

Facebook enters Settlement Agreement regarding PERM Labor Certification Recruiting Practices

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The U.S. Department of Justice ("DOJ") Office of Public Affairs issued a [press release](#) two days ago, October 19, 2021, announcing a settlement with Facebook involving their recruiting practices to qualify foreign nationals for permanent residence (green card) status in the U.S. This settlement involves a civil fine of \$4.75 million payable to the U.S. government, plus an additional payment of up to \$9.5 million to eligible victims. This settlement ends a lawsuit filed by DOJ against Facebook in December of 2020.

Most employment-based green cards for permanent residence in the U.S. require employers to test the labor market to ensure no U.S. workers are qualified and available for an advertised position. This process is known as PERM Labor Certification and is under the U.S. Department of Labor's ("DOL") jurisdiction. DOL has very specific rules for PERM recruiting; these rules must be followed specifically, otherwise labor certification will be denied, and the employer will not be able to proceed with the permanent residence process.

The DOJ filed this suit based on Facebook's discriminatory recruiting process for PERM labor certification applications in violation of the Immigration & Nationality Act's prohibition on employer hiring practices that do not properly consider applicants authorized to work legally in the U.S. This immigration related anti-discrimination provision is part of the Immigration Reform & Control Act of 1986—the same law that requires employers to conduct the I-9 employment verification for all new hires. The anti-discrimination provisions of this 1986 law were put in place as a trade-off with the I-9 requirement to ostensibly ensure that employers would not discriminate against job applicants who appear foreign or have foreign sounding names, but are legally authorized to work in the U.S. In this settlement with Facebook, this law is being used to combat discrimination against U.S. workers.

The press release states that "Facebook routinely reserved jobs for temporary visa holders through the PERM process. Specifically, the lawsuit alleged that, in contrast to its standard recruitment practices, Facebook used recruiting methods designed to deter U.S. workers from applying to certain positions, such as requiring applications to be submitted by mail only; refused to consider U.S. workers who applied to the positions; and hired only temporary visa holders. According to the lawsuit, Facebook's hiring process for these positions intentionally discriminated against U.S. workers because of their citizenship or permanent resident status, in violation of the anti-discrimination provision of the Immigration and Nationality Act (INA)."

By engaging in these PERM recruiting practices that were inconsistent with their regular recruiting process, Facebook proceeded with a process to qualify foreign nationals not only for permanent residence status, but also ongoing employment. All of this, the DOJ asserts, was at the expense of U.S. workers who applied for positions.

Because the recruiting practices in question are a part of the DOL PERM Labor Certification process, DOL also got involved by conducting audit examinations of Facebook's PERM applications and their recruiting practices. DOL's Office of Foreign Labor Certification reviewed Facebook's PERM recruiting to

ensure compliance with DOL's specific labor market test recruiting requirements. This audit also apparently uncovered irregularities such that Facebook will now be required to "conduct more expansive advertising and recruitment for its job opportunities for all PERM position, accept electronic resumes or applications from all U.S. workers who apply, and take other steps to ensure that its recruitment for PERM positions closely matches its standard recruitment practices."

DOL regulations outlining the required recruiting steps for the PERM process are already quite different from the way most employers recruit, requiring such relics as print advertisements and postings on state employment commission websites that rarely result in any applicants. Even so, this settlement is instructive to employers that PERM labor certification recruiting must align as closely as possible with the employer's normal recruiting practices—especially in the way applicants are permitted to apply for positions.

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