

**U.S. Department of Labor Employment and Training Administration,
Office of Foreign Labor Certification
PERM Program Guidance Bulletin on the Clarification of Scope of Consideration
Rule in 20 CFR 656.10(b)(2)**

The Department of Labor has a statutory responsibility to ensure that no foreign worker (or “alien”) is admitted for permanent residence based upon an offer of employment absent a finding that there are not sufficient U.S. workers who are able, willing, qualified and available for the work to be undertaken and that the admission of such worker will not adversely affect the wages and working conditions of U.S. workers similarly employed. 8 U.S.C. 1182(a)(5)(A)(i). The Department fulfills this responsibility by determining the availability of minimally qualified domestic workers before approving a permanent labor certification application and by ensuring that U.S. workers are fairly considered for all job opportunities that are the subject of a permanent labor certification application. Accordingly, the Department relies on employers who file labor certification applications to recruit and consider U.S. workers in good faith, even if the employer already has a temporarily-admitted foreign national occupying the position.

The Department has long held the view that good faith recruitment requires that an employer’s process for considering U.S. workers who respond to certification-related recruitment closely resembles the employer’s normal consideration process. In most situations, that normal process does not involve a role for an attorney or agent (as defined in 20 C.F.R. 656.3) in assessing the ability of applicants to fill the employer’s needs. It also does not involve any role for the foreign worker or foreign national in any aspect of the consideration process. However, given that the permanent labor certification program imposes recruitment standards on the employer that may deviate from the employer’s normal standards of evaluation, the Department understands and appreciates the legitimate role attorneys and agents play in the permanent labor certification process, and respects the right of employers to consult with their attorney or agent during that process to ensure they are complying with all applicable legal requirements.

By prohibiting attorneys, agents, and foreign workers from interviewing and considering U.S. workers during the permanent labor certification process, as described in 20 C.F.R. 656.10 (b)(2)(i) and (ii), the Department does not thereby prohibit attorneys and agents from performing the analyses necessary to counsel their clients on legal questions that may arise with respect to this process. The employer, and not the attorney or agent, must determine whether a U.S. applicant’s credentials meet the minimum qualifications for the position, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed. After an employer evaluates a U.S. worker and concludes that the worker is unqualified, the employer may seek the advice of its attorney or agent to ensure that its reasons for rejecting the U.S. worker are lawful, and the attorney or agent may review the qualifications of the U.S. worker to the extent necessary to provide that advice. By contrast, if an employer evaluates a U.S. worker and determines that the worker is minimally qualified, the attorney, agent, or foreign worker may not thereafter consider the applicants’ qualifications and attempt to substitute his or her own judgment for that of

the employer. In the Department's view, an employer's determination that a U.S. worker is minimally qualified for a position constitutes clear evidence that there are U.S. workers who are able, willing, qualified and available for the work to be undertaken.

More specifically, the types of actions prohibited by 20 C.F.R. 656.10(b)(2)(i) and (ii) include:

- Attorneys and agents may receive resumes and applications from U.S. workers who respond to the employer's recruitment efforts; however, they may not conduct any preliminary screening of applications before the employer does so, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed. The attorney or agent may not withhold from the employer any resumes or applications that it receives from U.S. workers.
- Attorneys and agents may not participate in the interviewing of U.S. worker applicants, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed. Such involvement, because of its uniqueness, has resulted in an impermissible "chilling effect" on the interests of U.S. worker-applicants in the position.
- After the evaluation of applications by the employer has been completed, the employer may consult with its attorney or agent about the implications of its qualification determinations on the labor certification application. Those consultations can encompass the question of whether applicants who were found by the employer to be unqualified were rejected for lawful, job related reasons. Under no circumstances, however, should an attorney or agent seek to dissuade an employer from its initial determination that a particular applicant is minimally qualified, able, willing and available for the position in question.

Where the Department finds evidence of potentially improper attorney, agent, or foreign worker involvement in considering U.S. worker applicants, the Department may audit applications to determine whether the employer's recruitment and hiring processes were conducted in good faith and to ensure adherence to all statutory and regulatory requirements.