Permanent (PERM) Labor Certification Program

PERM Appeals Submission and Practice Tips

June 13, 2018

Office of Foreign Labor Certification (OFLC)
Atlanta National Processing Center (ANPC)
Disclaimer

This presentation is intended for training purposes only and does not carry the force of legal opinion.

The Department of Labor (The Department) is providing this presentation, and related materials, as a public service and to give the public access to information on the Department’s programs. While we try to keep the information current and accurate, a delay between official publications of the materials and the modification of these pages could occur. The Federal Register and the Code of Federal Regulations are the official sources for the Department’s most up-to-date regulatory information.
Mr. Brandt Carter
*Center Director*
ANPC, OFLC

Ms. Melanie Shay
*Certifying Officer (CO)*
ANPC, OFLC
I. The PERM Appeal Process - Introduction and Overview

II. Common Issues

III. Post Board of Alien Labor Certification Appeals (BALCA) Actions

IV. Filing Tips

V. Methods of Submission

VI. Uploading Appeal Requests Through the Permanent Online System

VII. Resources for PERM Labor Certification Applications
Section I

The PERM Appeal Process - Introduction and Overview
What is the PERM Appeal Process?

- **Per 20 CFR 656.24(g)**, it is an opportunity for an employer to **request a Certifying Officer (CO) reconsider** denial of an PERM labor certification application (ETA Form 9089)

- **Per 20 CFR 656.26**, it is an opportunity for an employer to **directly request BALCA review** a CO’s decision to deny an ETA Form 9089
## Request for Reconsideration (Reconsideration) VS. Request for Review (Review)

<table>
<thead>
<tr>
<th>Reconsideration</th>
<th>Review</th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ 20 CFR 656.24(g)(1)</td>
<td>▪ 20 CFR 656.26</td>
</tr>
<tr>
<td>▪ May <strong>not</strong> be used to “appeal” revocation of certifications</td>
<td>▪ May be used to “appeal” revocation of certifications</td>
</tr>
<tr>
<td>▪ The CO will not consider evidence the employer did not previously submit</td>
<td>▪ May only include evidence the CO considered to deny the application</td>
</tr>
<tr>
<td>▪ The CO (OFLC) makes the final decision</td>
<td>▪ BALCA makes the final decision</td>
</tr>
</tbody>
</table>
The ANPC receives PERM appeals (Request for Reconsideration or Request for Review)
- All appeal requests **must** be filed with ANPC
- The ANPC **reviews and analyzes** all Requests for Reconsideration to make a decision
- The ANPC **only** prepares and submits a case file to BALCA for Requests for Review. No ANPC review involved.
Appeal Process Overview (continued)

- Requests for Reconsideration
  - The CO will either **overturn** or **uphold** the initial denial reason(s)

- The CO may request additional information through a Request for Information (RFI) letter prior to making a final decision
  - The employer must respond to the RFI within the allotted time-period (usually fifteen (15) days)
  - If the employer fails to timely respond, the ANPC will adjudicate the Request for Reconsideration based on the information provided in the initial request
  - If the employer timely responds, the CO will consider the information the employer provided (in addition to the initial arguments the employer made) to adjudicate the Request for Reconsideration
Appeal Process Overview (continued)

- **An overturn** occurs when the CO makes a favorable decision to re-evaluate the denial reason(s) and either:
  - Certifies the application; or
  - Resets the application for additional processing.

- **An uphold** occurs when the CO agrees with the denial reason(s)
Appeal Process Overview (continued)

- If upheld, the CO will document the reason(s) why he or she did not accept the employer’s arguments in a Notice of Decision (NOD) letter.
  - The employer has 30 days to respond to a NOD.
  - If the employer does not timely respond, OFLC will **administratively withdraw** the Request for Reconsideration from processing. OFLC will **not** forward it to BALCA for Review.
  - If the employer timely responds and seeks to continue, OFLC will forward the Request for Review to BALCA.
Section II

Common Issues
There are two options for filing an appeal:
- Request for Reconsideration (Reconsideration)
- Request for Review (Review)

How does an employer submit a request for reconsideration or review to the ANPC?
- The employer must clearly identify in its cover letter that it is making a Request for Review
- If the employer does not specify the type of request, the ANPC will process the case as a Reconsideration
- If the employer requests both Reconsideration and Review, the ANPC will process the case as a Reconsideration
Can an employer modify the information it submitted on the ETA Form 9089?

- No. An employer cannot make modifications to the ETA Form 9089 after it has been filed. 20 CFR § 656.11(b).

- If the ANPC denies the application, the employer may request Reconsideration within 30 calendar days from the date of the denial letter. If the CO:
  - Accepts the employer’s request, the CO will make the change(s) to the ETA Form 9089 and certify the application or reset it for additional processing; or,
  - Does not accept the employer’s request, the CO will issue a NOD informing the employer that it may make a Request for Review with BALCA, affirmatively in writing, no later than thirty (30) calendar days from the date on the NOD.
What happens after the CO makes a decision to uphold a Request for Reconsideration?

- If, after considering the Request for Reconsideration, the CO makes a decision to uphold the reason(s) for denial, the employer will receive a NOD letter.

- The NOD letter will outline the reason(s) for upholding the denial.

- The employer has 30 days to respond to the NOD letter.
What happens after the CO makes a decision to uphold a Request for Reconsideration? (continued)

- If the employer does not respond to the NOD letter within 30 days, OFLC will administratively withdraw the request.
- If the employer responds to the NOD letter within 30 days with a Request for Review, OFLC will forward the request to BALCA. The employer will receive e-mail notification confirming OFLC sent the case file to BALCA.
If the employer filed a Request for Reconsideration, can the employer later change it to a Request for Review?

- If less than 30 days have passed from the date of Final Determination, the employer may change its Request for Reconsideration to a Request for Review

How can an employer check the status of a Request for Reconsideration?

- E-mail the ANPC help desk at plc.atlanta@dol.gov; or
- Go to icert.doleta.gov and check the “Reconsideration Requests to the CO” processing times for general information.
Section III

Post-BALCA Actions
What happens after BALCA makes a decision on a Request for Review?

- BALCA will notify, **in writing** (U.S. mail), both the CO and the employer when it has made a decision.

- BALCA can either **uphold** or **overturn** the CO’s decision.
  - The ANPC will enter the decision to uphold or overturn a denial into the Permanent Online System. The case status in iCERT will either:
    - **For upholds** → revert to “Denied;” or
    - **For overturns** → show either “In Process” (if the case is reset for additional processing) or “Certified”
What if the ANPC does not enter the BALCA decision into the Permanent Online System?

- You may:
  - Upload a copy of the BALCA decision to the Permanent Online System; or
  - E-mail a copy of the BALCA decision to the ANPC help desk at plc.atlanta@dol.gov.

- Upon receipt, the CO will review the BALCA decision and enter the appropriate action into the Permanent Online System.
What if the BALCA decision is not entered in the Permanent Online System? (continued)

- The employer also can check the Office of Administrative Law Judges (OALJ) website at [www.oalj.dol.gov](http://www.oalj.dol.gov)
  - Use the search functionality to determine whether BALCA has made a decision
  - A .PDF document will be available for download if a decision has been made
Department of Labor: PERM Program

Enter foreign worker’s name (claimant) and/or Enter Employer’s Name
### Department of Labor: PERM Program

#### Search Results

16549 Records matched your criteria. Please Click on Case Number to see the details of the case. Please Click on the Column Title to sort the results by that column.

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Decision Date</th>
<th>Claimant</th>
<th>Employer</th>
<th>DMS File</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td>View Document(s)</td>
</tr>
<tr>
<td>8</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Select “View Documents”
Section IV

Filing Tips
Filing Tips and Information

- Make sure scanned documents are **clear and legible**
- Use the **upload function** in the Permanent Online System
- There is no longer a separate queue for **Government Error**
- Clearly indicate whether the employer is making a Request for Reconsideration (656.24(g)) or Review (656.26)
  - **Unspecified or both = Request for Reconsideration**
If responding to a “non-response” denial, include the “missing” documentation and proof it was timely filed with the Request for Reconsideration

- For example, if denied for “non-response to audit,” provide the audit documentation (with proof of submission)

**Respond to the NOD letter.** If the employer does not respond timely, the ANPC will administratively withdraw the appeal request and conclude processing.

**Do NOT** include information that was not part of the file at the time the employer submitted it (e.g. referral letters requested or received after the employer filed the application)
Filing Tips and Information (continued)

- Subscribe to the OFLC website (www.foreignlaborcert.doleta.gov) by entering your e-mail address to receive content updates, including FAQs

- Review www.oalj.dol.gov for BALCA-related information and decisions
Section V
Methods of Submission
Submission Instructions

1. **Preferred Method:** Upload documents to the Permanent Online System

- Provides a faster application processing time
- Reduces employer costs (e.g. no mailing cost)
- Can be done in four easy steps
Employer Benefits Related to Uploading

The employer receives many benefits, which include:

- **Immediate confirmation** of successful upload;
- **The ability to upload** each section under the respective drop-down;
- **Reduction in costs and burdens** from not having to submit documentation via mail, e-mail, or facsimile;
- **Streamlined process** for submitting responsive documents;
- **Expedited review** of PERM labor certification applications by connecting the responsive documents directly to the application; and
- **Integrity and receipt** of information submitted.
Reminders

- The **maximum size** limit for saving a single uploaded document is **30MB**
- Recommend separating document(s) that exceed (or seem to exceed, if the exact size is not known) the 30MB limit into two or more documents
- For example:
  - Case A-12345-XXXXX Reconsideration – Part I
  - Case A-12345-XXXXX Reconsideration – Part II
2. Send Documents to ANPC via E-mail

Employer receives fewer benefits compared to uploading, including:

- **No costs** associated with e-mailing documentation;
- **Immediate acknowledgement** that the ANPC received the documentation; and
- **No delay** for ANPC to receive and process documentation.
3. **Send Documents to ANPC via Mail Service**

Although permissible, this method has many drawbacks to employer, which include having:

- Costs associated with sending documents to the ANPC via regular postal mail, certified mail, FedEx, UPS, etc.;
- Delay in the receipt and processing of documentation; and
- No confirmation of receipt.
Section VI

Uploading Appeal Requests Through Permanent Online System
The employer must log into the Permanent Online System and select the ‘MY APPLICATIONS’ tab, and then click on the “UPLOAD DOCUMENTS” sub-tab.
The employer must enter the case number for the application in the “ETA Case Number” field and click on “Search”.

Enter or check the case number (if displayed) that you wish to upload documents. NOTE: Documents can be uploaded up to 30 days past final decision date.
After selecting “Upload Correspondence,” it will need to click on the “Browse” button and locate the audit document that needs to be uploaded.
Uploading Steps (continued)

The maximum size limit for saving any one uploaded document(s) is 30MB. Please consider separating document(s) that exceed (or seem to exceed if the exact size is not known) the 30MB limit into two or more document upload and save events to avoid lost information. Selectable document sequence options, i.e., xyz 1, xyz 2, etc., and the Note’s free-text data field are provided to assist stakeholders with document upload clarity.

The Note data field provides stakeholders with a maximum of 250 characters to provide additional document upload and save clarity. When appropriate, stakeholders may provide additional information pertaining to the uploaded document to be saved, e.g., document separation sequencing, uploading notations, clarifying previous document upload and save errors involving selection of the incorrect document type, etc.

Uploaded and saved documents must pertain only to the selected case. Do not combine documents for multiple cases. If combined documents are submitted, the case reviews may be delayed and/or denied for failure to follow instructions. The Note data field may not be used to explain any application issues or document content.

Upload Documents

* Select File: [Browse…]

* Category: [Appeal]

* Document Type to upload:
  - Appeal Miscellaneous
  - Appeal RFI Response
  - Appeal Withdrawal Request
  - NOD Response
  - Request for Reconsideration
  - Request for Review

Note: 250 characters remaining

Upload
The system will prompt the following appeal “Document Type” options:
The employer can:

- Upload and save several documents for the same case
- Select the “File”, “Category” and “Document Type.” (Optional: “File Name” and “Note” for each document to be uploaded.)

- Left click on “Save” and then “OK” to complete the last steps in uploading the documents in CMS
A view of the list of the documents uploaded, by document type, date uploaded, and any uploaded notes will be available, in addition to the name of the user that uploaded each document.

<table>
<thead>
<tr>
<th>File Name</th>
<th>Document Type</th>
<th>Date</th>
<th>Upload Note</th>
<th>User</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 for Employer and FW.docx</td>
<td>Audit Miscellaneous</td>
<td>04/26/2017</td>
<td>Attached is the employer’s audit response for case for ABC Employer and</td>
<td>uat1tester</td>
</tr>
<tr>
<td></td>
<td>Documentation</td>
<td></td>
<td>Foreign Worker Name.</td>
<td></td>
</tr>
<tr>
<td>Case [redacted] 4 for Employer and FW.docx</td>
<td>SR RFI Response</td>
<td>04/26/2017</td>
<td>SR Response Case to DOL’s SR letter dated 4/23/2017.</td>
<td>uat1tester</td>
</tr>
<tr>
<td>HD Inquiry Case [redacted] 4 for Employer and</td>
<td>Help Desk Inquiry</td>
<td>04/26/2017</td>
<td>What is the status of my case?</td>
<td>uat1tester</td>
</tr>
<tr>
<td>FW.docx</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New G-28 for Case [redacted] 4.docx</td>
<td>Change of Address Request</td>
<td>04/26/2017</td>
<td>Please see my change of address.</td>
<td>uat1tester</td>
</tr>
<tr>
<td>Audit Response for Case [redacted] 4 for ABC</td>
<td>Audit Miscellaneous</td>
<td>04/26/2017</td>
<td>See my updated G-28.</td>
<td>uat1tester</td>
</tr>
<tr>
<td>Employer and First and Last Name of Foreign</td>
<td>Documentation</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Worker.docx</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Substitute for New Attorney for Case [redacted]</td>
<td>Substitute Attorney/Agent</td>
<td>04/26/2017</td>
<td>See attachment.</td>
<td>uat1tester</td>
</tr>
<tr>
<td>docx</td>
<td>Documentation</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The external user will receive an automatically generated e-mail from “U.S. Dept. of Labor Employment & Training Administration <mailto: plc.help@dol.gov>” after uploading documents in CMS (a copy of the e-mail will be simultaneously sent to the ANPC help desk) acknowledging that documentation was uploaded.

Example:

“This internal e-mail is to notify you that correspondence has been added to A-12345-XXXXX. Correspondence Type uploaded:
- Request for Reconsideration  User Name (UserID)
- G-28 Documentation  User Name (UserID)”
Section VII

Resources for PERM Labor Certification Applications
PERM General Program and Processing Questions
- Help Desk: PLC.Atlanta@dol.gov
- Telephone: (404) 893-0101
- Mail: U.S. Department of Labor
  Office of Foreign Labor Certification
  Atlanta National Processing Center
  Harris Tower
  233 Peachtree Street N.E., Suite 410
  Atlanta, GA  30303

Check the OFLC website on regular basis for PERM updates, FAQs, webinar announcements, and updated forms at www.foreignlaborcert.doleta.gov
Go to [icert.doleta.gov](http://icert.doleta.gov) click on “Processing Times”
Visit the OFLC website and “Subscribe” for e-mail updates at www.foreignlaborcert.doleta.gov
View PERM FAQs, forms, regulations, etc., at www.foreignlaborcert.doleta.gov/perm.cfm