

# Stay Current.

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### **Update on Department of Labor's Proposed PERM Regulations**

The proposed PERM regulations, which seek to overhaul the labor certification process, are still expected to be published shortly. The Department of Labor ("DOL") has announced that the regulations will be implemented 60 days from publication, rather than the previously stated 120 days.

PERM is a streamlined labor certification process proposed by the DOL which is designed to rationalize the labor certification process by consolidating all labor certification processing through the US DOL by an automated attestation-based screening and review process. The PERM process is also anticipated to reduce significantly the lengthy processing times.

Once the regulations are finalized, all applications must be filed under PERM. It still remains unclear, however, at this time, to what extent the concerns about the proposed program, including severe limitations as to the types of experience which can be required, will be addressed in the final regulations. (See our client alert dated January 7, 2003.)

The DOL will continue to process under current regulations all cases pending prior to the implementation of PERM. The DOL has established two Backlog Reduction Centers ("BRCs"), one in Philadelphia and one in Dallas, to clear out backlogs that exist at both the federal and state Departments of Labor. Applications will be processed on a first in, first out ("FIFO") basis. The DOL has also announced that the State Workforce Agencies ("SWAs") must transfer all unopened permanent labor certification applications to backlog reduction by March 2005, and that any applications filed after January 1, 2005 will be date stamped by the SWAs but sent directly for processing to the national processing centers to be established in Chicago and Atlanta. SWA involvement in permanent labor certifications will be phased out, whether or not PERM is implemented.

For these reasons, it is of great importance that employers conduct a review of their foreign nationals' status to determine on whose behalf to initiate the green card process in light of the possible restrictions on labor certifications that may be imposed by PERM, and to file those applications as soon as possible before PERM is implemented.

### **Retrogression of Visa Numbers Expected in January/February**

As noted in our client alert dated September 23, 2004, cut-off dates may be established in one or more immigrant visa preference categories during fiscal year 2005.

In the past few years, the number of immigrant visa numbers available has exceeded those used in a given year. However, a potential reduction in labor certification processing times through PERM and the backlog reduction centers, as well as the increased processing of adjustment applications, may lead to a backlog in visa number availability. Specifically, it is expected that there will be a backlog in the employment-based third preference category (for "skilled workers, professionals and other workers") as early as January. In addition, further retrogression in certain family-based categories is possible.

If backlogs occur, foreign nationals cannot apply for adjustment of status to permanent residence until immigrant visa numbers are available, as determined by their priority dates. (A priority date is established on the date of filing the labor certification application, or immigrant petition if no labor certification application is required.)

### The New “Green Card”

The Department of Homeland Security (DHS) began issuing new permanent resident cards as of November 16, 2004. These new “green cards” have enhanced security features, as well as the seal of the DHS on the front of the card, and the words “Department of Homeland Security” on the back.

### IRS Guidance on Delays in Issuing Social Security Numbers

The Social Security Administration generally will not issue a social security number (“SSN”) until it has obtained independent confirmation of the foreign national applicant’s immigration status and work authorization. This can result in delays of several weeks in obtaining an SSN. Although work authorization in the United States is not dependent on a foreign national’s having a valid SSN, employers are often faced with a practical problem of adding a new employee to the payroll when that person does not have an SSN. In a recent article published on its website, the Internal Revenue Service has provided guidance to employers in this regard. The article confirms that there is no federal law administered by any federal agency which prohibits the hiring of a person based solely on the fact that the person does not have an SSN, nor is there any federal law which prohibits the making of a payment to a person based solely on the fact that the person does not have an SSN. The article also provides practical suggestions for employers to avoid penalties in this situation, including a recommendation that the employer maintain documentation showing that the foreign national has applied for, but has not yet received, an SSN. The article can be accessed at <http://www.irs.gov/businesses/small/international/article/0,,id=129227,00.html>.

### Change in Filing Procedure for Family-Based Adjustment of Status Applications

The Department of Homeland Security (“DHS”) has published a notice in the Federal Register changing the way in which certain adjustment of status applications and related employment authorization and advance parole applications will be filed and processed. The new procedure is applicable to family-based adjustment of status applications, as well as to applications from individuals who have won the diversity visa lottery, and certain other adjustment of status applicants. (“Adjustment of status” is the final stage of the “green card” application process for persons processing through the immigration service in the U.S. rather than at a U.S. Embassy or Consulate abroad.)

Under the new procedure, instead of filing these applications directly with the United States Citizenship and Immigration Services (“USCIS”) District Office that has jurisdiction over the foreign national’s place of residence, the applications will be filed directly with the USCIS lockbox in Chicago, Illinois. The personnel at the lockbox will deposit the filing fees and issue fee receipt notices, and will then forward the applications to the National Benefits Center in Lee’s Summit, Missouri for adjudication. The new procedure was effective on December 1, 2004, and it initially applies to applications from foreign nationals who reside anywhere in the United States other than Alaska, California, Idaho, Iowa, Kansas, Maryland, Missouri, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Texas, and Washington. On April 1, 2005, the program will be expanded nationwide for applications in the covered categories.

This new system does not impact the procedure for the filing or adjudication of employment-based adjustment of status applications, nor does it impact employment authorization applications (“EADs”) or advance parole applications filed as part of an employment-based adjustment of status application.