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# Employer Options Under the U.S. Labor Department's 2006 Reduction in Recruitment (RIR) Extension

## General Background on Labor Certifications

Since March 2005, with extremely limited exceptions, U.S. employers have been able to file labor certification applications only under the U.S. Department of Labor's "PERM" program. PERM[1] is the process created by the U.S. Department of Labor ("DOL") to determine if there are any U.S. workers who are able, willing, qualified and available to perform the particular job offered by the sponsoring U.S. employer to the sponsored foreign national in the area of intended employment. Unless an exemption applies, a U.S. employer must obtain the DOL's approval of a labor certification application before the employer and the foreign national can complete the remaining steps of the employment-based permanent residence ("green card") process. Labor certification tends to be the key to the success or failure of employment-based permanent residence in the majority of cases. Since March 2005, we have filed all new labor certification applications with DOL via the PERM process. After DOL resolved numerous, early glitches in the process that beset PERM from March 2005 through fall 2005, the PERM program has generally worked fairly well.

## A Summary of Application Choices Before PERM

Before March 2005, U.S. employers filed either (i) "traditional" or "regular" labor certification applications or (ii) Reduction in Recruitment ("RIR") labor certification applications.

Traditional ("TR") applications involved the employer's filing an application and awaiting DOL review of the application before a DOL-supervised test of the labor market could begin. RIR cases involved the employer's conducting a pattern of recruitment of up to six months and submitting the application together with the results. DOL pledged faster processing of RIR cases, but only if the employer filed for a job where there was a general unavailability of workers in that occupation and if the application did not list restrictive job requirements. DOL could reject an RIR request and put it on the TR track.

As part of its two-pronged approach to address the dismal adjudication times in the TR labor certification program, in October 2004 DOL created two Backlog Elimination Centers (BECs) in Dallas and Philadelphia. The BECs were created to allow DOL to consolidate all backlogged TR and RI applications in two locations so that the applications could be processed more quickly. By mid-2005, the two BECs inherited approximately 362,000 TR or RIR cases that previously had been pending throughout the country.

In March 2005 when the PERM program superseded the TR and RIR processes, U.S. employers had three options regarding their pending TR and RIR applications:

1. leave their TR and RIR applications in place at the BECs and allow them to be processed to completion by the BECs under the rules that existed before PERM; or

2. withdraw such applications and re-file them under PERM. Under limited circumstances, an employer could retain the same priority date (i.e., "filing date) of the original pre-PERM application when such re-filing took place under PERM. However, PERM is designed to trigger the automatic withdrawal of the TR or RIR application upon the filing of a PERM application for the PERM beneficiary where the employer elects to keep the priority date. DOL allows the employee to keep the priority date under the quota system only if the PERM application is identical to the pre-PERM application in all respects; or

3. In limited cases, leave the TR or RIR case in place, but also simultaneously pursue a

[1] PERM stands for Program Electronic Review Management.

PERM application if the PERM application was filed for a materially different job.

## What Has Happened With the Pre-PERM Cases?

When DOL created its two BECs to process pre-PERM labor certifications, DOL announced an intention to complete all (362,000) pre-PERM cases within 2 years of the inception of the BECs. BECs invested substantial resources to input all 362,000 cases into the DOL's database. It then generated in each case a "45-day letter" asking the employer if it still wished to proceed with the case. Because some employees had left employers or many employers no longer wished to proceed for various reasons, the massive entry of data was not a wise use of limited resources. The DOL BECs took until July 21, 2006 – almost two years – to issue all 45-day letters. The DOL BECs did decide some cases during the past two years, but our experience and the experience of immigration providers overall, is that the DOL BECs have primarily decided two types of cases: RIR cases (because recruitment was already complete); and TR cases where recruitment was already complete upon referral of the case to the DOL BEC.

Two years after the establishment of the DOL BECs, DOL has not reached its initially announced goal of deciding all cases at the two BECs. DOL recently indicated that it had disposed of approximately 50% of its original caseload though about half of those cases were closed due to a lack of response to DOL's 45-day letters. There are about 176,000 cases remaining at the two BECs.

For TR cases, the process remains essentially the same as before. Ultimately, if DOL finds the application to be in good order from a prevailing wage and job requirements acceptability standpoint, DOL will issue recruiting instructions and supervise the employer's recruiting efforts to complete the traditional process of determining if qualified and available U.S. workers have applied for the job. If no qualified workers apply, the employer must file a recruiting report and DOL can approve, deny, or issue a Notice of Findings with regard to the application. For RIR applications, all going well, DOL will simply decide whether the employer's recruiting summary is valid and issue a final approval or denial of the application. DOL also could choose to issue a notice of findings ordering supervised recruitment.

## Why in October 2006 Did DOL Authorize Conversion of Traditional Labor Certification Applications Pending at the DOL Backlog Elimination Centers to Reduction in Recruitment Applications?

At the point that DOL should be deciding the last cases remaining at the BECs, DOL has completed only about half of the cases and at least half of those were closed administratively due to lack of response or interest by employers who had previously filed these applications. Hence, DOL is in jeopardy of failing to meet its readjusted objective of completing all cases by the September 30, 2007 date displayed on DOL's website. DOL also is now recognizing that it takes considerably more DOL resources to complete case adjudication under the TR process as opposed to the RIR process.

## What Are The Key Characteristics Of An RIR Case That I Should Be Aware Of?

Many employers selected the TR process for two primary reasons that stem from the RIR eligibility standards described in the DOL's General Administration Letter (GAL) 1-97. These two standards are: (1) RIR cases should be filed only "for occupations for which there is little or no availability" of U.S. workers (i.e., historically certifiable in that there was a general lack of qualified, willing and available U.S. workers); and (2) such RIR cases must have no restrictive job requirements. RIR cases must also meet the prevailing wage test, and the employer must show adequate recruitment through sources normal to the occupation and industry in the six months leading up to the application filing. Finally, the results of the employer's recruitment had to be that the employer was not able to fill the job with a qualified and available U.S. worker, as supported by the results of the recently completed labor market test.

### Little or No Availability

Between 1997 and 2001, the majority of our clients filed RIR applications rather than TR applications because they could (a) conduct recruiting efforts in

advance without waiting for DOL to review the application (as is the requirement with TR cases), (b)submit the results of the recruitment with the application and, in most cases, (c) receive a prompt DOL decision. During the technology boom years from 1997 to 2001, DOL was quite liberal in accepting most occupations as meeting the "little availability" standard and willingly accepted many applications under the RIR approach.

When the technology bubble burst in 2001, we reminded our clients that the premise supporting RIR was a general shortage of qualified U.S. workers and that DOL could begin to reject RIR cases as a result of changes in the availability of U.S. workers. We also noted that where DOL rejected a case for RIR treatment, the case would be converted into a TR case by DOL and would require supervised recruitment of qualified, willing and available U.S. workers.

### Restrictive Requirements

Because one of the key requirements for RIR treatment is that the application may not contain "restrictive requirements," most RIR cases had a skill set that was short and basic (such as bachelor's degree in computer science plus 2 years of experience as a software engineer), rather than listing the employer's more detailed job requirements (such as, for example, BS/CS plus 2 years designing Oracle database solutions for multi-tier, multi-site database architecture; performing object-oriented programming; and developing pathways for data porting). Hence, rejected RIR cases presented a lower likelihood of success if they had to proceed as TR cases because the skill set by which employers judged U.S. worker applicants' qualifications was artificially low and often gave rise to a "false positive."

Sure enough, in the period between 2001 and 2005, DOL rejected many RIR cases based on DOL's view that the occupation described in the RIR application was not an occupation for which U.S. workers generally were in short supply in that geographic area.

## What Is The Impact on an RIR Application of Layoffs

### Layoffs By The Employer

The DOL standard operating procedure indicates that the certifying officer ("CO") will consider layoffs by the employer in deciding the RIR application. If the CO has reason to believe that employer layoffs occurred within the six months prior to either filing the application or processing, the CO will issue a Notice of Findings ("NOF") requesting the following information from the employer: 1) the number of workers that the employer laid off from the occupation contained in the RIR application, and the DOT code for the occupation, 2) documentation, by geographic area and worker, of the consideration given to the laid-off workers for the position in the RIR application, and 3) if any U.S. workers were rejected for the position contained in the RIR application, the lawful job related reasons for each worker rejected. The DOL instructs CO's to take a liberal approach to granting the one-time 35 day extension to respond to the NOF, in light of the content of the information required.

If the employer fails to provide the requested information, or does not provide adequate documentation, the CO will issue an NOF with intent to deny the RIR conversion request.

### Industry Layoffs

If the CO has reason to believe that industry layoffs involving the occupation contained in the employer's RIR application occurred within 6 months prior to filing the application or processing, the CO should permit the employer to either: 1) publish one additional advertisement consistent with the advertisement provided in the original RIR application, or 2) request that the CO remand the application to the State for regular processing.

If the employer opts to run an additional advertisement, the employer must allow a minimum of two weeks to generate a response to the advertisement, and then must submit a written report of the recruitment effort. Based on the written report, the CO will approve or deny the application, or issue a NOF.

## The New RIR Option is Not "New" But Rather Re-Hashes an Existing One and Places Emphasis on Why Employers Should Opt for RIR

As the October 2006 DOL RIR regulation makes clear, the option for a U.S. employer to convert a TR application currently pending at the BEC from TR to RIR is not new, and DOL's regulation merely extends the rules that that already exist regarding RIR cases. DOL's regulation and its accompanying Question and Answer document indicate that DOL is encouraging employers to covert TR cases to RIR to facilitate a more efficient use of DOL's limited resources.

Employers may ask themselves, "Why should we entertain RIR conversion now when we initially chose the TR option for well-thought out reasons such as the concern that the occupation (described in our application) may be in a geographic area where there is an available supply of minimally qualified U.S. workers and it is important that we include specific skill set items to demonstrate that our job is not generic and that not just any worker in this general field can qualify to perform our job? This may be particularly true for some employers whose RIR applications were already rejected and put on the TR path with the resulting problem that the skill sets for such jobs/applications were not fully described.

The answer is that DOL seems to be saying it is having serious trouble working through its backlog of cases and that it may be unable to process all TR cases by October 2007. So, the only way an employer is likely to receive timely action on a pending TR application is via the RIR process. While DOL does not explicitly say so and there are no guarantees (see section on risks below), DOL might be signaling that it is willing to accept RIR cases for virtually any occupation and locale – even those cases that contain a more detailed and demanding skill set than historically has been acceptable in RIR-style cases.

## What Risks Exist if an Employer Converts a Traditional Case to Reduction in Recruitment

The following are some possible pitfalls if an employer elects to convert a pending TR case to the RIR track:

1. To proceed with RIR, an employer must engage in a pattern of recruitment of up to six months leading up to RIR case filing and must determine whether any qualified, willing and available U.S. workers apply as a result. During the time that this unfolds, if DOL issues a Job Order to start recruitment for the TR case, then the case is no longer eligible for RIR conversion. Therefore, it is possible that an employer could have undertaken all RIR recruitment and incurred legal expenses only to be frozen out of RIR. DOL specifically addressed this concern in the question and answer document it issued, but indicated that it would not suspend TR processing upon request to allow for RIR conversion. This risk might discourage some employers from initiating RIR conversion.

   On the other hand, the American Immigration Lawyers Association recently observed that:

   > Beginning in November2006, DOL will be publishing BEC traditional (TR) case processing dates. Updated monthly, DOL will list for each BEC the date by month and year what TR filing dates the respective BECs are working. This is being done to help employers know when they can expect to receive recruitment instructions on their pending traditional cases and inform the decision to whether or not to pursue an RIR conversion request. DOL indicated that they are working on April 2001 and do not expect to advance the date for some time due to the volume of Section 245(i) applications filed then.

2. The existence of employer layoffs or industry layoffs within the six months prior to either filing the case or processing may disrupt the employer's pattern of recruitment. In the event of employer layoffs, the employer risks

receiving a Notice of Findings requiring the employer to provide detailed documentation of the layoffs. If the employer cannot generate the required information in a timely manner, the CO will deny the RIR conversion request. If industry layoffs occurred, the CO will require the employer to continue the pattern of recruitment by publishing an additional advertisement before the CO will decide the RIR conversion request.

3. DOL has not suspended the rules of the RIR program regarding RIR being used only for jobs for which there is little or no historical availability of qualified U.S. workers. Therefore, DOL could still decide to reject a RIR conversion request and order supervised recruitment under the TR application standards. Furthermore, if DOL decides the case has "restrictive requirements" (previously defined largely as a significant set of requirements in ETA 750, Part A, Item 15 of the TR application), DOL could also reject the request for conversion because the job requirements (as described) are unduly restrictive for RIR purposes. If DOL were to reject the case for RIR conversion, the case would go back into the TR queue for supervised recruitment.

4. Additionally, while some modifications may be made to the existing Part A (Offer of Employment) which contains the employer name, address, job title, salary, duties and requirements, the changes must generally define the same job and occupation. An outright change in the occupation would probably result in DOL rejecting the case as constituting a new application – something that is not permitted.

## What Benefits Exist if an Employer Converts a Traditional Case to Reduction in Recruitment

1. If the RIR conversion request is acceptable and DOL approves the application, the decision should come faster than if the case stayed on the TR track.

2. If DOL approves the application more quickly, the employer might be able to file an Employment-Based I-140 Immigrant Petition more quickly and, if the employee's priority date is current, enable the employee to file for permanent residence as well; and

3. While the employer can always convert a TR or RIR case (pending at the BEC) to PERM, PERM allows for conversion and priority date continuity only if the PERM case is identical to the pre-PERM application in all respects. A case conversion from TR to RIR would enable the employee to keep the existing (TR-based) priority date while benefiting from faster DOL BEC decision-making. A case conversion from TR to RIR will accommodate minor but important amendments or corrections to the RIR case as long as the occupation is still the same as in the TR case. Hence, for employees who are already into the sixth year of their H-1B status and cannot afford the risk of losing their priority date, RIR conversion may be more acceptable because conversion of TR to RIR does not put the priority date at risk.

## Final Comments

While the DOL regulation offers nothing new but merely perpetuates a conversion ability that has been around for years, what is new is the signal DOL is sending that TR cases may not be as close to seeing action as DOL's prior pronouncements have suggested and that the September 30, 2007 end date for all BEC cases (with an approval or denial) may not be achievable. Therefore, while some risks exist including regarding investment in RIR when one cannot tell when DOL will issue a Job Order to begin recruitment, some companies with long-waiting employees and line managers eager for action on the TR case may decide that it makes sense to force the action and convert the TR case to RIR and hope that DOL takes a liberal stance with regard to issues like whether the job is historically certifiable and the whether the skill set contains restrictive requirements. Employers can initiate TR to RIR conversion at any time and begin the recruiting process leading to filing an RIR conversion request, updating the TR application, and submitting recruiting evidence.

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