

**LAW OFFICE OF
LORNE M. FIENBERG P.L.L.C.**

Memorandum

TO: Our Clients
FROM: Lorne M. Fienberg
RE: Outline of Permanent Residence Process based on Labor Certification

This memorandum is to provide you with an overview of the complete permanent residence process based on labor certification. This process is essentially a three-step process and includes the Labor Certification Application itself, the immigrant petition, and the formal application for permanent residence which may be filed at a U.S. consulate abroad or, if the applicant is in the U.S. in lawful nonimmigrant visa status, with the U.S. Citizenship and Immigration Service (“USCIS”). When filed in the U.S., this last step is commonly referred to as “adjustment of status.”

LABOR CERTIFICATION

The labor certification process is a formal proof process to the U.S. Department of Labor (“DOL”) that there are no U.S. workers ready, willing, and minimally qualified to accept the offered position at the prevailing wage for the geographic area of intended employment. This proof process involves a test of the local labor market through specified recruitment steps. Once these steps are accomplished, the application is filed through an Internet-based system known as PERM (Program Electronic Record Management). PERM is a relatively new system which became available on March 28, 2005. Under the PERM system, the employer generally must place two local newspaper print ads, open a 30-day job order with the state employment commission, and post the job announcement at the work site for ten business days plus engage in three additional recruitment steps from the following menu of options:

- ∞ Job fairs
- ∞ Employer’s website
- ∞ Job search website other than the employer’s website
- ∞ On-campus recruiting
- ∞ Trade or professional organizations
- ∞ Private employment firms
- ∞ Employee referral program with incentives
- ∞ Campus placement offices
- ∞ Local and ethnic newspapers
- ∞ Radio and television advertisements

Most large newspapers have a separate Internet posting that runs in conjunction with the print ads for no or little additional charge and this will satisfy the third additional recruitment source.

None of the evidence of recruiting is submitted with the online application. This back-up documentation is kept on file. The DOL does have the authority to audit applications and request this documentation which must be provided within 30 days of any request. The Department of Labor's stated goal is to have PERM applications that do not require an audit adjudicated within 60 days. The documentation supporting the PERM application must be retained for five years from the date of filing.

IMMIGRANT VISA PETITION

The second step in the process, once the labor certification application has been certified by the DOL, is the immigrant visa petition. The immigrant visa petition is filed with the USCIS and to be approved, must establish that the foreign national qualifies for the position as described in the labor certification. Educational credentials and letters confirming previous experience must be presented as supporting evidence of the petition. An original version of the approved labor certification must also be included with the petition to show the USCIS that the DOL has already confirmed unavailability of U.S. workers thus giving the employer permission to pursue the immigrant visa petition on behalf of a foreign national.

Here again, processing times vary for different parts of the country, but the average time frame for immigrant petitions is 6 - 10 months.

APPLICATION FOR PERMANENT RESIDENCE

The final step in the process is the formal application for permanent residence. Please note that the visa number quota system must be current for the nationality and employment-based category before the permanent residence application can be filed. Assuming visa numbers are current, the application can be filed either with the U.S. consulate in the foreign national's home country or, if the foreign national is in the U.S. in lawful status pursuant to a visa, the application may be filed with the USCIS. The latter option is commonly referred to as "adjustment of status." It is at this stage of the process where immediate family members (spouses and unmarried children under age 21) are also eligible to file applications for permanent residence. USCIS policy now also allows the filing of the adjustment application at the same time as the immigrant petition which can save on overall processing times.

In most cases, foreign nationals and employers prefer the adjustment of status option because it does not involve coordinating a trip outside the U.S. and also usually does not involve a final interview. Filing the adjustment of status also allows immediate family members, who may not have been authorized for employment previously, to apply for a work authorization card. However, the consular processing option has become a more viable option in recent months due to lengthy backlogs in the USCIS processing times for adjustment of status applications.

For the adjustment of status option, the application documents are filed with the USCIS and if approved, the foreign national and immediate family members are instructed to report to the USCIS District Office with jurisdiction for final processing. This final processing includes obtaining a temporary permanent resident stamp in the foreign nationals' passport. It is at this final processing where the official paperwork requesting production of the Permanent Residence Card ("green card") is completed. The temporary stamp is usually issued for one year and serves as temporary evidence, while the card is being produced, that the foreign national is a lawful permanent resident.

While the adjustment of status application is pending, the applicants must ensure that they have proper travel and/or employment verification documents. Subject to the exception discussed below, all applicants for adjustment of status who need to travel outside the U.S. while the adjustment application is pending, must also apply for a special travel document known as "Advance Parole." The Advance Parole travel document provides notice to an immigration inspector that the foreign national has an application for permanent residence pending in the U.S. and wishes to continue to pursue that application upon re-entry into the country. Failure to travel internationally without the Advance Parole results in abandonment of the adjustment application and it must be re-filed.

The only exception to this requirement is for nonimmigrants who are maintaining valid H-1 or L-1 nonimmigrant status and their H-4 or L-2 family members. These nonimmigrants have a choice and may continue to be travel on their valid "H" or "L" visas and need not obtain Advance Parole. Employment authorized "H" or "L" nonimmigrants (H-1B and L-1A/L-1B) may also continue their employment status as long as they continue employment with the H-1B or L-1 employer and maintain a valid I-94 card. Dependent family members may also continue to travel on their valid H-4 or L-2 visas. However, a dependent family member who wants to take advantage of an employment authorization card, must then also secure Advance Parole in order to travel internationally.

Processing times for adjustment of status also vary in different parts of the country, but the average processing time is 8-12 months. While this process is lengthy, keep in mind that all applicants for adjustment of status are eligible for employment authorization cards and Advance Parole travel documents so even if the foreign national reaches his or her maximum nonimmigrant time, he or she can still remain in the U.S., be employed and travel internationally.

As a result of this delay, some foreign nationals may choose to file their application with the U.S. Consulate in their home country. This option involves filing documents similar to those filed for an adjustment of status application, but consulates use their own specific forms and procedures. A foreign national who chooses this option will also be required to secure a medical examination from a Consulate approved physician as well as police clearance letters. The Consulate will also conduct an interview which will require the applicants' physical presence. While adjustment of status is still preferred by most, there are some situations where consular processing is appropriate.