

FAQ: The Labor Certification (LC) Process (PERM)

Phase 2 - Recruitment

As part of the employment-based Green Card progression, an employer must generally undertake a **Labor Certification** (LC) process. This is a long and complex process that requires employers to test the U.S. labor market.

The **PERM** (Program Electronic Review Management) is the system that the U.S. Department of Labor (DOL) uses for employers to file the LC.

At the end of the process, the DOL should certify that:

- ✓ there are no U.S. workers able, willing, qualified, and available to accept the job opportunity in the area of intended employment and,
- ✓ that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

To facilitate your understanding of this process, we have divided the process into three phases:

- **Phase 1 - Job opportunity and Prevailing Wage Determination (PWD)**
- **Phase 2 - Recruitment (testing the U.S. labor market)**
- **Phase 3 - Preparing and Filing LC (PERM)**

This FAQ focuses on Phase 2 of the process. After the Prevailing Wage Determination and before filing the Labor Certification, employers are required to complete very specific advertising and recruitment steps for the position.

TEAMWORK

1. What is involved in Phase 2 of the process for Recruitment?

The goal of this phase is to “test the U.S. labor market”. It involves selecting advertising channels; developing a job advertising timeline; preparing, posting, and monitoring advertising; keeping detailed evidence of all required ads; evaluating lawful rejection of applicants; allowing a quiet time period to pass after the last ad and determination of whether to proceed with PERM filing.

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2. What does the Marks Gray Immigration Team do for clients during Phase 2?

Among other services, our team will:

- Identify and recommend recruitment channels that meet the legal requirements;
- Plan and strategize with the employer on advertising channels and timeline;
- Coordinate with advertising recruitment agencies on ad content, timeline of posting, and costs;
- Guide and facilitate employer's registration or login with the SWA;
- Confirm all ad placements and monitor all recruitment steps;
- Gather documentary evidence of the recruitment efforts;
- Facilitate the preparation of a recruitment summary report including recruitment activities, recruitment results, and detailed applicant analysis;
- Prepare employer for evaluating applicants;
- Create audit file index and exhibits;
- Monitor and advise about changes in law, procedure, trending issues, and timeline that might affect case processing.

RECRUITMENT ADVERTISEMENTS

3. What recruitment steps are required under the LC process for professional positions?

Employers are required to place two Sunday print ads in a newspaper of general circulation, a 30-day online job order, post an internal notice of filing, and undertake three additional recruitment steps.

4. What are the three additional recruitment steps for professional positions?

Permissible additional recruitment options include:

- Job fair;
- Employer's website;
- Job search websites other than the employer;
- On-campus recruiting;
- Trade or professional organizations;
- Employee referral program, including very identifiable incentives;
- Campus job placement office, if the job requires a degree but no experience;
- Local and ethnic newspapers;
- Radio and television advertisements.



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The language, process, and timing of these ads must meet DOL's very specific criteria and we manage this process for the employers, with their support.

5. What are the requirements of the Sunday print ads?

These must be two consecutive Sunday ads in the newspaper of general circulation in the area of intended employment.

The ad must list the name of the employer, the geographic area of employment, and a description of the position-specific enough to apprise U.S. workers of the job opportunity and direct applicants to send resumes to the employer.



6. What are the requirements of the 30-day State Job Order?

The Job Order is placed with the State Workforce Agency (SWA). For PERM purposes, the Job Order must run for a minimum of 30 days.

7. What are the requirements for the Notice of Filing?

The Notice is posted internally at the worksite for 10- consecutive business days. It must contain the salary for the position or a salary range. The notice should include a contact person and very specific language and format.

8. For a union position, does the employer need to provide the Notice of Filing to a bargaining representative?

Yes, the bargaining representative of the employees in the same occupational classification for which the application is being filed must be given notice. If there are no bargaining representatives, then an Internal Job Posting must be made.

9. Does the employer need to include the wage rate in the advertisement?

The wage that will be paid to the sponsored employee does not need to be included, *except* for in the Notice of Filing. If a wage is included, it cannot be lower than the Prevailing Wage rate.

10. How long is the PERM recruitment period?

In practice, we aim to complete all recruitment activities within 45 days. After the recruitment is completed, the law requires a 30-day quiet period to allow for more possible applicants before the PERM can be filed. Therefore, it usually takes at least 2-3 months or more to complete.

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REVIEWING APPLICANTS

11. What happens if the employer receives a minimally qualified applicant?

If the employer receives applications related to the LC ads from applicants who appear minimally qualified for the position, the employer must evaluate the applicants and contact those who appear to be minimally qualified as soon as possible and keep records of those contacts.

Employers must show good faith effort in contacting applicants. Delaying to contact potentially qualified applicants could result in the denial of the LC. Applicants may only be disqualified for lawful reasons.

Employers are only required to consider qualified “U.S. workers” (described below). If there are minimally qualified U.S. workers who would accept the position if it were offered to them, the PERM process cannot be continued. A new PERM process can be completely restarted after a six-month waiting period.



12. Who is considered a qualified U.S. worker for purposes of a labor certification?

A U.S. worker is defined as a U.S. citizen, permanent resident, or another specially authorized noncitizen (such as an asylee or refugee) who satisfies the minimum job requirements of the position and is willing to take the position under the conditions and terms described in the labor certification application. Nonimmigrants in H-1B, L-1, O-1, and many other nonimmigrant statuses are not considered qualified U.S. workers for PERM purposes.

13. What are lawful reasons to disqualify applicants?

Every case is different and below are some lawful and job-related reasons for rejecting a candidate:

- Not having the education or work experience required;
- Not willing to relocate to fill the position;
- Not willing to accept the job position’s salary;
- Failing to attend or respond to an interview letter;
- Poor work references;
- Not being a “U.S. worker”;
- No longer being interested in the position.

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14. When considering an applicant, if the job requires four skills and the job applicant lacks one of those skills, can that applicant be lawfully rejected?

It depends. A lack of certain skills may not be enough to lawfully reject an otherwise qualified U.S. worker. The employer needs to explore and evaluate whether the U.S. applicant could perform the job with a reasonable amount of on-the-job training in the lacking skill(s). What is reasonable will depend on the particular employer and the job opportunity.

15. What happens if there is no minimally qualified U.S. worker?

Then, the employer can proceed with the filing of the LC.

16. What recruitment documentation is the employer required to keep?

The employer must keep a recruitment report with evidence of the recruitment undertaken and its results. It must include the number of rejected U.S. workers and lawful job-related reasons for their rejection. It must have copies of the newspaper tear sheets, screenshots of websites, and copies of applications received in connection with the recruitment steps.

17. How long does the employer need to retain the recruitment documentation?

For five (5) years from the date of filing of the application.

18. How much do the advertisements cost?

They vary primarily depending on the location of the intended employment where the ads need to be run. The most expensive ad is typically the newspaper ad in the newspaper of general circulation (which is a required ad). A job posting in a large metropolitan area will generally cost more than a job posting in a rural locale.

19. Why do we have to advertise if we already found the employee we want (the foreign national)?

From the DOL's perspective, the position is open because the sponsored employee is on a temporary work visa status such as an H-1B, not a permanent immigration status. Additionally, the employer is required to show that there are no U.S. workers willing, able and qualified for the position.

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