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**MEMORANDUM**

**TO:**

**FROM:** KahBo Dye-Chiew, Esq.

**DATE:** January 22, 2009

**RE:** Lawful Permanent Resident Status through Labor Certification – the “PERM” Process

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The following memorandum outlines the regulations that *Employer* will need to follow on behalf of yourself (hereinafter referred to as “*Beneficiary*”) to sponsor Beneficiary in obtaining lawful permanent resident status through the labor certification process (the “*PERM Regulations*”).<sup>1</sup> These regulations became effective on March 28, 2005 and replace the former labor certification process. **Please be aware that effective for all cases to be filed on or after July 17, 2007, all legal fees, costs for the PERM Application must be paid by Employer and Employer is not allowed to obtain reimbursement from the Beneficiary for any of these costs.**

**I. SUMMARY.**

On December 27, 2004, the U.S. Department of Labor (“*DOL*”) published, in the Federal Register, its final rule governing the labor certification process. As indicated therein, the final rule “is effective on March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.” The new regulations are now referred to the “PERM Regulations”.

This memorandum assumes that you have discussed your immigrant visa options with an immigration attorney and have determined that in order for Beneficiary to obtain lawful permanent residency status, Beneficiary will need to use the labor certification process – which is the procedure which a U.S. employer uses to prove to the DOL that there are no U.S. workers who are willing, able, available and qualified for the position offered.

The most significant changes in the labor certification process resulting from the PERM Regulations are as follows: (a) Employers are required to engage in recruitment prior to filing the Application for Permanent Employment Certification (Form ETA 9089) (the “*PERM*

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**Application**”); **(b)** Employer is required to pay Beneficiary the prevailing wage or higher (previously Employer was required to pay the salary within 95% of the prevailing wage or higher); **(c)** Documentation regarding recruitment (the “**Recruitment Report**”) will not be submitted at the time the PERM Application is filed with DOL; **(d)** review of the Recruitment Report will be conducted only if DOL requests for an audit either for cause or randomly – thereby eliminating the backlog caused directly by the current required review of every filed labor certification by the State Employment Service Agency (“**SESA**”); **(e)** DOL now has the authorization to revoke a previously certified (or approved) PERM Application within 5 years of certification and **(f)** the Employer is required to pay legal fees and all costs for PERM and may not seek any reimbursement of these costs from the Beneficiary.

## **II. PROCEDURES.**

**A. Prevailing Wage.** Prior to filing the PERM Application, Employer must obtain a prevailing wage determination from the Workforce Development Division of the Department of Labor and Industrial Relations of the State of Hawaii (“**WDD**”). The validity period of the prevailing wage determination will be specified by WDD. As part of the PERM Regulations, DOL has revised the way that the WDD is to determine prevailing wage for any position. We understand that the new standards will not be available until after March 8, 2005. Under the PERM Regulations, Employer is required to pay the Employee 100% of the prevailing wage or higher. Employer must begin recruitment no later than the period specified by the WDD. The prevailing wage is required to be listed only on the Internal Posting and on the PERM Application.

### **B. Recruitment.**

**1. Summary:** Prior to filing the PERM Application with DOL, Employer is required to engage in systematic recruitment efforts to find U.S. workers. At the end of the recruitment period, the US Employer is required to prepare a Recruitment Report (which is described in Paragraph B3 below). The Recruitment Report is not submitted at the time that the PERM Application is filed. It is only required to be presented to DOL when an Audit (described in Paragraph D below) is requested.

**2. Required Recruitment.** The following recruitment efforts are mandatory for each Employer and, unless specified otherwise, must be conducted at least 30 days but no more than 180 days prior filing PERM Application unless otherwise specified:

**a. Internal Posting** – A notice must be posted at the employer’s place of business for at least 10 business consecutive days and must be posted at least 30 days but no more than 180 days prior to filing the PERM Application (this notice must contain the same information as the Internal Posting as required in the former labor certification regulations);

**b. In-House Media** –Employer must post the position with its in-house media which Employer “normally uses” for recruitment purposes, the Position Offered (eg. Intranet Site or In-House Newsletter);

**c. Job Order** – Employer must place a job order with WDD (or its local unemployment office) for a period of 30 days;

**d. Print Advertisements** – Two (2) advertisements must be placed in either **(a)** the Sunday edition of a newspaper of general circulation or **(b)** a professional journal – if the professional journal normally would be used for the type of Position Offered [Note – these print advertisements must contain the following: **(i)** Name of Employer, **(ii)** information on how to apply for the position, **(iii)** provide a sufficient description of the position to apprise the US worker of the position offered, and **(iv)** indicate the geographic area of the position];

**e. Additional Recruitment for Professional Jobs.** In the event that the position offered is a Professional Position (for example, any position which is currently classified as a Specialty Occupation/H-1B1 position), Employer is required to engage in three (3) additional recruitment steps. Only one of the three additional recruitments may be conducted within 30 days of filing the PERM Application – all others must be done between 30 days and 180 days. The additional recruitment can be any one of the following:

- (i) Job Fairs;**
- (ii) Employer’s website (Outside Posting);**
- (iii) Job search website other than employers;**
- (iv) On campus recruiting;**
- (v) Trade or professional organizations;**
- (vi) Private Employment Firms;**
- (vii) An employee referral program – if it includes identifiable incentives;**
- (viii) A notice of the job opening at a campus place office.**
- (ix) Local and Ethnic newspaper** to be the extent that they are appropriate for the job opportunity; or,
- (x) Radio and Television Advertisements.**

**3. Recruitment Report.** After recruitment is completed, Employer must prepare a Recruitment Report which contains the following:

- a.** Each recruitment step taken (including specific dates) and results;
- b.** Report the number of hires and number of US worker rejected, categorized by the lawful job-related reasons for rejection.

**c.** Resumes of all applicants – categorized according to why each was rejected. These are not required to be specifically identified and described in the Recruitment Report but must be kept in case the Certifying Officer requests such information.

**d.** If necessary, the Recruitment Report should also contain business necessity justifications for any “special” requirements for the Position Offered, for example, if Employer’s minimum requirements exceed DOL specified requirements, or Employer requires a foreign language, or the Position Offered involves a combination of DOL specified occupations, Employer must be able to justify that those requirements are a business necessity. It is likely that such requirements will trigger an Audit procedure as described in Paragraph D below.

The Recruitment Report and supporting documents must be maintained for a period of five years from the date of filing.

**C. Filing of the PERM Application.** After **(a)** the Recruitment Report is completed and **(b)** the 30 day post recruitment deadlines have been met, Employer will “file” the PERM Application with DOL either electronically or by mail to a “PERM Processing Center”. No supporting documentation is to be filed with the PERM Application. All supporting documentation (ie. the Recruitment Report) must be kept and be made available in the event that the Certifying Officer of the PERM Processing Center (“**CO**”) or the National Certifying Officer (the “**NCO**”) requests for such information either as a result of an Audit (as discussed in Paragraph D below) or in determining whether a certified PERM Application should be revoked (as discussed in Paragraph F below). Our experience is that if a case is sent to Audit, it generally takes an additional at least four (4) months before a final decision is made.

**D. Audit Procedures.** DOL may request an audit of the PERM Application (“**Audit**”) either for cause (ie. due to an issue highlighted by a response to a question on the PERM Application) or randomly (for audit and control purposes). In the event a PERM Application is selected for an Audit, the CO will issue an audit letter which will state, among other things, **(a)** the documentation that must be submitted and **(b)** the 30 day period within which the Employer must respond to the audit request. Failure to respond to the audit letter will result in a denial of the PERM Application.

**E. Decision of the DOL.** The NCO and the CO have the authority to certify (ie. approve) or deny the PERM Applications. Prior to making a determination, the NCO or the CO may refer the case to the national office of the DOL for further review.

The decision of the NCO or CO to certify the case will be based upon whether or not the NCO or the CO believes that the Employer has met the requirements that there are no U.S. workers willing, able, qualified and available for and at the time of the job opportunity.

- 1.** If the PERM Application is certified, a notice will be delivered to the Employer or his agent/attorney. The certified PERM Application is only valid for a period of 180 days.

2. If the PERM Application is denied – the Final Determination will state, among other things, (a) the reasons the denial was issued, (b) advise of review procedure available to the Employer pursuant to the regulations and (c) advise of the 30 day period during which Employer must take advantage of the review procedure if desired.
  - a. If Employer does not request a review, Employer may file a new PERM Application at any time.
  - b. If Employer requests a review, Employer may not file a new PERM Application in the same occupation for the same alien until the review procedures are completed.

**F. Revocation Of Approved Labor Certification.** Even after the labor certification is granted, the CO, in consultation with the Chief, Division of Foreign Labor Certification, may revoke an approved labor certification if he/she finds that issuance of the certification was not justified. The CO will issue Employer a Notice of Intent to Revoke an approved PERM Application which will contain a detailed statement of the grounds of the revocation and the time period allowed for the employer's rebuttal. The CO will make a final determination on whether to revoke the PERM Application based upon all the evidence available.

### **III. AFTER PERM.**

After the PERM Application has been approved and a favorable Final Determination has been received, Employer must file the Immigrant Petition for Alien Worker (Form I-140) ("**Immigrant Petition**") on behalf of Beneficiary with the California Service Center of the U.S. Citizenship and Immigration Services (the "**CSC**") within 180 days of the certification. Beneficiary may file the Application to Register Permanent Residence or Adjust Status (Form I-485) (the "**Green Card Application**") for himself and each of the Family Members simultaneously if a visa number is immediately available.<sup>2</sup> The approval of both the Immigrant Petition and the Green Card Application will result in Beneficiary and his family members becoming lawful permanent residents of the United States.

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<sup>2</sup> The maximum number of immigrant visas which is issued per fiscal year (October 1 through September 31) for employment based categories is 140,000.00. These 140,000 visas are divided among the five separate employment based categories. For the last several years, the visa numbers for all employment based visa categories with the exception of those positions which required less than 2 years of experience have been current (meaning that as soon as the labor certification is approved, the client is eligible to file for the Green Card). However, in January 2005, the visa numbers for citizens of India, Philippines and Mexico became backlogged and only those persons who had approved labor certification filed prior to June 2002 from those countries could file for an immigrant visa or their green card. In July 2005, no visa numbers were available for "skilled worker" or "professional positions" for any country. Currently, immigrant visa numbers are available in most skilled worker and professional categories. However, the priority date is severely backlogged. To check on the current priority date which is being processed, go to www.http://travel.state.gov/visa/frvi/bulletin/bulletin\_1360.html to find the current visa bulletin.

**IV. CONCLUSION.**

With each PERM Application which we file, we more insight into the processing. In cases where the DOL has not audited the case, our experience is that the PERM Application has been within two to three weeks. In more recent months, the DOL appears to be auditing most of the PERM Applications which have been filed. As a result, there has been a significant delay in the adjudication of the PERM Applications. In addition, we still do not know the criteria which are being set to determine what constitutes an Audit for “cause” or how many “random” PERM Applications will be selected. Although the procedures have changed, the underlying legal basis of the labor certification process remains the same and, therefore, the experience that we have from the prior labor certification process will continue to be important in the PERM Application process.

The above is a very brief summary of the PERM Regulations. More detailed analysis will probably be required as we discuss and evaluate the position description more carefully.

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