PERM II: Recruitment and Beyond

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PERM Recruitment

- 20 CFR §656.17(e)
- Professional Occupations (college or higher degree required): 3 mandatory steps + 3 additional steps
- Nonprofessional Occupations: 3 mandatory steps

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Mandatory Steps

- Job Order with SWA: placed for 30 calendar days
- Notice of Filing – Hardcopy + In-House Media: If CBA, notice to union; if no CBA, posting 10 consecutive business days at location(s) of employment
- Print Ads – 2 different Sundays in "newspaper of general circulation;" professional journal substitution

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10 Options for 3 Additional Steps

- Employer's website
- Job search website other than the employer's website
- Trade or professional organizations
- Campus placement offices

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Options
(continued)

- Employee referral program with incentives and nexus to job opening
- Local and ethnic newspapers
- Job fairs
- On-campus recruiting

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Options
(continued)

- Radio and TV advertisements
- Private employment firms
- Practice Pointers:
  - Cannot use 1 step to satisfy 2 requirements
  - Must meticulously document each step

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Advertising Requirements

- 20 CFR §656.17(f)
- Must name employer
- Must direct applicants to send resumes to employer
- Must provide description of vacancy specific enough to apprise U.S. workers of the job opportunity

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Ad Requirements
(continued)

- Must indicate the geographic area of employment (including any travel reqs) with enough specificity to apprise applicants of where they have to reside
- Must not contain any job requirements or duties which exceed job reqs or duties listed on ETA 9089
- Must not contain wages or terms and conditions of employment less favorable than those offered to the alien

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Special Recruitment Circumstances

- Position requiring travel to multiple worksites: Employer should engage in national recruitment
- 20 CFR §656.18
- University teachers: special handling rules ("equally qualified") and must be filed within 18 months after a selection is made pursuant to a competitive recruitment and selection process

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Notice of Filing Requirements

- 20 CFR §656.10(d)
- Must: state notice is being provided as result of filing a LC, any person may provide evidence to CO, and provide the address of the CO (NPC in Atlanta)
- Must contain rate of pay not lower than PWD or wage offered on ETA 9089
- Must contain all advertising requirements

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How Much Time Do I Have?

- All recruitment must take place at least 30 days and no more than 180 days prior to filing the ETA 9089
- 1 of 3 additional steps required for professional occupations may take place within 30 days of filing
- Recruitment must begin or ETA 9089 must be filed within validity period of NPWC's PWD

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Related Timing Issues

- Impact of layoff of similarly-employed workers in area of intended employment within the 6 months immediately preceding filing the ETA 9089
- Time period: # of days during which an activity must take place; may include start and end dates
- Timeline: # of days prior to or after an event; may not include start and end dates

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Prevailing Wage: Basic Tools

- The wages offered to a foreign worker must be the prevailing wage offered for the occupational classification in the area of intended employment.
- Regulations at 20 CFR 656.40
- Prevailing Wage Determination Policy Guidance (Nov 2009): InfoNet Doc. No. 11010468

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Prevailing Wage: Basic Tools
(continued)

- O*Net Online Summary Reports: www.onetonline.org
- Online Wage Library: http://www.flcdatacenter.com/
- I-Cert and Form 9141: http://icert.doleta.gov
- The employer's job description and requirements
- The location of the job (or location(s))

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The Employer's Job Description

Senior Embedded Software Engineer
- Responsible for Software Architecture , Software Design, Failure Mode Analysis, Software Implementation in all the phases of life cycle (requirements, design, V&V). Adhere to Software Processes Utilizing DFSS methodology, tools, and rigor to assure the system and service CTQ's (Critical to Quality) are achieved. Actively participate in design and code reviews. Coordinate project activities. Interact with customers to drive requirements and customer satisfaction. Drive team performance and reliability enhancements.

Basic Qualifications
- Bachelor's degree in Electrical or Computer Engineer. Three years experience in embedded real-time software design and development. Demonstrated ability with project management tools.

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The Dept of Labor's Occupational Classification

(www.onetonline.org)

- **Summary Report for:**
  15-1133.00 - Software Developers, Systems Software
- Research, design, develop, and test operating systems-level software, compilers, and network distribution software for medical, industrial, military, communications, aerospace, business, scientific, and general computing applications. Set operational specifications and formulate and analyze software requirements. May design embedded systems software. Apply principles and techniques of computer science, engineering, and mathematical analysis.
- **Sample of reported job titles:** Software Engineer, Software Developer, Systems Engineer, Network Engineer, Developer, Publishing Systems Analyst, Application Developer, Averaged HEND (High-Energy Neutron Data) Data Product Lead (AHD Product Lead), Business Systems Analyst, Computer Consultant

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Retrieving the Wage Data

- Go to the Online Wage Library: http://www.flcdatacenter.com
- Enter the job location and occupation (use ACWIA database if college/university)
- Retrieve the wage data

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Retrieving the Wage Data

- Your search returned the following: **Print Format**
- **Area Code:**28140
  Area Title: Kansas City, MO-KS MSA
- **OES/SOC Code:**15-1133
  OES/SOC Title: Software Developers, Systems Software
  GeoLevel:1
  Level 1 Wage:$28.48 hour - $59,238 year
  Level 2 Wage:$34.66 hour - $72,093 year
  Level 3 Wage:$40.84 hour - $84,947 year
  Level 4 Wage:$47.02 hour - $97,802 year
  Mean Wage (H-2B):$40.84 hour - $84,947 year
- This wage applies to the following O*Net occupations:
- **15-1032.00 Computer Software Engineers, Systems Software** Research, design, develop, and test operating systems-level software, compilers, and network distribution software for medical, industrial, military, communications, aerospace, business, scientific, and general computing applications. Set operational specifications and formulate and analyze software requirements. Apply principles and techniques of computer science, engineering, and mathematical analysis.
  O*Net™ JobZone: 4
  Education & Training Code: 5-Bachelor's degree

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Predicting the Wage

- There are 4 wage levels
- Predicting the wage level depends on
  - Quantitative Factors in the requirements, and
  - Qualitative language in the duties

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Quantitative Factors: Degree and Experience Requirements

- Follow the DOL worksheet included with the November 2009 Guidance:
  - Education
    - Add point/level if higher than educational code listed
  - Experience
    - Points added as experience exceeds "low end" of JobZone/SVP

    JobZone 4: BS + 0-2 = Level 1
    BS + 3 = Level 2
    BS + 4/MS+ 3 = Level 3
    BS + 5 = Level 4
  - Foreign Language
  - Supervision
  - Travel

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Qualitative Factors

- Appropriate "level" language in the job duties
  - Example: Level 1 – "non-complex duties" and "close supervision"
  - Example: Level 2 – "moderately complex duties"
  - Example: Level 3 – "exercise judgment" and "coordinate projects or staff"
  - Example: Level 4 – "advanced skills" and "complex projects/problems"

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Calculations

- For our sample job, "Senior Embedded Software Engineer":
  - Quantitative analysis (BS + 3) = Level 2
  - Add qualitative factors (coordinating, project management, etc) = Level 3
- All Industries, Level 3 Wage
  - for a Software Developers, Systems Software in Kansas City is:
    - $40.84 hour - $84,947 year

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Collecting and Retaining the Resumes

- The employer should send the original resumes or copies of the resumes to the attorney.
- Resumes must be available for a potential audit and for the "5-year File."
- The employer should be instructed not to make notes on the resumes – a checklist should be provided.
- A system should be in place identifying the person who is reviewing the resumes and the detailed reasons why each applicant is not qualified for the position.

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Alternatives to OES Wage

- Collective Bargaining Agreement (this MUST be used over the OES)
- Davis Bacon Act and Service Contract Act
- Private Surveys can also be submitted (*Mercer*, *Tower-Watson*, *Dietrich*, *BLS*, etc), but must meet strict criteria at 20 CFR 655.40(g)

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Who Can Review the Resumes?

- Anyone but the attorney and beneficiary.
- The attorney can give general advice regarding reviewing resumes but cannot be involved in the process nor can the beneficiary.
- It is helpful to have one person review the resumes. A manager is often better than an HR professional although the manager must be briefed about the rules and how to respond to applicants and co-workers who inquire about the process.

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The Process for Reviewing Resumes

- The review process should include the following steps:
  - Can it be determined if the applicant is a "U.S. worker "
  - Does the applicant meet the educational requirement
  - Based on the resume does the applicant possess the required work experience and/or special qualifications
  - Is the applicant able to perform the job in an acceptable manner based upon the combination of education, experience, and training? Is this only required when the application includes the language of *Kellogg* case, (94 INA 465; 1998 WL 1270641)?

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The Process for Reviewing Resumes (continued)

- Can the applicant perform the job duties after a reasonable period of on-the-job training?
  - *Kennametal, Inc.* 2010-PER-01512; 2012 WL 1074390 (March 27, 2012) case
    - What is a "reasonable period" and how to document that a "reasonable period" of training is insufficient to perform the job?
    - How does *Kennametal, Inc.* case impact employer's burden and/or process of properly investigating the qualifications of applicants?

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The Process for Reviewing Resumes
(continued)

- Does the applicant need to be interviewed and how to contact applicants – is certified mail still the best practice?
- Is applicant unavailable or unwilling to accept position – what is acceptable or not acceptable regarding unavailability?
- Can the employer us other "soft" reasons for disqualifying an applicant?

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Preparing the Recruitment Report

- Prepare report as soon as possible.
- Report must include:
  - Description of recruitment steps
  - Number of resumes/applications received
  - Number of resumes/applications received

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Preparing the Recruitment Report
(continued)

- Number of people hired
- Number of U.S. workers rejected - organized by the reasons for rejection
- A more comprehensive report is preferable detailing all the reasons why an applicant was deemed to be unqualified, including the different levels of analysis cite previously
- Prepare narrative and do not include checklists

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What Happens After Filing - Approval, Audit or Supervised Recruitment

Approval – Filing of I-140 immigrant visa petition within the 180 validity date as designated on the bottom of the certified PERM

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Audits

- May be selected randomly or targeted.
- Requires a response within 30 days of date of notice
- Boilerplate information requested (except for Special Handling under 656.18)
  - If the job opportunity requirements exceed Specific Vocational Preparation level listed on the O*Net Job Zone assigned to the Prevailing Wage Determination, the employer must establish with documentation as well as a statement the business necessity of the requirements or if the employer answered #H12 of Form ETA 9089 in the affirmative.
  - If a foreign language is required, proof of business necessity.
  - Live-in requirements for domestic workers (and others) must be established as a business necessity (For live-in house workers, a contract and experience letter must be submitted)
  - If the job involves a cross occupational combination of duties, an explanation is required

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Documentation to Be Submitted with Audit Response

- All Recruitment documentation and notice of job opportunity. Make sure dates of recruitment documented and employer's name appears in all recruitment – Exception – Use of Employment Agency/Recruiter does not require employer's name on recruitment.
- Documentation required as proof for placement in SWA Job Order – Matter of A Cut Above Ceramic Tile, 2010-PER-00224 Ceramic Tile
- Common problem areas – Websites, Employer Incentive Programs.
- A copy of prevailing determination.
- A copy of Audit Notification.
- A printed copy of Form ETA 9089 with original signatures of foreign national, employer and Preparer (including attorney) in designated sections.

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Current Frequent Triggers for Audits

- A foreign language requirement
- If the foreign national is living in a geographic area other than the worksite location stated on the Form 9089, a request for an itinerary may be requested.
- Query if a U.S. worker can be trained to perform the job within a reasonable training period.
- Audit selection is a moving target. Be prepared for other issues identified on Form 9089 to generate audits. Examples: Layoffs or owner interest or familial relationship with employer.

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Boilerplate Audit Requests for College and University Teachers under 20 CFR 656.18

- A statement signed by an official with actual hiring authority on the recruitment process, explaining why the foreign worker was considered to be the most qualified.
- A final report of the university search body making the recommendation of selection of the foreign national.
- A copy of the required advertisement for the position and, if conducted, evidence of other recruitment sources.
- A written statement attesting to the foreign nationals educational, professional and academic achievements.
- A copy of the prevailing wage determination and copy of the request for determination.

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Supervised Recruitment 20 CFR 656.21

- This is a pre or post filing process in which DOL approves the text and publication vehicles for recruitment.
- Post filed cases can be chosen for supervised recruitment before and after an audit. Currently, audits tend to be the initial staging action for supervised recruitment.
- Supervised Recruitment can be directed on all or some of an employer's future applications for a period of up to two years. Can be mandated where there has been a demonstrated pattern and practice of failure to comply with documentary requirements in auidts or because of perceived material misrepresentation. 20 CFR 656.20 and 656.24

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Nutshell View of the Four Stages of Supervised Recruitment

1. Notice that the application has been selected for Supervised Recruitment and a directive to submit a draft advertisement to the Supervised Recruitment Unit of OFLC within 30 days of the date of the letter.
2. Notice that approves or corrects the draft and directs the employer to place the draft in designated newspapers, journals and/or websites.
3. Notification and copies of resumes received by the Supervised Recruitment Unit sent to employer or employer's representative.
4. Notification that recruitment period has ended and directing employer to submit recruitment documentation

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Denials – Making Decisions on Next Step

- Research Board of Alien Labor Certification decisions and assess whether a motion to reconsider or a motion to review has merit. If not, consider the alternatives.
- Motion to Reconsider – 20 CFR 656.24(g)
  - Allows the Department of Labor, at its discretion, to reconsider its decision and permits a limited amount of evidence to be submitted if the employer was not given an opportunity to present the evidence prior to the denial. It is important to file a motion to reconsider if new evidence is part of the basis for the motion. Important case: Denzil Gunnels, d/b/a Gunnels Arabians, 2010 PER-00628 (Nov.16, 2010). A motion to reconsider can also provide "two bites of the apple". Denials of motions to reconsider are automatically sent to BALCA for review.
- Motion to Review – 20 CFR 656.26
  - This is a request for review directly to the Board of Alien Employment Certification. No new evidence can be submitted with this type of motion. The scope of a motion to review includes legal arguments based on timely submitted evidence. If the DOL does not reopen a denial for reconsideration, it will be sent to BALCA for an appeal. Filing a motion to reconsider first can preserve the evidentiary part of a motion challenging a denial.

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Questions & Answers

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