

PREFACE

“Plus ca change, plus c’est la meme chose” (The more things change, the more they stay the same.)

— *Jean-Baptiste Alphonse Karr*

When AILA published the third edition of this manual, the Program Electronic Review Management (PERM) program had been functional for only three months and we had a limited amount of real-world PERM experience to draw upon. Now that PERM has been in place for three and one-half years, we have had a veritable lifetime of PERM experience to draw upon in preparing the fourth edition: the Backlog Elimination Center has served its purpose and pre-PERM labor certifications are fading into the past. The Department of Labor (DOL) has issued innumerable rounds of Frequently Asked Questions (FAQs) intended to provide practical guidance to practitioners in preparing applications. Practitioners have learned the vagaries of DOL’s decision logic software through painful trial and error. The Board of Alien Labor Certification Appeals (BALCA) has issued a series of post-PERM decisions, including *Matter of HealthAmerica*, shedding light on important and never-before-adjudicated questions relating to the idiosyncrasies of an electronic filing system. DOL published new regulations eliminating labor certification substitution, prohibiting aliens from paying either for attorney’s fees or for the costs associated with the PERM process, and greatly enhancing DOL’s authority to impose stiff penalties against employers or agents suspected of fraud or misrepresentation in the labor certification process. The legal and employer community has now witnessed the post-PERM imposition of supervised recruitment and a significant uptick in PERM audits, including audits aimed not just at particular applications, but even at particular law firms and employers. DOL has issued a series of guidance bulletins purporting to illuminate the agency’s position on the proper role of attorneys and agents in the labor certification process.

The increase in audits has led to a significant increase in case processing times. While PERM was heralded as a beacon of electronic efficiency for the labor certification process—holding the promise of lightning-speed certifications—as we go to press, the reality is that the average processing time of an audited application is now 16 months, and the average processing time of a non-audited application is six months. At this writing, we face the worst financial crisis since the Great Depression and DOL is warning that it will begin auditing an even greater number of applications and likely will be increasing its use of supervised recruitment. Practitioners who had pre-PERM labor certification practices may well be feeling a sense of déjà vu.

Our distinguished authors have now had a wealth of real-world PERM experience to cull from in crafting their articles for this fourth edition, resulting in extremely insightful and practical guidance for both novice and experienced practitioners alike. There is one thread that runs through all the articles that harkens back to the early days of PERM when the application form was new and unfamiliar: after most of the enclosed articles were written and edited, DOL announced that it would be issuing a completely new version of the ETA Form 9089 PERM application, and, indeed, the proposed, radically changed form was published in the *Federal Register*. This new Form 9089 was due to go into effect in January 2009, but immediately prior to publication of this edition, DOL announced that it would delay the implementation of the new Form 9089 until the spring of 2009. As a result, our stalwart authors and editors revised their articles repeatedly to accommodate DOL’s pronouncements and to ensure that this edition robustly serves our readers’ needs.

We don't yet know how DOL will adjudicate labor certifications based on answers to newly minted questions on the revised form, or how the decision logic programmed into the software will respond to answers appearing in the new fields. Our authors have drawn upon the last three and one-half years of experience to provide the best possible guidance about the new form, short of actual experience using it. We are enormously grateful to each of them for their time and commitment in preparing their original articles, and in revising them to discuss the forthcoming Form 9089.

In this fourth edition, we have structured the manual to address the practical and substantive concerns of practitioners faced with the task of beginning a PERM case for a client. Section 1 contains two overview articles. Regardless of the type of employer and the type of position involved, in all but Schedule A cases, everyone faces the universal challenge of understanding and completing the Form 9089. Steve Clark's painstaking article on the "Anatomy of ETA Form 9089" dissects the new form line by line, providing strategic guidance throughout the article, on both procedural and substantive issues. As we noted above, our beloved colleague, Michael Maggio, provided an overview of the ethical issues in PERM cases—a must-read for anyone considering filing a PERM application. We thank Amy Novick for overseeing the final version of this article after Michael's untimely passing.

In Section 2, we focus on alien-related issues that impact the labor certification process, in particular, and the permanent residence process, in general, including Neil Dornbaum's article entitled "Using the Initial Consultation and Questionnaire to Lay the Foundation and Spot Issues," which lays the foundation for analyzing the case from the outset. In the same vein, Jessica Choi and Karen Pollins contributed an article that addresses spotting alien-related issues before commencing a PERM case. We have included Jane Goldblum's helpful chart regarding admissibility, to assist in the analysis of whether it is prudent to start a labor certification case in the first place. James Vázquez-Azpíri contributed an insightful article filled with practical guidance regarding the alien's education and experience. The article addresses both procedural considerations in completing the Form 9089 when the alien meets an alternative requirement, and substantive legal analysis of relevant BALCA case law and trends at the service centers regarding employment-based second and third preference (EB-2 and EB-3) I-140 adjudications. Allen Kaye elucidates the special requirements and considerations involved in PERM applications for closely held businesses.

Section 3 focuses on employer-related concerns. The first article in this section, "Employer-Related Issues to Spot Before Commencing a PERM Case," by Wendy Castor Hess, Jonathan Grode, and Maria Fritzingler, provides a helpful, issue-spotting overview before diving into the case. Robert Cohen's article focuses on the employer's requirements for the position—arguably one of the most important aspects of any PERM case. Ester Greenfield and Linda Rose have updated their extremely detailed and helpful article on calculating prevailing wages for PERM cases, and Josie Gonzalez has updated her related summary, "Finding the Right Job Code, Wage, and Experience Level: A Step-by-Step Guide to Navigating the O*NET," which goes hand in hand with the wage discussion. Mary Jane Weaver has contributed an article, "Recruitment Under PERM: Lessons Learned (So Far)," to provide practitioners with a frank and practical guide to the requirements of the PERM recruitment process, and Howard Gordon has updated his excellent article on "The Recruitment Process Under PERM." Catherine Haight has updated her article, "Layoff Provisions Under PERM," to provide insights into this potential minefield in PERM practice. This is a must-read article, especially in today's economic environment, as layoffs are becoming rampant.

In this edition of the manual, we decided to add an article regarding the effect of the PERM application on the subsequent I-140 petition to focus specifically on the importance of considering the I-140 petition in preparing the PERM case and drafting the PERM application. Edward Litwin and Marcine Seid

have contributed an insightful article focused on this issue: “Drafting PERM Applications to Ensure I-140 Approval.”

Section 5 addresses the issues that can derail a PERM application. Alan Tafapolsky and J. Anthony Smith contributed an article on PERM audits, and Susan Cohen updated her article on worst-case scenarios with PERM, entitled, “Worst Case Scenarios: Revocation, Invalidation, Debarment, Suspension, Appeal, and the Paramount Importance of Document Retention”—a wordy title, but descriptive of the article’s contents.

Finally, in Section 6 we add articles focused on PERM applications for specific occupations. Robert Aronson’s and Dinesh Shenoy’s article on PERM filings for Residents, Interns, and Physicians provides invaluable guidance to practitioners navigating these idiosyncratic cases. Jane Goldblum offers penetrating insights into preparing special handling PERM applications, and Tien-Li Loke Walsh, Naveen R. Bhora, and Frieda Wong-Dittmar offer our readers an insightful guide to Schedule A applications.

Special recognition and thanks are due to all of the authors who took the time to research, analyze, and write informative and thoughtful articles, and to revise them to take the new PERM application form into account. Our editors—Cheryl Lenz-Calvo, Ester Greenfield, Elliott C. Lichtman, and Deborah J. Notkin—worked very hard in reviewing articles and contributing edits and suggestions. Their time and contributions have greatly enhanced this volume. Finally, we are indebted to AILA’s tireless and top-notch staff, Danielle M. Polen, Associate Director of AILA Publications, and Tatia L. Gordon-Troy, Director of AILA Publications, for keeping this book on track and bringing it to fruition.

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December 2008