of company headquarters to avoid triggering undue concerns about the employer’s existence. You may not use P.O. Boxes or rural codes.

Item C 4: Employer Headquarters or Main Office Phone Number

- Use the switchboard phone number, not the contact’s direct line. DOL will check to see if this phone number matches that on IRS or commercial databases to determine if the employer is a legitimate company. If the number does not match that on record as the general phone number then the company may fail the database comparison, resulting in delays.
- Do not use a cell number. Firms listing only a cell number will be deemed to be illegitimate.

Item C 5: Number of Employees

- If the number of employees is small then the company may be required to submit copies of the articles of organization, list of shareholders, their relationship to the foreign national (if any) and their investment amounts in the event of an audit by DOL. The burden will be on the employer to prove that the job is truly open and available to all U.S. workers. The number is not specified, but the rule does state that if the employer has fewer than 11 employees, and an audit requests documentation of lack of alien influence and control over the job opportunity, then the employer must document any family relationship between the alien and employees.
- This question is a possible trigger point for an audit, but to date practitioners have not noticed any pattern of audits focused on smaller firms.

- Where the number of employees is below 11, and there are part-time employees, one should count part-time employees and not just report full-time equivalents. Although the PERM regulatory definitions provide that only full-time employment qualifies one for a labor certification, no such requirement is delineated in the instructions to item C#5. Note that the draft form in the Federal Register asks for the “number of employees in the area,” but the actual form asks for the number of employees without requiring the employer to count only employees in the local area.
- On the other hand, if the number of employees is above 10, then it may be advisable not to count part-time employees or to only count full-time equivalents so that the payroll cost listed on tax returns does not seem to be low for the stated number of employees. The USCIS may review this information when the I-140 is filed.
- The question does not ask for current number of employees, but the instructions and online help do specify the current number.

Item C 7: Federal Employer Identification Number (FEIN)

- The FEIN can have implications for applying the rule that the employee cannot qualify for the labor certification job based on experience or qualifications gained after the date of hire (see item H 11, J 21). This rule prohibits use of experience gained working for the petitioner on the basis that it would be unfair to require experience of U.S. worker applicants that the foreign national employee did not have at the time of hire. An exception is made if the foreign national is promoted to a job, which is not “substantially comparable” (e.g. one in which more than 50% of the time is spent performing different duties).
- In determining whether the employee’s previous experience may be used to qualify for the labor certification job, the DOL will treat a predecessor with a different FEIN as a different employer and allow the use of experience with the predecessor company. This “bright line” test replaces a number of BALCA decisions dealing with related companies, foreign operations, and efforts to subvert the rule by using another company as a training ground and then swapping employees.
- If the company incorporates or reorganizes and uses a new FEIN, then it may be able to use experience gained with the prior entity to qualify the employee even though it is a related company.
- If the employer is a private household, it will be necessary to obtain an FEIN even though payroll taxes can sometimes be reported on the employer’s personal tax return, Form 1040.

Item C 8: NAICS Code

- This is the 6 digit code for the employer’s industry used in the census. The on-line form contains a drop-down list. If you prefer, or are filing out a paper form, you can find a searchable database at <http://www.naics.com/search.htm>. However, the code appears on the corporate tax return, Form 1120, at page 1 as well as on other business filings.

Item C 9: Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?

(AKA ... Let’s check your family’s medical history.)

- The instructions define “closely held corporation” as one with relatively few shareholders and not traded in the securities market.
- The instructions and rule do not define familial relationship. For purposes of the Affidavit of Support, Form I-864, the USCIS defines relationship as spouse or immediate blood relative.
- Webster’s Dictionary defines a “relative” as one “related by blood or affinity.” DOL could go beyond this language to reach in-law relationships.
- When we encounter owners who are spouses of blood relatives, cousins, or even aunts and uncles, it is difficult to provide bright-line guidance, but Webster’s would provide support if the employer does not report a familial relationship in these instances. However, the time it would take to fight out such an issue should be duly considered.
- A “Yes” answer to this question will most certainly flag the case for an audit, in which case the burden will be on the employer to provide documentation showing a bona fide job opportunity exists.²³
- Under *Modular Container Systems*, the following factors, among others, may be examined to determine whether a job is clearly open to a U.S. worker:
 - Is the alien in a position to control or influence hiring decisions regarding the job for which labor certification is sought;
 - Was the alien an incorporator or founder of the company;
 - Does the alien have an ownership interest in the company;
 - Is the alien involved in the management of the company;
 - Is the alien on the Board of Directors;
 - Is the alien one of a small number of employees;
 - Does the alien have qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and

²³ The determination will be governed by the criteria in *Matter of Modular Container Systems*, 89-INA-228 (BALCA July 16, 1991).

- Is the alien so indispensable to the sponsoring employer, because of his or her pervasive presence and personal attributes, that the employer would be unlikely to continue the operation without him or her?

Item D 1: Employer Contact

- This does not have to be the hiring authority who signs the form because the form allows a different person to sign.
- This would normally be the HR person dealing with the occupation, or in firms where the legal department deals with immigration issues, this could be the representative of the legal department. However, this should not be the same as the legal staff listed in item E who is acting as attorney for the employer.

Item D 4: Phone Number for Employer Contact

(AKA ... We need a phone number for your pharmacy to call in some anti-depressant meds for you.)

- This should be the direct number of a person who can be contacted to authenticate the application. It should not be a switchboard number where the person who answers may not be aware of the existence of the job opening. DOL will email the employer contact and if there is no response, contact this telephone number and inquire to be sure the individual is aware of the filing. This has been the source of much confusion, as well as denials. The nature of the inquiry should be explained to the employer contact prior to filing.

Item E 1-7: Attorney Information

- Use the “search for agent” link to search for the attorney information used in a previous case and do not type the information in freehand. If you select the attorney from the list the information will be pre-filled. This is preferable because differences in the placement of a period or abbreviation will create a new entry for the attorney.

Items F 1-8: Prevailing Wage Information

- This should be straightforward, as it will be copied from the SWA prevailing wage determination form.
- Note that not all SWAs provide a tracking number for the Prevailing Wage Determination (PWD) and one is not required.
- Item #4, the Skill Level, is also not always provided in the case of private surveys, and AILA reported the skill level could be left blank if based on a non-OES wage.²⁴

²⁴ “Notes from DOL Focus Group,” published at AILA Doc. No. 05031166 (posted March 11, 2005).

- PWDs must be valid at the beginning of recruitment or at the time of filing. If the PWD was issued after recruitment began and has expired when the case is filed, the case will be denied.²⁵ Use care in entering the validity dates. If the validity period is less than 90 days the case will be denied even if the SWA issued it that way.²⁶ This can happen when one inadvertently enters the prior year during early months of the new year – the Decision Matrix will read this as a negative number which is less than the sacred 90 days.

Item G 1: Wage Offer Information

- If you do not use a range the form nonetheless prompts for a top and bottom figure. If you are not using a range, then leave the maximum field blank.
- Use of a wage range can be desirable where confidentiality of the precise wage amount is an issue. The bottom end of the range must now be 100% of prevailing, rather than only 95% which was allowed under preceding regulations.
- When converting the wage determined to daily, hourly, weekly or annual amounts multiply the hourly rate by 8, 40, or 2080 respectively.
- The online form will not accept commas in wage figures.

Item H 1: Primary Worksite

- This is the address of the primary site or location where the work will actually be performed.
- The TAG manual under the prior rule suggested using the address where the majority of the work is performed, if there is more than one site.
- Where the worksite cannot be ascertained, guidance under the prior rule allowed the employer to insert the address of the company headquarters or a main office and such other locations as the employer assigns.²⁷
- While it is not clear whether guidance under the prior rule will be recognized, in the absence of new guidance, the DOL may be hard pressed to support rejection of a practice in compliance with prior guidance. Although not directly relating to Item H.1, the DOL has specified the location for posting the job notices for roving employees, stating that the posting must be on the premises of each work site, at least in Schedule A cases.

²⁵ “DOL PERM FAQ set Rounds #1 and #2,” *supra*.

²⁶ “DOL PERM FAQ set Round #6,” *published at* AILA InfoNet Doc. No. 06022474 (*posted* February 24, 2006).

²⁷ Field Memorandum No. 48-94 (DOL May 16, 1994) *reprinted in* 13 AILA Monthly Mailing 544, 546 (July-Aug. 1994).

Further, the FAQ stated that if a work site cannot be determined, then this may suggest the employer has no premises and there may not be a legitimate job offer.²⁸

- Provisions of the rule relating to advertising require the advertisement to indicate the need to travel or where the worker will likely need to locate in order to perform the job. Thus, it may not be sufficient to simply state the headquarters address in the advertisement. The possibility of telecommuting should be disclosed in the advertisement if the job can be performed without living in the area indicated.

Item H 3: Job Title

- This is to be the common name or payroll title of the job offered (e.g., the employer's title, not the title under the SOC. However, if the employer has an unusual or non-descriptive title (e.g., member of technical staff), use of a more common title will avoid misunderstandings and thus reap a tactical benefit.

Item H 4: Education Required

- The block of "Other" education would be used for professional degrees such as a JD or MD, which do not equate precisely to a doctorate or masters. This will also be used where the requirement is below degree level (e.g., x years of college).
- Education requirements can kick up the wage level under the *Revised Prevailing Wage Determination Policy Guidance* issued by the DOL on March 17, 2005.²⁹ The wage level will go up 1 step unless the education is at or below the levels described in the O*NET job zone as what "most of these occupations require." So a Level One wage will become a Level Two wage. But, if the wage is already at Level Four, it does not go higher. For example, if the job zone indicates that the job requires a minimum of a bachelor's, but the employer requires a master's, the job will go up one wage level. If the employer's education requirements exceed the O*NET job zone guide for usual education by two levels (B.S. to Ph.D.) or more, then two extra points are added. For non-professional jobs that require more than the level of education the O*NET job zone described as what "some may require" then two points will be added. If two points are added, the wage will rise by two levels unless it is already at Level Four.
- Item H-4b contains space to enter several related fields.

Item H 6: Experience Required in Job Offered (AKA ... *Or, get ready to aggravate your TMJ.*)

- Indicate, "Yes" if the employer requires experience in the occupation being offered in the PERM application even if the foreign national qualifies on the basis of an alternate combination of education and experience in that occupation.

²⁸ "DOL FAQ Round 7," published at AILA InfoNet Doc. No. 06022473 (posted February 24, 2006).

²⁹ Published at AILA InfoNet Document No. 05052066 (posted May 20, 2005).

DOL issued a “clarification” of its position with respect to the issue of when experience in the job offered should be contemplated, and when the alternative experience is noted. It is worth reviewing in its entirety (but note that just reading this has led to reported instances of Chronic Fatigue Syndrome):

A number of [AILA] members have reported receiving denials of labor certification applications under PERM on the basis that “the alien beneficiary must meet the actual minimum requirements necessary to perform the job. The alien's qualifications listed in Section J of ETA Form 9089 do not meet these requirements.” Yet, upon review of the application, it appears that the beneficiary does indeed meet the minimum requirements, but on the basis of a combination of education and experience in the occupation.

Therefore, AILA's liaison queried the DOL, which explained that these denials are the result of a difference in how people are reading question H.6 (“Is experience in the job offered required for the job?”) when there is an alternative combination of education and experience provided in question H.8 (“Is there an alternate combination of education and experience that is acceptable?”), but no alternate occupation in question H.10 (“Is experience in an alternate occupation acceptable?”).

DOL indicates that question H.6 should be read separately from question H.6A (“Number of months of experience required”) for purposes of answering question J.18 (“Does the alien have the experience as required for the requested job opportunity, as indicated in question H.6?”). If experience in the job offered is required, and the alternate requirement in H.8 is a different educational background and different amount of experience, the answer to question J.18 should still be “yes”, since the alien does have the “”experience as required...in question H.6”. H.6A, which explores the amount of experience, is a separate question.³⁰ For an expanded clarification with case examples, see “Ask the Expert with Steve Clark,” *Immigration Law Today* (AILA Nov/Dec 2006), 40-42.

If experience in an alternate occupation is acceptable, must you specify experience in the job offered? DOL has clarified that it is acceptable not to specify experience in job offered where none is required, and where the alien qualifies based on alternative experience it is not necessary to insert the “magic language”.³¹

- The level of experience required in combination with education may not exceed the SVP, unless it is documented on the basis of business necessity. Thus, it is critical to determine if the SVP specified in the O*NET is exceeded. If it is, or if the employer indicates the requirements are not normal, an audit may be triggered to request business necessity documentation.

³⁰“Pointer from DOL Liaison on Completing Form ETA 9089,” published at AILA InfoNet Doc. No. 05082968 (posted Aug. 29, 2005).

³¹ DOL Stakeholders Meeting Minutes, December 11, 2006, AILA InfoNet Doc. No. 06122066, posted Dec. 20, 2006.

- In addition, experience requirements can increase the wage level for prevailing wage purposes under the Revised Prevailing Wage Determination Policy Guidance. If the experience is at or below the level described in the O*NET job zone it does not increase. For jobs in O*NET job zone 1, if the employer’s requirements meet SVP Level Two (anything beyond short duration or up to 1 month) the wage gets bumped up one level, for SVP 3 (over 1 month up to and including 3 months) the wage gets bumped 2 levels, and for SVP 4 (over 3 months up to and including 6 months) the wage can get bumped three levels. For jobs in job zones 2-5 the wage goes up one level if the experience is at the low end of the job zone range, two if at the high end, and three levels if it exceeds the range. Level Four is the top level and it will not go beyond that. But if the employer loads up the experience requirement even within ranges acceptable to the O*NET, Level Four can be approached all too quickly.

Item H 7-A: Alternate Major Field of Study
(AKA ... *Homeopathy*)

- The box is small, but may be adequate if you do not include a large number of alternative fields.
- This typically happens when you require “computer science, math, engineering, or science major” (e.g., for IT positions). This actually works, but that is about the maximum number of acceptable characters.

Item H 8: Is there an Alternate Combination of Education and Experience
(AKA ... *Acupuncture plus Surgery?*)

- This can be used to specify a Master’s plus three years of experience or a Bachelor’s plus five years experience to qualify for EB-2 based on master’s equivalence. If the foreign national qualifies based on a Bachelor’s and is working for the petitioner, be sure to use the mantra “any suitable combination of education, training or experience is acceptable” in item H.14. While the rule can be construed to require this only for an alternate experience requirement, as opposed to a combination of education with experience, 20 CFR § 656.17(h)(4) is admittedly unclear. The language is only required in the application, not in the advertisement or posting, and then only if the worker qualifies based on the alternate requirement and is currently working for the petitioning employer. See items H 11, H 14 for further discussion. The NSC has clarified that the presence of this language does not dilute the requirements so as to render the applicant ineligible for EB-2 classification.³²

Item H 10: Acceptable Alternate Occupation
(AKA ... *Psychic?*)

- Note that the amount of experience in 10-A is to be listed in months.

³² AILA-NSC Liaison Visit Q&A, April 19, 2006, item 7, AILA InfoNet Doc. No. 06050966 (posted May 9, 2006).

- Under PERM the only experience options are for experience in job offered or to identify an alternate acceptable occupation. Employers, however, look for experience with duties and skills, not occupations, so there is a fundamental difference of classification. The question is how best to bridge the gap.
- It appears to be permissible to identify experience in any occupation involving key duties or utilizing key skills under PERM. For example, “software applications programmer using Java Beans,” or “any position performing C++, database and object-oriented programming.”
- One option is to list the occupation and then specify the skills and duties needed as special skills in item 14. The concern then is that this may flag the requirement for closer scrutiny in an audit.
- Another option is to list duties rather than an occupational title in this item. However, members who have done this report denials. Other members, who have listed “Any occupational title involving use of” and then fill in the tools or programs used, have reported approvals.
- An alternative approach that may work is to add the skill required to the job title. For example, if the position requires experience as a software engineer using UNIX, change the title to “UNIX software engineer.” The limitation is that this can get clumsy if the employer requires experience with multiple skills or has very different title schemes.
- While it is easy to get alarmed about this uncertain state of affairs, it is also useful to note that the comparable item for the ETA-750A, item 14, uses the similar language: “Experience: related occupation.” The ETA-9089 item 10-B specifies, “Job title of acceptable alternate occupation.” The supplementary information mentions that commentators felt that the restriction of this item to the title of the occupation and the lack of space to specify duties or skills required in this experience were contrary to real-life hiring practices. The DOL response in the supplementary information did not squarely address this concern, implying there was no change in policy. What is different here, apart from the slight change of language, is the fact that we are dealing with electronic forms, and there is no provision for a review process or Notices of Findings to direct us to amend the forms and re-recruit if the DOL disagrees with the manner in which we have completed the application.

Item H 11: Job Duties

- The instructions require the employer to specify equipment used and pertinent working conditions.
- Describe actual job functions rather than basic duties to highlight the differences when attempting to distinguish the labor certification job as not substantially comparable to a

previous job. For example, if a software developer manages other developers, state the duty as reviewing code prepared by other developers rather than developing code. Carefully describe specific actions taken by the worker rather than vague areas of responsibility, particularly where the employee is relying on experience with the employer in a position that is not substantially comparable. Also give percentage breakdown of key duties for both the job offered and the qualifying experience in an effort to document less than a 50% overlap.

- Job requirements exceeding the O*NET SVP may be challenged, but unusual job duties are only subject to challenge if they involve a combination with duties normally found in other occupations. However, the business necessity test states that once the requirements are found to be excessive, then the job duties (as well as requirements) must bear a reasonable relationship to the occupation. BALCA's *Matter of Information Industries Inc.*³³ has been incorporated into 20 CFR §656.17(h). This section sets out the two prong test for business necessity and requires that the employer demonstrate that "the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and, second, that the requirements are essential to perform the job in a reasonable manner."³⁴ When the experience or educational level is excessive, it is necessary to be sure that the duties are reasonable for the occupation. While there is no direct requirement of reasonable duties, the issue arises indirectly if the requirements exceed the SVP constraints or if the duties themselves reflect those normally found in separate occupations.
- A number of occupations have been reclassified with lower SVP codes in the O*NET thereby triggering audit scrutiny to review business necessity documentation of such applications. A Specialty Cook, for example, has been downgraded from an SVP of 7 (corresponding to over two years and up to four years experience) in the Dictionary of Occupational Titles to an SVP of just four, corresponding to three up to six months experience in the latest version of the O*NET job zone. It remains to be seen whether the DOL will take downgraded occupations into account favorably in determining its audit criteria. Prior to PERM there might have been open discussion of issues of this nature, but under PERM the tendency of DOL is to refuse to reveal criteria on the pretext that it must maintain secrecy for audit criteria to be effective. Practitioners do note relatively few audits challenging business necessity for these downgraded occupations. The prudent practitioner will, of course, nonetheless prepare business necessity documentation.
- The job duties may impact the prevailing wage under the revised prevailing wage guidance issued May 17, 2005. Under the revised guidance, the wage determination depends on the following which should be reflected in the description of job duties:
 - Supervisory duties if not normal for the occupation may raise the wage level one level; and

³³ 88-INA-82 (BALCA 1989) (en banc).

³⁴ 20 CFR §656.17(h).

- Level of complexity of tasks performed and judgment exercised determines the wage level:
 - Level 1 performs routine non-complex tasks with limited, if any, judgment.
 - Level 2 performs moderately complex tasks with limited judgment.
 - Level 3 performs tasks requiring exercise of judgment and may perform supervisory duties.

Item H 12: Are the Job Requirements Normal for the Occupation?
(AKA ... Or, do the symptoms really identify an illness?)

- If the requirements exceed industry standards or the SVP level, then the employer must state that the requirements are not normal and be prepared to submit business necessity documentation in the event of an audit.
- DOL has indicated that this item is an audit flag, so an audit will occur if “No” is checked. However, numerous cases checked “No” have been approved without audit.
- If the employer gives an inappropriate answer, the Certifying Officer will be able to determine that by comparing the requirements to the SVP, and then deny the application without affording an opportunity to document business necessity in an audit.³⁵ (The rules have not only eliminated Notices of Findings and replaced them with Audits, but they eliminate the need for even an Audit where the response is inappropriate.)
- The rule does not define what is “normal.” They simply say that the job requirements must be both normal and not exceed the SVP as shown in the O*NET job zones, unless documented as arising from business necessity.³⁶ Some believe that the requirements are normal as long as they are within industry standards or that the employer’s incumbent employees in the occupation meet the requirements, but there is no official guidance on this subject.

Attorneys report that cases are being approved where the SVP is exceeded but the separate O*NET job guidelines for experience and education are met. This may be due to ambiguity in the rule, which benefits a liberal interpretation. The supplementary information to the rule states that the DOT SVP is to be used.³⁷ But the rule refers to the “SVP as noted in the O*NET.”³⁸ The O*NET does not contain the SVP; it simply states the reported range of SVPs. O*NET does contain the job zone, but the job zone provides for the experience level without deducting time spent in education, so a larger level of experience is permitted. One should, however, prepare business necessity documentation when exceeding the SVP as defined in the DOT to be safe.

Item H 13: Is a Foreign Language Required to Perform the Job Duties?

³⁵ “DOL PERM FAQ set Round #1,” pg. 17.

³⁶ 20 C.F.R. § 656.17(h) (1).

³⁷ 69 Fed. Reg. 77351.

³⁸ 22 C.F.R. § 656.17(h) (1).

(AKA ...Madam, your glomerulus contains chemical deoxyribonucleic acid in your nephron....)

- A “Yes” response will heighten audit exposure, except where the language requirement is due to the nature of the occupation (e.g., translator, interpreter, or foreign language instructor).
- A “Yes” response also requires the employer to prepare business necessity documentation in the event of an audit, which will be likely.
- The language requirement will raise the wage one level unless the job is already a level four or if the job title is foreign language teacher, interpreter or caption writer, or the requirement does not sufficiently increase the level of seniority and complexity of the position (e.g., specialty cooks.).³⁹

Item H 14: Specific Skills or Other Requirements

There is no quantitative standard for restrictive skills comparable to that for education or experience, but skills, which do not appear in the O*NET job summary, must be documented by a business necessity letter. The rules contemplate and best practice is to prepare this prior to filing the application. The test for restrictive requirements will be a subjective standard similar to that for determining when skills spike the wage level, and no doubt an area of controversy since the O*NET does not purport to identify all skills required for all occupations. If you click the details button in the online O*NET (<http://online.onetcenter.org/>) you will find a surprising number of skills have been added.

- Skills which the worker can readily learn through a reasonable period of on-the-job training, or for which the worker is qualified by a combination of education, training and experience, cannot be used to reject applicants. DOL has not defined a standard of reasonable length of such on-the-job training, stating that the training will vary with the occupation.⁴⁰
- DOL has indicated that the magic words, “any suitable combination of education, training or experience is acceptable” should be placed in this field when required (see discussion at H 8, 11, 14 above).⁴¹ Often DOL overlooks the language, so it will be well to put it in ALL CAPS. If placed at the beginning of the field it is less apt to be overlooked, but it fits in better at the end so that it is not confused with other requirements. While this language must appear in the application, it is not required in advertisements.⁴²
- The online form contains an addendum for this field.

³⁹ Revised *Prevailing Wage Guidance*, supra, at 12.

⁴⁰ 20 CFR § 656.24(b).

⁴¹ PERM FAQ set Round #7, AILA InfoNet at Doc. No. 06022473 (posted on Feb. 24, 2006).

⁴² DOL Stakeholders Meeting, December 11, 2006, item 19, AILA InfoNet Doc. No. 06122066 (posted Dec. 20, 2006).

Item H 15: Does the Job Include a Combination of Occupations?

(AKA ... Combining medications can cause an allergic reaction ... or an audit!)

- If the job involves a combination of duties normally found in more than one occupation, the need must be documented by business necessity.
- This will be a likely trigger an audit. Mere cost of hiring separate workers for each occupation is not normally accepted as a justification. Situations where it is impractical or infeasible may suffice as business necessity, but not mere cost.

Item H 16: Is the Position Offered to the Alien?

- A “No” answer compels a denial. Care must be taken to be sure that this is always answered “Yes” in the application. A denial is not only embarrassing but could lead to investigation of the employer and attorney and possible disbarment.

Item H 17: Does the Job Require the Alien to Live on the Employer’s Premises?

- If the job requires the employee to live on the premises, then business necessity documentation is required, and prepare for the audit request. This could arise, for example, in the case of a ranch foreman who is required to live on the ranch.

Item H 18: Is The Job For A Live-In Household Domestic Service Worker?

(AKA ... Is there a doctor in the house?).

- If “Yes”, then the employer must have a contract with the worker, executed in duplicate, that meets DOL requirements, including provision of private room with bath; the worker must document one year of paid experience performing the duties; and the employer must provide a description of the premises, including ages of children, number of rooms in the home, etc.
- If the job is not live-in, then no contract is required and business necessity is not required. In addition, in a departure from prior practice, one year’s paid experience is not required for household domestic service workers who are not required to live-in.

Item I A-1: Is the Application for a Professional Occupation Other Than a College or University Teacher?

- The standard for “professional” is whether a bachelor’s degree (or equivalent) is normally required, not whether this specific job requires a degree.
- Appendix A to the rule lists professional occupations. If listed, the occupation is professional, even if this specific employer does not require a bachelor’s degree or equivalent for this position.

- Professional positions require three additional recruitment steps.
- If the occupation is not listed on Appendix A and the occupation is in Job Zone 5, the admonition in PERM FAQ set Round #1, to err on the side of providing the three additional steps⁴³ has resulted in confusion. DOL has clarified that it is not necessary to conduct the three additional steps if the occupation is not listed on Appendix A.⁴⁴

Item I A-2: Is the application for a College or University Teacher?

- Always answer this question, but you may skip 2A and 2B if the position is not a college or university teacher.

Item I A-2A: Did you Select the Candidate Using a Competitive Recruitment and Selection Process?

- This question and the following one indicate whether you used the competitive recruitment selection process or basic professional process to recruit. The rule clarifies that regardless of which method is used, the “best-qualified” candidate standard can be used and it is not necessary to show that there were no minimally qualified candidates available for the position.
- The competitive process application must be filed within 18 months of the teacher’s selection and allows the use of a single journal ad with some other method chosen by the employer, and selection using a search committee. Otherwise, the employer must use the basic recruitment process consisting of two Sunday newspaper ads, a job bank posting, and internal posting/notice of filing. and three additional recruitment steps. The Technical Assistance Guide (TAG), however, also offers the option of conducting a second competitive recruitment.⁴⁵

Item I B-3: Date Alien Selected

- While the competitive recruitment process may be a relatively painless way to obtain a labor certification, note that the 18 month deadline from the teacher’s selection can easily pass by, because it is not always clear when the teacher was selected. Eighteen months may sound like a significant period of time, but academic positions are typically recruited a year in advance of commencement of employment. The 18 months can run out before the teacher reports for work, or shortly thereafter.

⁴³ “DOL PERM FAQ set Round #1,” *supra*, at 8.

⁴⁴ DOL Stakeholder’s Meeting, December 11, 2006, item 24, AILA InfoNet Doc. No. 06122066 (posted Dec. 20, 2006).

⁴⁵ U.S. Employment and Training Administration, U.S. Department of Labor, *Technical Assistance Guide No. 656: Labor Certification (TAG) (1981)* at 70. The DOL could take the position that the TAG is not controlling of the PERM program.

- The 18-month deadline is really a 16-month deadline because the required internal posting/notice and all other required recruitment must be completed before the final 30 day “quiet period” prior to filing. To complete the posting by that time it is necessary to post some 10 days earlier, so the deadline in reality is 16+ months. Prior to PERM, the posting could be done at any time prior to filing and would even be forgiven if done in response to a NOF, but under PERM, the time sequence must be complied with strictly. If there is a collective bargaining agent then it is not necessary to post 10 days. Simply have the school furnish a copy of the application to the bargaining agent but allow time to get the name and address of the bargaining agent. Institutions can be terribly slow to respond even as the clock ticks away.
- Also remember to allow time to get a prevailing wage determination even if there is a union contract wage – the SWA must determine it is valid.

Item I B-5: Additional Recruitment Information

(AKA ... Does recruiting give you a rash?? “I have a simple philosophy....scratch it where it itches...” Alice Roosevelt Longworth)

- The requirement for additional recruitment for competitive recruitment and selection positions is vague. The rule does not require any specific steps beyond the single print ad in a journal. It only requires the institution to specify any means used on the application. This is because standards imposed by the institution may be more rigorous than the PERM rules. Methods often employed include postings with other institutions or other relevant professional organizations, professional newsletters, or advertisements appropriate for the academic discipline. However in some cases, only the journal ad is used. The idea here is to simply state the methods actually used and be prepared to document those specified.

Item I C-6: Start Date for SWA Job Order

- SWA Job Orders are not required for competitive recruitment and selection teacher cases or Schedule A cases.
- Be sure that a full 30 day interval is shown. DOL has offered that many early denials were due to the fact that February has less than 30 days and many applications showed the Job Bank interval from a day in February to the same day in March, which would only be 28 days (29 in a leap year, but still inadequate).⁴⁶ DOL thoughtfully provides a calendar online to check dates.
- Run the job order for an additional two or three days to be sure it is for the full 30 days, should you have any control over the actions of the SWA staff. Check to see that the job order is removed at the end of the 30-day period, as sometimes SWAs leave the job order online until the employer reports that the job has been filled.

⁴⁶ AILA Liaison Meeting Minutes, April 27, 2005, *supra*.

- Be sure to wait the additional 30 days after the job order is removed for filing.⁴⁷ Members have reported that applications have been denied when the Job Order was running for more than 30 days prior to filing, and allowed to keep running into the final 30 days. The date inserted on the application for ending the job order must be 30 days prior to filing the application. Do not count the last day of the job order when calculating the 30-day waiting period.
- For a more complete and authoritative guide to counting deadlines and timelines on the PERM form see PERM FAQ set Round 9, posted November 29, 2006.

Item I C-8: Is there a Sunday Edition of the Newspaper in the Area of Intended Employment?

- If the answer is “No”, and the area is rural, then the weekday paper with the largest circulation may be used. The employer must be able to document that the edition chosen does, in fact, have the widest circulation.⁴⁸
- If the area is suburban, then a Sunday paper must be used. If the position requires an advanced degree and experience and a professional journal would normally be used, “the employer may, in lieu of one of the Sunday advertisements, utilize the professional journal most likely to bring responses from able, willing, qualified and available U.S. workers.”⁴⁹
- Be sure the date specified actually is a Sunday, DOL will deny if it is not, and unless BALCA intervenes, there is no “harmless error” rule to cure this headache.

Item I D-13-22: Additional Recruitment Steps

(AKA ... Did you take any Medications before this Office Visit?)

- Items D-13-22 are additional recruitment steps. Professional occupations, other than competitively recruited and selected university and college teachers, must use three from the menu of ten. Documentation described here is not submitted with the application, but should be prepared, so it is ready in the event of an audit. Only the date(s) go on the form. Remember the key to good health and a good PERM is to follow the Boy Scout Motto – “Be Prepared.”

Item I D-13: Date Advertised at Job Fair

- The form asks for dates advertised at a Job Fair. This would be the date of the advertisement for the position.

⁴⁷ 20 CFR § 656.17(e) (1) (A); “DOL FAQ Round 1,” *supra*, at 12.

⁴⁸ “DOL PERM FAQ set Round #2,” *supra*, at 9.

⁴⁹ 20 CFR § 656.17(e) (4).

- Document in the compliance file with a copy of ad listing the employer as a participant and/or a brochure.

Item I D-14: Dates of On-Campus Recruiting

- Dates posted would seem appropriate rather than only the date of the interview.
- Document in the compliance file with a copy of the posting including the date of interviews for the occupation.

Item I D-15: Dates Posted on Employer’s Web Site

- Insert the date posted and the date posting ended in this field.
- DOL has not stated what an adequate period of time is. Real world practices are safest.
- Document in the compliance file with a printout of the page including the posting, the URL, the address, and date. If possible, make printouts for the initial date posted and the date the posting ended. DOL has indicated that if the ad was removed before a printout could be made that it is acceptable to provide a notarized statement that the internet ad was placed.⁵⁰

Item I D-16: Dates advertised with trade or professional organization

- Electronic ads are acceptable, but not when used in lieu of a Sunday newspaper ad or as a national professional journal to support a special recruitment case.⁵¹
- The rule does not explicitly require that the publication actually be that of a non-profit trade or professional organization rather than a freestanding commercial journal devoted to the trade or profession. However, the heading quite clearly implies a publication of such an organization. If DOL intended the use of a free standing journal then it could have used the language “professional journal” as in the special recruitment provision. (Members report approvals using such commercial trade journals such as Computerworld, but the safe approach is to use only association sponsored ads.).
- Document in the compliance file with copies of pages of newsletters or trade journals containing ads for the occupation.

⁵⁰ DOL Stakeholders’ Meeting, December 11, 2006, item 23, AILA InfoNet Doc. No. 06122066 (posted Dec. 20, 2006). The language was sufficiently broad to apply to any internet ad, but not a print ad.

⁵¹ “DOL PERM FAQ set Round #2,” supra specifies that print ads are required for special recruitment ads as well as journal ads in lieu of a Sunday newspaper ad. However, in the “Minutes of AILA-DOL Liaison Meeting” (Nov. 14, 2005), *published at* AILA InfoNet Doc. No. 05120260 (*posted* Dec. 2, 2005), item 14 clarifies that electronic journal ads are acceptable when used as a trade or professional organization ad used as one of the three additional steps.

Item I D-17: Dates Listed with Job Search Web Site

- This can include an Internet ad generated by a newspaper advertisement.⁵²
- America’s Job Bank (AJB) cannot be used as an additional piece of recruitment in states where the SWA uses AJB for its posting. This will be the case in many states.⁵³
- DOL has no guidelines on duration of posting. Real-world recruitment for as little as a week is commonly used as a standard offering by vendors. This should be deemed to be acceptable, if challenged, since most electronic ads generate responses within the first week or so.
- Document in the compliance file the same as with employer’s web site, using the receipt generated by the site, including the text of the posting and dates posted.

Item I D-18: Dates Listed with Private Employment Firm

- Enter dates listed.
- Document in the compliance file with a copy of the agreement with the recruiting firm and a copy of its recruitment for the occupation.

Item I D-19: Dates Advertised with Employee Referral Program

- The incentives for the referral must be identifiable at the time of the posting.
- An Employee Handbook (hardcopy or virtual) is not a form of documentation specified by the rule but is the way many employers make their programs known to employees. Given that reality, it seems prudent to suggest it can be used. However, it is not clear what dates to specify. The form asks for dates advertised. Assuming the Handbook policies regarding referral of candidates is on-going, then an employer should be able to use the dates of the internal posting or the dates the position is posted on its web site. The employer should mention the Referral Program in the posting.
- If a referral program is instituted during recruitment, it is best to post the program before posting the position.
- Document in the compliance file with dated copies of memos, notices, or pages from employee handbook specifying the incentives offered. Enter the date of the memo or notice.

Item I D-20: Dates Advertised with Campus Placement Office (AKA ... *Did you check in with the Health Center?*)

⁵² “DOL PERM FAQ set Round #1,” *supra*.

⁵³ *Id.*

- Insert either date furnished or dates employer requested Placement Office to post the notice.
- Document in compliance file with copy of employer's notice of the job opportunity provided to the Campus Placement Office.

The Supplementary Information to the PERM regulation suggests that use of the campus placement office is only appropriate for jobs requiring no experience, but the rule does not so restrict. *Compare* 69 Fed. Reg. 77,326, 77,345 (Dec. 27, 2004) with 20 CFR § 656.17(e) (1) (ii) (H). Members report denials based on use of campus placement office to recruit for jobs requiring experience. Clarification was requested from the DOL at the AILA Liaison meeting in November, 2005 since this method of recruitment seems more appropriate for experienced positions than on-campus recruitment (which is actually more geared to entry level hiring). One can only wonder if the restriction was inadvertently placed in this section rather than in on-campus recruiting. DOL finally provided guidance in the Stakeholders Meeting of December 11, 2006 (agenda item 22), AILA InfoNet Doc. No. 06122066 (posted Dec. 20, 2006).

Item I D-21: Dates advertised with Local or Ethnic Newspaper

- No format specified in the rule.
- Enter date published.
- The Supplementary Information to the regulation states this should only be used where appropriate but the rule itself does not restrict usage to where appropriate. *Compare* 69 Fed. Reg. 77,326, 77,345 (Dec. 27, 2004) with 20 CFR § 656.17(e) (1) (ii) (I).
- Conservative practitioners are not using local newspaper ads for professional jobs, unless there is no other choice, or ethnic papers for jobs other than ethnic cooks or bilingual positions (jobs that seek applicants from the ethnic target of the publication). A more flexible approach is to use these methods where the employer or other employers normally use them.
- Document in the compliance file with copy of page in newspaper that contains the advertisement.

Item I D-22: Dates advertised with radio or TV ad

- Enter date(s) aired.
- Radio and cable TV can be less costly than one might think in less populated areas.

- Document in compliance file with copy of text of ad and statement of date aired from station.

Item I E-23: Has the Employer Received Payment of any Kind for the Submission of this Application

(AKA ... Take care not to hyperventilate; we don't want you to lose consciousness....)

- DOL expressly stated that requiring the employer to document financial involvement or prohibiting employers, agents or attorneys from requiring the aliens to pay the costs of the labor certification process was beyond the purview of the rule, but it opined that if they require the alien to pay costs, that this could be used to demonstrate that the job is not clearly open to any U.S. worker.⁵⁴
- However, on February 13, 2006, DOL published a Notice of Proposed Rulemaking to eliminate substitution of alien beneficiaries in labor certifications, and one of the salient points of the proposed rule is to prohibit an employee from paying the attorney's fees connected with a labor certification.⁵⁵
- Despite the conflicting statements in the supplementary information, the form asks for information pertaining to payment for the submission of the application. This could be construed, in this context, to only relate to a fee to process the case, and not to payment for legal expenses or advertisements, and possibly not even a reasonable fee to compensate the employer for time spent in processing (as opposed to "for submitting") the application. However, this interpretation is hardly the only possible one.
- Item 23-A does ask for the purpose of the payment, and question 23 does refer to payment of "any kind" for the submission. The instructions make clear that intended payroll deductions are included in the question.
- H-1B enforcement actions had previously targeted employers who require the employee to pay for the advertising costs, but receded because of the lack of any clear prohibition in the rules. This rule does not make it any clearer. Until such time as there is further guidance, it is not advisable for an employer to charge for time processing an application. However, if the alien pays directly for advertising costs, the rule does not, by its terms, require disclosure in this item.

Item I E-25: Has notice been posted for 10 business days ending at least 30 days before filing this application?

- Both the first and last day of the posting count for purposes of counting the duration of posting. However, when calculating the timeline for number of days before, or in this

⁵⁴ 69 Fed. Reg. 77,336.

⁵⁵70 Fed. Reg. 7655 (February 13, 2006).

case after an event, begin counting with the next day (e.g., the 30 days begins to run the day after the posting is removed. This is so for all timelines in the rule.⁵⁶

- The form does not ask about in-house publication (printed or electronic) customarily used to post the occupation in-house which is required by the posting rule.⁵⁷ If applicable, this should be documented by a copy of the posted notice and made available if requested in an audit.

Item I G-26: Has the Employer Had a Layoff in the Area In the Occupation or Related Occupation within 6 months of filing, and has it Notified and Considered Laid Off U.S. Workers for the Job?

- The employer will have to provide documentation that laid-off workers were notified and considered for the position. Web postings may possibly be appropriate to notify workers in a large layoff where that is the customary method. A recruitment report listing the number of laid-off workers categorized by reasons for rejection should certainly be acceptable.
- A related occupation is one, which has a majority of the essential duties of the job offered.

Item J 10: Alien Admission Number (I-94)

(AKA ... If this is a medical emergency involving symptoms of a heart attack, hang up and dial 911).

- Use of PERM filings to trigger enforcement has so far not been addressed in any depth, but this item in the form has obvious implications for that potential.

Item J 13: Year Relevant Education Completed

- Where the employee completed education the same year as the job with the petitioner started, it will not be clear that the worker met the job requirements prior to being hired. This could be viewed as a possible violation of the rule requiring use of actual minimal job requirements. If the employee graduated before commencing, it may be helpful to so disclose the completion date in the application, but there is no place to indicate the month and no obvious place for this information.

Item J 18: Does Alien Have Experience Required?

⁵⁶ AILA DOL Liaison Committee, “Update on PERM Issues,” published at AILA InfoNet Doc. No. 05070141 (posted Jul. 1, 2005). See also PERM FAQ set Round 9, posted November 29, 2006.

⁵⁷ 20 C.F.R. § 656.10(d) (1) (ii). DOL has clarified that where the in-house media has system constraints that do not allow the full posting language to be included, or does not contain the wage or “magic language”, that this is acceptable. DOL Stakeholders Meeting, December 11, 2006, item 25, AILA InfoNet Doc. No. 06122066 (posted Dec. 20, 2006).

- This item is the subject of an AILA Pointer⁵⁸ discussed more fully at H 6 above, explaining some inscrutable denials on the basis the alien lacked the required experience. That guidance suggests that the item must be answered “Yes” where the alien qualifies on the basis of an alternate combination of education and experience in the occupation offered (H.8), even if the amount of experience is less than specified in item H.6.a.

Interplay of Sections J and H:

Item J 19: Does Alien Have the Alternate Combination of Education and Experience?

- Default response is “No.” But if H-8 is completed to specify an alternate combination of education and experience, the answer will be “Yes.”

Item J 20: Does Alien Have the Experience in Alternate Occupation Requirement?

- Default is “No.” If using experience in job offered, check “No.” But if qualifying through course project experience, Delitizer experience, or experience in an alternate occupation as specified in Section K, check “Yes.”

Item J 21: Did Alien Gain Qualifying Experience in Substantially Comparable Position?

- Default is “No”, but “N/A” if no experience is required.

Item J 22: Did Employer Pay for Alien’s Required Education or Training?

- These questions will detect ineligibility if truthfully answered and should be reviewed carefully before filing. If the employee qualifies only through alternate requirements then the employer must indicate that any reasonable combination of education, training, or experience is acceptable in item H 14.
- The requirements must reflect the actual minimum requirements necessary to perform the job. If the alien did not have the required training, experience or education, then the alien was able to do the job with less, and the requirement is not the true minimum. This will be tracked through items J-17, 18, 19, and 20.
- If the alien gained the experience working for the employer, then it was not truly needed to begin the job and should not be required of a U.S. applicant. However, if the alien’s position was changed to one which is not substantially comparable to the starting position (e.g., which involves different duties more than 50% of the time) then the experience can be used.⁵⁹ This is tracked through item J-21.

⁵⁸ AILA InfoNet Doc. No. 05082968 (posted Aug. 29, 2005).

⁵⁹ 69 Fed. Reg. 77353, 77354.

- Even if the alien acquired the training or education while working for the employer in a job which was not substantially comparable, the training or education cannot be required of US applicants if the employer paid for the education or training, unless the employer offers to provide the education or training to the US applicants. This is tracked through item J-22.

Item J 23: Is Alien Currently Employed by Petitioner?

- The ETA-750 did ask the employee to list all employment in the past three years, but many applicants would nonetheless not mention current experience through inadvertence or fear of disclosure of unauthorized employment. This question makes it unavoidable.
- This question also triggers scrutiny of a number of considerations including whether the employee gained any qualifying experience in a substantially comparable position for the petitioner.
- If the answer is truly “No,” then it is not necessary to specify that any suitable combination of qualifications is acceptable.

Item K 5: Alien’s Job Title

- Practitioners report denials based on lack of qualifications where section K shows the employee is qualified. We have thought that this may be because the Decision Matrix is looking for the exact job title specified in Section H and does not recognize similar, but equivalent job titles in Section K. However, we are told that the analysts will look for a position with not simply a similar job title, but similar job duties.

Item K 9: Job Details of Alien’s Experience

- The form requests duties, use of tools, machines, equipment, skills, qualifications, certifications, and licenses.
- Be sure to specify duties similar to that in the job offered when relying on experience in the job offered to qualify the alien.
- See notes on H-11 above for situations where experience with the petitioner is needed to qualify.
- When the employee gained qualifying experience working for a related employer, or one with a similar name, and that employer has a different FEIN, state the FEIN.
- This item has space where additional jobs can be listed.

- The form requires the month and day employment began as well as the full address of all employers. The instructions to the PERM User Guide at page 38, item 5 states that if the alien is currently working and this is the first work experience entered, leave the end date blank.
- The form requests name and telephone number of the supervisor. This was not in the draft published with the final rule. Be sure to update client questionnaires to include this information.

Item L: Alien Declaration

(AKA ... Sign these forms please...)

- Employee must sign the declaration of intent to accept the position offered if granted permanent residence. This underscores obligation that some did not clearly understand and underscores DOL's concern with certifications processed for the purpose of substitution (rather than immigration of the beneficiary who is listed).
- Signature is not required when submitting electronically, but the form must be signed before submitting the I-140. In fact, DOL urges that the application be signed immediately upon certification and generally requires a copy signed by employer, employee and counsel in the event of audit.
- It is prudent for the attorney to have employee sign a draft prior to filing to assure there is no disagreement as to content or accuracy of the form.
- It is prudent for the employer to have the employee sign again immediately upon approval so that another employee can be substituted should the employee change employers.

Item M: Preparer's Declaration

- The declarer certifies that the application was filed at the direct request of the employer and that the information contained in the application is true.
- Attorneys must sign as preparers – prior to filing, when filing by mail, or upon approval, when filing electronically.
- Corporate counsel or staff who signs for the employer sometimes face denials without DOL even inquiring whether they are the person who normally hire for the occupation. For this reason it may be advisable to recommend that HR staff rather than legal staff sign in companies where the general counsel's office normally oversees immigration matters. Cases have been approved signed by legal officers, but since we do not know which pattern will prevail, it is safest to avoid use of legal staff in signing the forms when it is feasible to do so.

Item N: Employer Declaration

- Attestation #1 reaffirms that the prevailing wage applies once the alien is admitted to permanent residence.
- Attestation #9 underscores that U.S. workers who applied were rejected for lawful job related reasons. Of course, they may also have withdrawn their applications or otherwise have become unavailable.
- Attestation #10 underscores that the position is full-time as well as permanent employment for an employer other than the alien. While the attestation of permanent employment is new, this obligation was implicit in the prior rule. Presumably, that does not entail a commitment to lifetime employment, only employment intended to last for no less than a year and terminable at will, as under the prior rule. The attestation that the alien is not the employer is new but reflects longstanding DOL policy, which arose under the prior rule without any explicit mention in the rule or legislative history.
- Apart from these items the attestations are the same as in the Form ETA-750A.
- The proposed rule dropped the attestation under the prior rule as to ability to pay the required wage, but it resurfaced in the final rule along with “ability to place on payroll before entry.” The supplementary information explains that a financially solvent employer may not be in a position to place the alien on payroll for reasons other than financial condition, such as because a new business is not ready to start operation.
- It is wise for the practitioner to have the employer sign before filing, even though not required, if filing electronically to avoid disputes as to whether the application reflects the employer’s intentions. Also, should the employer decide to refuse to sign after filing, this places the attorney in an awkward position if the employee has been paying attorney’s fees for what would then become a worthless certification.⁶⁰

Part IV: Problems Encountered in Preparing Applications Continue (No problem, really, it’s just a complete and total mental breakdown. We have a prescription for that....)

At the inception of the program, there were a number of problems in registering and completing the application. Where possible, we have referred to issues relating to specific items in the above item-by-item guide. In addition, DOL issued the Permanent Online System User Guide as online help for the PERM online application.⁶¹

⁶⁰ DOL has stated its intent to prohibit employees from paying attorneys’ fees associated with a labor certification. 71 Fed. Reg. 7655 (February 13, 2006).

⁶¹ USDOL, ETA, Division of Foreign Labor Certification, published April 26, 2005.

While these explanations are helpful, there are continuing concerns that the computer Decision Matrix, per the User Manual, which makes initial decisions for PERM cases, is seriously flawed and contains a number of bugs. It is not clear whether the system is requiring the Job Bank posting to be for 30 business days, rather than 30 calendar days as required by the rule, for example. DOL acknowledges that the PERM electronic system is rule-bound, and can be quite unforgiving. Thus, denials will continue to happen, in hopefully decreasing numbers, until those filing applications become used to the unique features of the system. Real people will be adversely affected, many permanently, as the system works out the kinks even in its third year.

More troublesome is the end result -- numerous denials that do not appear to be based on failure to comply with the rules. DOL has furnished AILA with their explanation for the series of denials, which AILA has posted to AILA InfoNet, with more undoubtedly to come. The denials seem to have decreased, or that was perhaps the effect of a net loss of practitioners deciding to wait for the glitches to work themselves out (or seeking alternative means of economic sustenance.)

So...the patient remains in need of ongoing care, even as it infects hundreds of "Beneficiaries" with its illness of unintended consequences. DOL continues to remain open to discussion and working to improve the process. It is initiating a series of discussions with stakeholders (led by AILA) designed to address pressing issues. Whether this intensive care will assist in getting the patient back into a healthy state remains to be seen. However, the results of the December 2006 meeting show promise of recovery.

Filers are advised to remember that the key to good mental health is humor. "He who laughs lasts." Mary Pettibone Poole.