



# Business Immigration

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An Update

## *Yes, I like my PERM Thank You...*

*—Success with the new Labor Certification Process.*

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**T**he Program Electronic Review Management (PERM) is a daunting process to navigate without a proper road map. The purpose of this article is to address questions that many of our clients pose to the Firm about options with regard to PERM and questions about what can or cannot be done.

### **EB-2 or EB-3?**

This is our most frequently asked question. With retrogression persisting and dates for the EB-2 and EB-3 categories backlogged, most clients are rightfully concerned about their place in the ‘Green Card’ queue. Most IT professionals

have a bigger problem resolving this question. For instance, the other day, Rajesh Solanki\* (name changed to preserve the identity of the client) called and demanded, “I have two Master’s degrees in Engineering and Computer Science and two years of experience. Do I qualify for EB2? It should stand to reason that a person with these qualifications would be able to apply for a labor certification in a category that is geared towards people who hold advanced degrees. However, The Department of Labor (DOL) classifies EB-2 and EB-3 not by the foreign national’s qualifications, but by the needs of a particular position as it exists within a company. This has



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always been the case.

As part of PERM restructuring, the Department of Labor opted to use the O\*Net guidelines to define the minimum requirements for many positions. So for instance, a Software Engineer who might have qualified for an EB-2 under the old process (RIR), now only has an EB-3 option. Why? Because, in defining the education required for a Software Engineer, the O\*Net states, "Most of these occupations require a four - year bachelor's degree, but some do not."

A company that files EB-2 PERM applications for job duties that are not seen as EB-2 worthy risk denial of the case, increased scrutiny of future filings, supervised recruitment, and/or a blackout from the PERM system.

### Can I use old recruitment?

The DOL has always required proof of recruitment less than 6 months old. The old guidelines for recruiting were basically placement of an advertisement in a newspaper of general circulation for at least two non-consecutive Sundays, and posting of a job notice before filing. If the State Workforce Agency (SWA), thought the recruitment efforts did not appear to be good faith, then supervised recruitment was ordered.

PERM requirements are very different.

**Please note:** This article only addresses professional workers:

- 2 Sunday advertisements in a newspaper of general circulation are still required; however, the ads can run consecutively but 30 days must pass before filing the PERM.
- A job order must be filed with the SWA for a 30 day period and 30 days must pass before filing the PERM.
- 3 additional forms of recruitment are required. The forms are spelled out in the stat-

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ute, there are 10 and no form can be duplicated. The **only exception** is employer website and job search engine

For Professional positions, calculating the recruitment steps is **key**. It is also one of the most difficult parts of the process for our clients to understand. Simply put:

- Every PERM must have a prevailing wage determination. The prevailing wage is valid for either 90 days or one calendar year depending on when it is obtained. Recruitment must start during the validity period of the prevailing wage or the case must be filed while the wage is still valid.
- The job order, which is filed with the SWA must run for at least 30 days, with a 30 day cooling off period to follow.
- Two newspaper advertisements must run in a newspaper of general circulation. There is no statutory direction about the timing of the ads. They can run back to back unlike the old labor certification process. There is a 30 day cooling off period for the newspaper ad as well.
- A job notice must be posted for 10 business days in a conspicuous spot in the workplace
- Three additional forms of statutorily defined recruitment are required. They can run for any length of time, but only one can take place within the 30 days before filing.

### Should I withdraw my RIR or Regular Recruitment labor cert and opt for PERM?

That should be decided on a case by case basis. Although the PERM process is faster, it also has more requirements than the old process. To preserve the filing date of a pending labor certification, the position and recruitment must be identical **on a case by case basis**. There is no definition of identical. The Department of Labor decides whether a case is identical. If the DOL determines the case is not identical, a new priority date is assigned. A new labor certification date may not be sufficient for processing a 7<sup>th</sup> year extension or for filing an adjustment of status due to retrogressed visa numbers. There is no method to re-activate a case accepted for processing under the old system that is "converted" to PERM.