

## PROVING BUSINESS NECESSITY IN A PERM LABOR CERTIFICATION AUDIT



by

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One of the most common reasons for an audit in a PERM labor certification application is that the employer's job requirements (as listed on the ETA Form 9089) are not considered "normal" for the particular job. In cases where the employer's job requirements are not considered "normal", the Department of Labor typically will audit the PERM labor certification application. Audits are becoming more and more frequent in PERM labor certification cases since, upon the closing of the Backlog Elimination Centers, there are a greater number of Department of Labor employees who can be used to audit PERM cases.

### What is an Audit?

An audit occurs when the Department of Labor issues an audit letter requesting additional information and documentation in connection with the PERM labor certification case. In cases without audits, the ETA Form 9089 contains a number of employer attestations regarding the job and various certifications that regarding the advertisements and other information. No supporting documentation is filed to corroborate the information contained in the ETA Form 9089.

In an audit, the Department of Labor sends to the employer or his attorney a written request for additional information or documentation in order to determine whether the PERM labor certification can be approved. An audit can be either random (in which case the Department of Labor does not have any particular concern regarding the application but simply wants to make sure that the information submitted electronically is in fact accurate) or can target one or more particular issues. This article will focus on one of the more common reasons for an audit – where the employer's job requirements are not considered "normal".

### Using "Business Necessity" to Justify a Job Requirement that is Not "Normal"

The PERM regulations at 20 CFR 656.17(h)(1) provide:

*"The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation*

*level assigned to the occupation as shown in the O\*NET Job Zones. To establish a business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner."*

As part of the labor certification process, the employer must determine if its minimum job requirements are normal for the occupation. Specifically, Section H of the ETA Form 9089 requires the employer to list the job's minimum requirements in terms of education, training work experience and any special skills. As part of Section H, Question H-12 on the ETA Form 9089 asks:

*"Are the job opportunity's requirements normal for the occupation? (If the answer to this question is No, the employer must be prepared to provide documentation demonstrating that the job requirements are supported by business necessity.)"*

Answering "yes" (the job requirements are not normal) will likely result in the Department of Labor auditing the labor certification application. As part of the audit, the employer would be required to demonstrate that there is a business necessity for requiring those requirements which are not "normal". When auditing a case the Department of Labor typically asks for all recruitment documentation (copies of all required job advertisements, a recruitment report, a copy of the Notice of Filing, etc.) in addition to the business necessity documentation.

### **What is Considered a "Normal" Job Requirement?**

The term "normal" seems simple to define. In actuality, it can be very difficult to determine, in the context of a PERM labor certification case, whether an employer's job requirements are, in fact, "normal".

Unfortunately, the PERM regulations do not clearly define what is considered a "normal" job requirement. What one employer may consider a "normal" job requirement, another employer (or a Department of Labor official reviewing the PERM ETA Form 9089) may not consider "normal". Therefore, in many cases, it is not entirely clear whether the answer should be "yes" or "no" in response the question on the PERM ETA Form 9089 asking whether the job requirements are normal.

The Department of Labor has issued some guidance on what is considered a "normal" job requirement in its list of "Frequently Asked Questions". In response to the question of how you know if the job description contains requirements beyond those considered normal for the occupation, the Department of Labor advises that the job summary specific to the SOC/O\*NET code and Occupational Title provided by the State Workforce Agency on the prevailing wage determination is considered to identify the requirements normal to the occupation. The O\*NET is a Department of Labor

publication which provides summaries of various jobs and typical requirements for various types of jobs. Therefore, the employer and his attorney should consult the Department of Labor's O\*NET publication and to look up (based on the job's SOC/O\*NET code provided by the State Workforce Agency) information on the job to determine if what the employer is requiring is consistent with what the Department of Labor says with respect to the job.

### **Are the Job Requirements "Normal" – Yes or No?**

When in doubt as to whether a minimum job requirement is considered "normal", the conservative, and perhaps best, approach is to answer "no" (the requirements are not normal). Why? Because by indicating that the job requirements are not normal, the likely worst scenario is that the Department of Labor will audit the PERM application and provide the employer with an opportunity to document and explain why the requirements can be justified by a showing of "business necessity". There is also the possibility that, even if you indicate that the job requirements are not normal, a DOL official reviewing the filing may still not audit the file.

However, if you indicate that the job requirements are normal and a DOL official disagrees, then (according to the Department of Labor's list of Frequently Asked Questions" on PERM), the PERM application "will be denied whether proof of business necessity is available or not."

### **How Can An Employer Prove "Business Necessity"?**

The regulations provide that, in order to establish a business necessity, the employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner." Thus, the employer can justify job requirements which are not normal for the job if it can demonstrate two very important things:

- (1) the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business, and
- (2) the job duties and requirements are essential to perform the job in a reasonable manner.

From a practical perspective, the employer, prior to even filing a labor certification which involves a job requirement which arguably is not normal to the job occupation, should ask itself whether if the Department of Labor questions its requirements it can justify its job requirements. Is the job requirement reasonably related to the occupation when viewed in the context of the employer's business? Why is the requirement necessary in order to be able to perform the job in a reasonable manner? Why is it absolutely necessary that the person filling the job position meet the job requirement in question in order to perform the job reasonably well?

In responding to a request for business necessity documentation, the employer should be prepared with as much documentation as possible in order to show that the job requirement is necessary for the employer's business. The "business necessity" documentation should include, at a minimum, a letter from the employer which provides an overview of the employer's business and carefully explains the nature of its business since the "context of employer's business" is to be considered by the Department of Labor. Describe the business, the types of work the business performs, the type of clients or customers that the business serves and explain how the job requirements are related to the occupation in the context of the employer's business. This information is being offered in order to show that, while the job requirement may not be "normal" for the particular occupation in question, it is required, as a matter of business necessity, by this particular employer with respect to this particular job in question. The employer should consider whether, in addition to his letter, there is any other evidence or documentation that he can provide in order to prove business necessity. The employer's audit response must be provided to the Department of Labor within thirty (30) days of the date of the audit letter.

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