

THE FOUR STAGES OF EMPLOYER SPONSORED PERMANENT RESIDENCE VIA PERM

The employment-based permanent residence process is generally comprised of four phases:

- (1) Advertisement/Recruitment Cycle
- (2) PERM Labor Certification: Recruitment and Prevailing Wage Determination
- (3) I-140 Application for Immigrant Visa and Proof of Ability to Pay
- (4) I-485 Adjustment of Status

1. Advertisement/Recruitment:

U.S. Labor Market Test: First the employer is required to participate in a process to test the U.S. labor market by recruiting to determine if there are any able, willing, available and qualified U.S. workers for the position to be offered to the foreign national. Recruitment is just like it sounds, the employer must advertise the position and review resumes for more than 30 days, but less than 180 days, prior to filing the application to ensure that there are no other qualified U.S. workers available. Advertising must include a Sunday newspaper listing unless no such listing is available in the area. This process to include copies of advertising placed, resumes and review notes must be documented. There is no listing of acceptable journals or publications for recruitment.

Prevailing Wage Determination: The employer is also required to offer at least the prevailing wage for the position, as determined by the DOL, based on the job requirements and location of

employment. A prevailing wage determination from DOL must be obtained before filing the PERM application once recruitment has been conducted.

An attorney may not determine minimum job requirements or review resumes on behalf of the employer, however, an attorney can provide checklists to guide the process and ensure compliance, review advertising to ensure it is sufficient, provide resources to help employers articulate job requirements and submit to the DOL for a prevailing wage determination for the position based on the employer's job requirements.

At a minimum, it will take about 60 days for an employer to engage in the required recruitment process. Given the additional time that it typically takes to prepare the minimum requirements for the job and obtain the prevailing wage determination, the entire process may take about four to six months to file the PERM application with DOL provided that there were no able, willing, available and qualified U.S. workers and also provided that there were no layoffs in the location of employment that involved a position that is the same or similar to the position offered to the foreign national.

2. The PERM labor certification:

Once the PERM application is filed with DOL, it may take the DOL several months to adjudicate the application. If DOL audits the PERM application, the employer will have thirty days to respond and it goes back in the processing queue which may take an additional year to be processed by the DOL. Processing times vary based on backlogs and may be found on the DOL website located at <https://icert.doleta.gov/>.

The DOL regulations (20 C.F.R. §656.12(b)) expressly prohibit an employer from paying for any fees and costs associated with the PERM labor certification application process if an attorney represents both the employer and employee which is typically the situation in almost every case. Therefore, employers may generally not require employees to pay for any portion of the cost for this step. Yes Employers, this is sunk cost in an employee, just like costs you incur to recruit and

train a new employee who may leave soon after starting. It can take well over a year for these 2 phases to be completed.

3. I-140 Employer's Application for Immigrant Visa and Proof of Ability to Pay:

Once a PERM application is certified (approved) by DOL the employer must file an I-140 Immigrant Worker Petition with the USCIS within six months of the approval date of the PERM application. The employer is required to show that it has the ability to pay the wage offered and that the foreign national possesses the education, experience and skills required in the PERM application. This generally involves submitting proof such as Profit and Loss Statements, Balance Sheets, and for new startups, may even involve providing personal financial information from the owners. The employer's attorney will help determine what documents are needed to support this filing and prepare the filing.

USCIS processing time for an I-140 Petition is typically four to six months. However, for an additional \$1,466.40 fee, the USCIS will adjudicate the petition via "premium processing" (15 calendar days). If the USCIS requests additional evidence in order to process the I-140 Petition, an additional thirty to sixty days could be added to the processing time or an additional 15 calendar days, if premium processing was requested.

Unlike the PERM application, there are no restrictions on who may pay for the fees and expenses associated with the I-140 Petition. Thus, an employer may pass all of the fees and expenses or some of the fees and expenses on to the foreign national either at the time of filing the I-140 Petition or as part of a "pay back" agreement if the foreign national leaves the employer within a specified period of time after obtaining permanent resident status.

4) Adjustment of Status:

The last and final step in the permanent resident process is an application filed by the foreign national. The foreign national's immediate dependents (spouse and children) may also join the

foreign national employee at this step in the process and file their own applications as the employee's dependents. In most cases, the individuals are in the U.S. and thus it is easier and more beneficial for the foreign nationals to file an I-485 Application to Adjust Status. If they are not in the U.S., a DS-260 Immigrant Visa Application may be filed with the U.S. consular post abroad and the individual will be required to attend an interview at the U.S. consular post in his/her home country. Current processing time for an I-485 application is about six months and approximately six to nine months for an Immigrant Visa Application processed abroad at a U.S. consular post.

Each case is given a priority date based upon when it is first filed with USCIS. This priority date is the foreign national's "place in line" for an immigrant visa for someone from their birth country as they become available. If the foreign national employee's priority date is current, the I-485 application may be filed with USCIS concurrently with the I-140 Petition. If the priority date is not yet current due to quota backlogs, then it may be several months or years before the individual may file the last phase in the permanent resident process. The attorney will track priority dates and prepare this filing.

It is only during this last phase that the Executive Actions allows for greater flexibility for foreign nationals, it could take upwards of 10 years for foreign nationals from countries like India or China to have their priority date become current, during which time a normal employee would receive promotions or transfers, but current PERM rules require that the employee be in the same or similar job as they had been nearly a decade earlier.

The USCIS currently charges a \$1,410 filing fee per I-485 application. This fee, as well as any attorney fees or other expenses, may be paid by the employer, employee, or a third party and, as with the I-140 Petition, the employer may require the foreign national employee to pay back all or part of the legal and/or USCIS filing fees if he/she leaves employment within a certain period of time after obtaining permanent resident status.