

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION
2019 PERM FAQs

**Round 14: Withdrawals, Requests for Reconsideration or
BALCA Review, and Pay Differentials**
May 13, 2019

WITHDRAWALS

1. How can a pending application filed under PERM be withdrawn?

If the application was filed online, the employer may withdraw its pending application by accessing the employer's account in the Permanent Online System. Instructions are available via the PERM Online System website under the "Online Help" tab. In addition, the employer may submit a withdrawal request via the "Upload Documents" and the Help Desk Inquiry tools in the Permanent Online System.

If the application was filed by mail, or in the event an employer is unable to withdraw the pending application electronically, the employer should send a **withdrawal request** by e-mail to the Atlanta National Processing Center at PLC.Atlanta@dol.gov. To ensure the request is processed expeditiously, please include the following information in the e-mail request:

The subject line of the e-mail must indicate it is a "Withdrawal Request – Pending PERM Application," and include the application case number and the employer's name.

In the body of the e-mail, include the following information:

1. Application Case Number
2. Employer's Name
3. Employer's FEIN
4. Foreign Worker's Name
5. Name and title of individual requesting withdrawal

As an alternative to e-mail, a letter with the above information must be mailed to the Atlanta National Processing Center at the following address:

Atlanta National Processing Center
ATTN: Application Withdrawal Request
Harris Tower
233 Peachtree Street, Suite 410
Atlanta, Georgia 30303

IMPORTANT NOTE: While an employer may request to withdraw a pending application, the Atlanta National Processing Center is under no regulatory requirement to accept any submitted withdrawal request. Moreover, if an employer seeks to withdraw an application after it receives an audit notification letter, the employer is not relieved of its requirement to comply with the audit procedure provisions of 20 CFR § 656.20 and must submit all required audit information and/or documentation before the withdrawal will be processed. The employer must submit the required information and documentation to the Certifying Officer by the date specified in the audit notification letter.

2. What is required of an employer who wishes to withdraw a certified PERM application?

An employer may request to withdraw a certified PERM application at any time, via the Help Desk Inquiry tool in the Permanent Online system, using e-mail or mail. An employer making its withdrawal request by mail must send it to the Atlanta National Processing Center at the following address:

Atlanta National Processing Center
ATTN: Certification Withdrawal
Harris Tower
233 Peachtree Street, Suite 410
Atlanta, Georgia 30303

If a request is submitted by e-mail, the employer must send a withdrawal request to the Atlanta National Processing Center at PLC.Atlanta@dol.gov. All requests must include the following information:

Indicate "Withdrawal Request - Certified PERM Application" and the employer's name in the subject line of the letter or e-mail.

In the body of the letter or e-mail, include the following information:

1. Application Case Number
2. Employer's Name
3. Employer's FEIN
4. Foreign Worker's Name
5. Name and title of individual requesting withdrawal

IMPORTANT NOTE: An employer making a withdrawal request by mail must enclose, with its request, all pages of the original certified Form ETA-9089 issued by the Atlanta National Processing Center. An employer making its withdrawal request via e-mail must submit the certified Form ETA-9089 by mail and include, as a cover to the certified form, a copy of the e-mailed withdrawal request.

3. Once an employer makes a request to withdraw, how soon can the employer file a new application for the same foreign worker in the same job opportunity?

After requesting a withdrawal, an employer may not file a new Form ETA-9089 for the same foreign worker in the same job opportunity until the Atlanta National Processing Center has verified one of the following:

- A. The status of the pending application is now in "Withdrawn" status or "Denied" status; or
- B. Employer receives confirmation (via standard U.S. Mail or e-mail) from the Atlanta National Processing Center that the Form ETA-9089 that was in process has been withdrawn.

4. How can an employer withdraw a PERM application if it is in Certified-Expired status?

The Office of Foreign Labor Certification recognizes that there are times when the employer may have a specific reason for seeking post-expiration withdrawal. In those rare instances, the employer must send a request via the Help Desk Inquiry tool in the Permanent Online System or an email to PLC.Atlanta@dol.gov explaining the circumstances why it believes it is necessary to note a withdrawal in the PERM system. These requests will be considered on a case-by-case basis.

REQUESTS FOR RECONSIDERATION OR BALCA REVIEW

1. What is the difference between Request for Reconsideration and Request for Review?

Upon receipt of a Final Determination letter denying labor certification, the employer has the option to make a Request for Reconsideration or a Request for Review.

In a Request for Reconsideration (20 CFR § 656.24(g)), the employer asks the Certifying Officer (CO) to re-evaluate the CO's own denial decision. The Request for Reconsideration must be made no later than thirty (30) calendar days from the date on the Final Determination letter. The Request for Reconsideration generally can only include documentation the CO previously received. The only new documentation that the employer may submit is documentation that existed at the time the application was filed, but that the employer did not have an opportunity to present. This regulatory provision grants a narrow exception. The exception may only be exercised where the additional documentation does not modify the Form ETA-9089 in any way. If the information provided requires amendment of the Form ETA-9089, the additional documentation will not be accepted because the only new documentation the regulation permits is documentation maintained by the employer to support the Form ETA-9089 as it was initially filed (see question 2 below). If the employer opts to request reconsideration, and the CO decides to uphold the denial, the CO issues a Notice of Decision (Notice). If an employer disagrees with the Notice, the employer may file a Request for Review with the Board of Alien Labor Certification Appeals (BALCA) (20

CFR § 656.26). This request for BALCA’s additional review must be made no later than 30 calendar days from the date of the Notice.

In contrast, the employer may skip the Request for Reconsideration by the CO option and instead make a Request for Review (§ 656.26) by BALCA only. Like the Request for Reconsideration, the Request for Review must be filed no later than thirty (30) calendar days from the date on the Final Determination letter. The Request for Review may contain only legal argument(s) and evidence that was presented to the CO prior to the CO’s decision.

2. I filed an application that was denied based on incorrect or missing information on the Form ETA-9089. Can I correct this?

An employer may not make modifications or corrections to the Form ETA-9089 as the employer filed it. See 20 CFR § 656.11(b).

If an employer can prove that a correction is necessary to correct a mistake by the Department, it may request corrections to the denied application by filing a written Request for Reconsideration within thirty (30) calendar days from the date on the denial letter.

If the CO accepts the correction, the CO will make the change to the Form ETA-9089. The application will be returned to “in process” status and then will be processed according to the priority date (Note: Please know that the priority date remains the same). If the CO does not accept the employer’s correction, the CO will issue a Notice of Decision (Notice). The Notice will inform the employer that it may request review by the Board of Alien Labor Certification Appeals (BALCA), but must affirmatively do so in writing no later than thirty (30) calendar days from the date on the Notice.

3. If I file a Request for Reconsideration and the Certifying Officer (CO) upholds the denial of the application, what other actions can I take?

If the CO upholds (or agrees with) the denial of the application, the CO will issue a Notice of Decision (Notice) to the employer. The Notice will inform the employer that it has the option to file a Request for Review by the Board of Alien Labor Certification Appeals (BALCA). The CO will not automatically forward the appeal file to BALCA. The employer must affirmatively request review by BALCA, in writing, no later than thirty (30) calendar days from the date on the Notice.

4. What will happen if I do not request Board of Alien Labor Certification Appeals (BALCA) review of the Notice of Decision (Notice) on a Request for Reconsideration within thirty (30) days from the date on the Notice?

If an employer fails to request BALCA review within thirty (30) days from the date on the Notice, the case file will not automatically be forwarded to BALCA for review. The application will be listed as denied in the Permanent Online System.

5. May I concurrently file a Request for Reconsideration before the Atlanta National Processing Center and a Request for Review before the Board of Alien Labor Certification Appeals (BALCA)?

No. The employer must affirmatively state in writing whether it is requesting reconsideration by the Certifying Officer (CO) or administrative review by BALCA. To effectively protect each employer's due process rights, a submission that is vague or asks for both reconsideration and BALCA review will be treated as a Request for Reconsideration.

If the CO upholds the denial decision on a Request for Reconsideration, the CO will issue a Notice of Decision (Notice) to the employer. The Notice will explain to the employer its option to request review by BALCA. Such request must be filed in writing no later than thirty (30) calendar days from the date on the Notice.

6. I do not want the Atlanta National Processing Center (ANPC) to reconsider its decision. I would like the Board of Alien Labor Certification Appeals (BALCA) to review my appeal. How do I file a Request for Review solely before BALCA?

An employer's cover letter should expressly state at the top of the letter the phrase "Request for BALCA Review Only" to notify the Certifying Officer (CO) that it desires BALCA review without reconsideration by the CO. Upon receipt of the Request for Review, the ANPC will send the appeal file to BALCA.

7. In the case of a Request for Review, what information is contained in the appeal file forwarded to the Board of Alien Labor Certification (BALCA) by the Certifying Officer? What information is contained in copies of the appeal file sent to the employer and its attorney/agent of record?

The appeal file sent to BALCA contains a transmittal letter, a table of contents, the request for review, the complete application file, including the Form ETA-9089, and copies of all written material upon which the denial was based, including letters and emails and documentation submitted by and to the employer and, when applicable, the employer's attorney or agent of record.

The Atlanta National Processing Center (ANPC) will typically email a copy of the same appeal file sent to BALCA to the employer and to its attorney/agent of record. However, if for some reason ANPC must physically mail a hardcopy of the appeal and there is an attorney/agent of record, then a complete copy of the appeal file will be mailed to the employer's attorney/agent of record and the Notice of Decision letter alone will be mailed to the employer. If there is no attorney/agent of record, a complete copy of the appeal file will be mailed to the employer.

8. I submitted a Request for Reconsideration to the Atlanta National Processing Center (ANPC). Now I only want to request review by the Board of Alien Labor Certification Appeals (BALCA). Can I now change my case's appeal classification from a Request for Reconsideration to a Request for Review by BALCA?

If less than thirty (30) days have passed from the Final Determination, the Request for Reconsideration can be reclassified to a Request for Review by BALCA.

It may not be possible to reclassify the case if the employer makes its request more than thirty (30) days after the date of the Final Determination. If the Certifying Officer issues a Notice of Decision (Notice) upholding its denial, a Request for Review by BALCA may be filed within 30 days of the date of such Notice (see question 3, above).

9. How can I find out the status of my Request for Reconsideration?

An employer may inquire about the status of a Request for Reconsideration through the Permanent Online System Help Desk Inquiry, by email at PLC.Atlanta@dol.gov or by mailing a letter requesting the status of the request to the Atlanta National Processing Center at:

Atlanta National Processing Center
ATTN: Application Status – Request for Reconsideration
Harris Tower
233 Peachtree Street, Suite 410
Atlanta, Georgia 30303

The subject line of the letter must state: "Application Status – Request for Reconsideration" and include the employer's name.

An employer making an inquiry about the status of a Request for Reconsideration by e-mail must send it to the Atlanta National Processing Center at PLC.Atlanta@dol.gov.

The subject line of the e-mail must state: "Application Status – Request for Reconsideration."

In the body of the letter or e-mail, include the following information:

1. Application Case Number
2. Employer's Name
3. Employer's FEIN
4. Foreign Worker's Name

PAY DIFFERENTIALS (COST-OF-LABOR ADJUSTMENTS)

1. What is a pay differential?

A pay differential (also referred to as a pay adjustment, cost of labor adjustment, cost of living adjustment, or locality pay) is a type of pay offered to workers, in addition to the base rate of pay for a job, to account for cost differentials depending on the area where the job is located. Typically, a pay differential is offered when an employer employs individuals in multiple areas of employment with a set base rate of pay for a job company-wide and then pays a wage differential to account for the different costs of living or costs of labor in the places where the job is performed. A pay differential is generally established as a certain amount per pay period and is paid along with the base salary on a biweekly, monthly or similar basis.

2. Is a pay differential considered part of the offered wage?

Yes. Under 20 CFR § 656.10(c), the employer must certify the “conditions of employment,” including the “offered wage.” The offered wage, in turn, must equal or exceed the prevailing wage in the area of employment. 20 CFR § 656.10(c)(1). Pay adjustments such as locality pay – whose purpose is to bring a worker’s wage rate at least “level” with the prevailing wage rate in the area of employment – are part of an employee’s base pay. *See Crowley v. United States*, 57 Fed. Cl. 376, 381 (2003) (finding that federal locality pay is a “special pay adjustment” to be deemed part of “base pay”). Accordingly, in the labor certification context, the Department considers the “offered wage” to include all wage adjustments.

3. Must the pay differential be included on the employer’s Form ETA-9089?

Yes. Since a pay differential is a wage adjustment and therefore part of the offered wage, the employer must include the pay adjustment in Section G-1 of the Form ETA-9089.

4. Must a pay differential be included in the Notice of Filing (NOF)?

Yes. Pursuant to 20 CFR § 656.10(d)(4), the NOF must state the rate of pay. The rate of pay is the wage offered to the interested person, whether a U.S. citizen or foreign national, for the job opportunity at the worksite location. As a pay differential is part of the offered wage, employers must include any pay differential in the rate of pay when completing the NOF.

5. The worksite(s) for the job opportunity described on my Form ETA-9089 cannot be anticipated at this time. How do I include a locality-based pay differential in the Form ETA-9089 and Notice of Filing (NOF) to appropriately apprise U.S. workers of the offered wage?

As noted above, if the employer can anticipate the various worksites, it must disclose any locality-based pay differential in the ETA Form 9141 and the Form ETA-9089, and all statements of wages offered or rates of pay must include applicable pay differentials. In instances in which the worksites cannot be anticipated at the time of filing, the Employer must use the location of its Headquarters to determine its recruitment and prevailing wage. Section G-1 of the Form ETA-9089 must state the wage offered at Headquarters, including the applicable pay differential. The rate of pay offered must equal or exceed the prevailing wage. The NOF must state the rate of pay listed in Section G-1 of the Form ETA-9089, including the differential.