The PERM Book

2008-2009 Edition
Editor: Joel Stewart, Esq.

Published by ILW.COM's Law Library

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by Leon Wildes and David Lazaar
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by Leon Wildes

and David Lazaar

Recruitment reports under the PERM regulations are not your father's recruitment reports! By that, we mean that the PERM rules in effect since March 2005 mandate a streamlined, structured protocol quite unlike its predecessors.

The Recruitment Report

The rule governing recruitment reports under PERM is found at 20 C.F.R. 656.17(g), which states:

> "The employer must prepare a recruitment report signed by the employer or the employer's representative noted in §656.10(b)(2)(ii)[1] describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections. The Certifying Officer, after reviewing the employer's recruitment report, may request the U.S. workers' resumes or applications, sorted by the reasons the workers were rejected."[2]

Contrast this rule with the requirements under the pre-PERM regulations. Pre-PERM regulations on recruitment were essentially divided into two distinct formats, viz. "Traditional" and "Reduction in Recruitment" (RIR).

In preparing a Traditional labor certification application, employers were instructed to conduct recruitment under the supervision of a Department of Labor (DOL) local office and to prepare a detailed report which included the identification of each recruitment source, the number of applicants responding, the names and addresses (along with the resumes) of each

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[1] This particular section of law mandates that the employer's representative who is involved with interviewing or considering workers for the labor certification job offer must be the same person who normally performs this function for the employer in non-labor certification job opportunities.

[2] 20 C.F.R. 656.17(g)(1)

individual, identification of the interviewer, and the specific, job-related reasons for rejection of the applicants.[3] This rather burdensome rule was vastly ignored in favor of RIR.

The RIR rules were much simpler. They were similar to the PERM recruitment rules in that they required non-supervised pre-filing recruitment to be conducted by the employer. The recruitment report itself, however, is a different matter. The RIR rules did not require anything more than a request to the DOL to reduce the recruitment burden, backed up by the specific documentation that had been amassed. Typically, this consisted of newspaper ads run over a period of several weeks or months.[4] That was it.

In terms of the burden, therefore, we could position the PERM rules as being between the two pre-PERM requirements; Traditional and RIR. The PERM rules are far easier to comply with than was the Traditional standard, but a little more burdensome than the RIR rules.

Legal Requirements

Now that we have examined the recruitment report from a historical perspective, let us now turn to the current PERM regulations for recruitment reports and what is now required to meet the rule's standards.

The regulations stipulate two basic reporting requirements, with sub-categories, as follows:

(1) A description of the recruitment steps undertaken. This would consist of delineating the State job order, the two Sunday ads and where appropriate, the three additional forms of recruitment for professional occupations. Some practitioners include the Posted Notice (or bargaining representative documentation) in the report, but since the notice requirement is not truly a recruitment vehicle, it is not necessary to include it in the report itself.[5]

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[3] 20 C.F.R. 656.21(j) Pre-PERM rule
[4] 20 C.F.R. 656.21(i) Pre-PERM rule
[5] In the Supplementary Information preceding the final PERM rule, USDOL declares, "In our view, Congress' primary purpose in promulgating the notice requirement was to provide a way for interested parties to submit

(2) A description of the results achieved. This is further broken down, as follows:

(a) The number of hires (if applicable); and

(b) The number of U.S. workers rejected. If this item is used, the rejections must be "...categorized by the lawful job related reasons for such rejections."[6] This means we may group rejected applicants according to the reasons for rejection. For example, three applicants did not possess the required degree, two applicants did not meet the minimum experience requirement, etc. A further examination of determining the method of categorization of applicants will follow later in this article.

Practical Requirements

Having thus examined the recruitment report statutes, it is now appropriate to address practical approaches to the preparation of a well-constructed report. Unlike pre-PERM RIR rules, or the Traditional supervised post-filing recruitment rules, no report is required to be filed to process a labor certification application. Documentation is collected but submitted only if the case is audited. In promoting an attestation-based system, the DOL requires us to gather and maintain required documentation regardless of whether or not it will be used. However, it is most important that we not let our guard down by overlooking any of the audit requirements as it is impossible to guarantee that any PERM case will escape an audit. To gamble by ignoring the documentation requirements because we have prepared the "perfect" case is to invite the perfect storm.

It is believed that the key piece of documentation in an audit file may well be the recruitment report. It is the vehicle by which we can demonstrate to the DOL that we have conformed to all the regulatory requirements and that we have examined the U.S. labor market with integrity. Since the DOL has not mandated a specific format for the structure of a PERM

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documentary evidence bearing on the application for certification rather than to provide another way to recruit for U.S. workers." 69 Fed. Reg. 77338

[6] 20 C.F.R. 656.17(g)(1)

recruitment report, we should look for a reasonable, logical method of presenting the data. Credibility of presentation is the most important element in convincing the DOL that the employer has conducted a fair and impartial recruitment campaign. It follows, therefore, that the explanations of the reasons for rejection of applicants is the most vital element in the report.

We assume that practitioners will ensure that all of the required recruitment items are delineated. The most diligent approach is to structure the report by listing each of the recruitment items in turn and describing the results achieved for each one. The report should start with the two basic recruitment vehicles – the Job Order and the Sunday ads, and then cover each of the three additional recruitment vehicles for professional cases. By listing each recruitment item, followed with the results achieved for that specific method of recruitment, the DOL is presented with an orderly, logical approach to determining that all appropriate methods were used and that we have reported on each of them in turn.

Within each of the recruitment vehicles, a summary of responses is required along with an explanation of the disposition of each candidate's application and the reasons for rejection for each group of applicants. In creating this summary, the method of categorization of applicants comes into play. The question becomes: What is the best way to categorize the rejected applicants in the report?

Reference to the Statute

Although unspecified in the regulations, the safest course in determining the proper method of categorization is to turn to the labor certification provisions of the Immigration and Nationality Act (INA)[7] referred to in the PERM regulations.[8] We refer to the section which defines the standard to be met by individuals who, if identified, would make the hiring of an alien for the offered position unnecessary and indeed, unlawful. In accordance with the INA

[7] INA 212(a)(5)(A)(i)(I)
[8] 20 C.F.R. 656.1 and at 656.2(c)(1)

provision quoted in the PERM regulations, those individuals are, "...United States workers who are **able, willing, qualified and available...**"[9] Let us examine these four criteria in more detail for the purpose of classifying the rejection of an applicant in a recruitment report. In doing so, we must remember that in order to properly reject the individual applicant, we must find that he/she does not meet the definition of any one of the listed criteria.

"Able" - This refers to the applicant's ability to perform the job duties in an acceptable, normal manner. If the applicant demonstrates some trait which suggests inability to conform to this standard, he/she may be properly rejected. A prime example of this would be the ability to communicate. If the applicant's lack of English fluency suggests an inability to follow instructions or to communicate with customers or the employer in a reasonable manner, the applicant may be properly rejected.

"Willing" – This refers to the applicant's willingness to be offered the job. An applicant must accept the conditions of employment imposed by the employer by virtue of the details that were advertised. If the applicant is unwilling to accept any of these conditions, the applicant may properly be rejected as unwilling. The primary example of this is the wage offer. If the applicant is unwilling to accept the wage as offered, he/she can be properly rejected.

"Qualified" – This refers to any applicant who, by virtue of his/her resume and/or personal interview, minimally conforms to the job offer's duties and requirements and thus can be considered qualified. Therefore, any rejection would have to define the individual as falling short of meeting that standard. This is the most widely utilized category as it relates directly to the measured parameters set for the offered position. Applicants must demonstrate that they possess the education, training, experience and special requirements listed in order to be considered qualified. This standard allows for rejection if the applicant does not meet the exact

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[9] *Id.*

standards specified. Obvious examples of allowable rejections would include lack of the required degree or lack of amount or type of experience required.

"Available" – This standard requires that the applicant be immediately able to commit to employment on a full-time and permanent basis for the position being offered. Any suggestion of a postponement in the applicant's availability or intention to accept the position full-time, or with a target date for ending employment, can be considered a reasonable ground for rejection. The issue of availability also refers to applicants who do not have to be considered for the job by virtue of their status in the United States. Applicants who could be excluded from consideration include individuals who are not here legally as U.S. citizens, permanent residents, refugees, asylees or certain registry or special agricultural workers.

In summary, we have identified four possible categories of rejections, namely, Unable, Unwilling, Unqualified and Unavailable. If we can fit the explanation of our rejection of applicants into the overall framework of those category headings, it's a good bet that our presentation will be acceptable.

There is one additional category of potentially qualified applicants which must be considered. The PERM regulations specify that:

> "A U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training. Rejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers."[10]

This rule is stated as a corollary to the section of the regulations which deals with the Certifying Officer's (CO) responsibility to make a determination on granting or denying a case.

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[10] 20 C.F.R. 656.17(g)(2)

That decision is based, in part, on evidence supplied which may lead the CO to decide that an applicant is qualified for the job opening because, "...a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job-training."[11]

There is precious little guidance in either the regulations or anecdotal material published to date on how the DOL interprets this rule. In dealing with the issue of how to define a "reasonable period of on-the-job training,"[12] the DOL stated that, "This final rule does not specify what constitutes a reasonable period, as it will vary by occupation, industry, and job opportunity."[13] The DOL then goes on to lay the problem at the feet of the COs by stating, "The COs are experienced in assessing the qualifications of applicants, and we do not believe this rule will present any difficulty."[14]

Unfortunately, the difficulty is that no one knows how to interpret the DOL's rule, including the COs. Fortunately, we are not aware of any disputes that have arisen in this context. It would appear that the COs are allowing reasonable latitude in implementing this rule. As a practical matter, it would be prudent for employers to ensure that reasons for rejection of applicants which are based on narrow grounds of not meeting a specific skill be examined closely from a common sense perspective. If we believe that a skill could be learned in a reasonable period without disrupting the ability to perform the job, then in rejecting the applicant, an employer may be exposing itself to the ramifications of this rule.

One area in which the DOL has provided clarification, however, involves the issue of determining whether or not an applicant's particular combination of education, training and experience equates to the college degree required by the employer. The DOL has decided to take a liberal approach to this question by not requiring employers to examine the applicant's

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[11] 20 C.F.R. 656.24(b)(2)(i)
[12] Supplementary Information preceding final PERM rule. 69 Fed. Reg. 77350
[13] *Id.*
[14] *Id.* at 77351

credentials so closely. The reasoning the DOL has used in deciding to let employers off the hook is that the DOL feels that, "...we lack adequate information to determine whether a given worker's combination of education, training and experience is the functional equivalent of a college degree."[15]

Ultimately, despite our best efforts and cautious approach, we may be faced with the reality that the DOL reserves the right, and "...may request the U.S. workers' resumes or applications, sorted by the reasons the workers were rejected."[16] We have seen few examples where the DOL has demanded this level of review, but if our categorization techniques and reasons for rejection can stand up to scrutiny, we can be confident that we will prevail.

Supervised Recruitment

Having addressed basic recruitment reports, we now turn to an alternate form of reporting required in certain situations covered under the section of the rule referred to as "Supervised recruitment."[17] It is not within the purview of this article to examine the issues associated with an employer being required to adhere to this special recruitment procedure. Suffice it to say that the PERM regulations provide for situations where if the CO finds that the employer did not produce required or adequate documentation, or that a material misrepresentation was made, or for other unspecified reasons, the CO can require the employer to submit to a regimen of supervised recruitment for a time period of up to two years.[18]

In such situations, the format of the recruitment report is designated by the DOL. The requirements are more stringent than the basic PERM report as described previously. In a supervised recruitment environment, the employer is required to provide more detail in the report with accompanying documentation supporting all statements and claims made. The report and attachments must include:

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[15] Supplementary Information preceding final PERM rule. 69 Fed. Reg. 77351
[16] 20 C.F.R. 656.17(g)(1)
[17] 20 C.F.R. 656.21
[18] 20 C.F.R. 656.24(f)

(1) An identification of each of the recruitment sources by name, along with the appropriate evidence that the source was used. Examples of evidence would include newspaper tear sheets, dated copies of web pages, and copies of letters to trade associations, unions, etc.;

(2) A statement of the number of U.S. workers who applied;

(3) The resumes of the applicants, including identification of their names and addresses, along with a statement indicating the number of applicants who were interviewed and the job title of the individual who performed the interviews; and

(4) A specific explanation of the reasons for not hiring each of the applicants. This provision includes the aforementioned requirement for justifying why a particular applicant was rejected for deficiency of skills that could be acquired through a reasonable period of on-the-job training.[19]

The provision stipulating the requirements of supervised recruitment mandates filing the recruitment report and supporting documentation within 30 days of the date requested or the application will be denied by the CO.[20]

However, the regulations also allow the CO to grant one request for an extension for an unspecified period of time in response to any such request, based on "good cause shown."[21] Unfortunately, the regulation fails to define the latter phrase.

Special Recruitment Procedures – College and University Teachers

The PERM regulations stipulate one further category which requires a recruitment report that differs from the basic variety discussed in detail above. That category concerns college and university teachers whose applications are filed under the special recruitment documentation provisions where the employer details how the alien was selected for the job opportunity because he/she was found to be more qualified than any of the U.S workers who applied for the position

[19] 20 C.F.R. 656.21(e)
[20] 20 C.F.R. 656.21(f)
[21] 20 C.F.R. 656.21(g)

in question. In those cases, the employer is documenting how the alien was selected based on a competitive recruitment and selection process stipulated in the PERM regulations.[22]

In this process, the recruitment report consists of a statement signed by the employer detailing the complete recruitment procedures which were implemented in the case. The statement must include the total number of applicants along with the specific reasons why the alien was found to be more qualified than each of the other applicants. The regulations proceed to detail the supporting evidence and documentation required in support of the statement described. It is beyond the scope of this article to discuss the specific evidentiary requirements of this type of application but we do mention it for the purpose of highlighting all the various recruitment reporting techniques required in the PERM regulations.

Significance of the Recruitment Report

Thus, our description and explanation of all the forms of recruitment reports required under PERM is complete. It remains to view the recruitment report in a larger perspective. While the report is the record of evidence upon which a practitioner bases his/her contention that the labor certification application should be approved because no able, willing, qualified or available U.S. worker was identified, in a larger sense, we will also have created a document which will endure. That is, for at least for five years, because that's the period mandated in the regulations for retention of audit documents.[23] Therefore, we have created a semi-durable document which also serves as a monument to the case that we have created. We should remember that some time later, when the alien is thanking us for successfully obtaining a green card, it stemmed, in part, from the meticulous attention to detail that went into the creation of the wonderfully written recruitment report. We hope that in some small way, we have assisted you in your efforts.

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[22] 20 C.F.R. 656.18
[23] 20 C.F.R. 656.10(f)

About the authors:

Leon Wildes, senior partner and founder of Wildes & Weinberg, PC, has practiced immigration law for almost 50 years. Mr. Wildes holds J.D. and LL.M. degrees from the New York University School of Law and serves for the past 29 years as an Adjunct Professor of Law at the Benjamin N. Cardozo School of Law in New York City, where he teaches immigration law. A past national president of the American Immigration Lawyers Association, he regularly publishes scholarly articles in the field and lectures widely to practitioners. He has testified before the U.S. Congress as an expert in immigration matters, and was awarded the Edith Lowenstein Memorial Award for Outstanding Contributions to the Field of Immigration Law. He is best known for his successful representation of former Beatle John Lennon and his artist wife, Yoko Ono, in deportation proceedings.

David Lazaar is a Paralegal with Wildes & Weinberg, PC, in New York City, a position he has held for nearly 20 years. Mr. Lazaar specializes in labor certification processing and its impact on nonimmigrant visa immigration status. Prior to his current position, he worked with the New York State Department of Labor for ten years, where he specialized in Labor Certification processing. He has lectured at the Manhattan Paralegal Association and served on the faculty of the Practising Law Institute where he authored an article on labor certifications. He holds a bachelor's degree from The City College of New York.