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Must we withdraw a PERM application if the employee is laid off?

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Submitted by Rajiv S. Khanna on Feb 2nd 2010

Here is a set of questions posed to me recently by one of our clients:

I am Mr. Jones, the employer. The employee, Mr. Smith, is no longer employed with us because of company's budget issue. However, we may hire him in the near future if circumstance changes.

My question:

Q1. Do we need to withdraw PERM LC for him that was submitted 2009?

The status is still in process now. I would like to know if this PERM LC still has any goods for him. Let me know the pros & cons between withdraw it and not withdraw it.

A1. I do not know of any law that requires an employer to withdraw a PERM application if an employee leaves or gets laid off, but the employer still retains a good faith intention to hire them back. When we first filed the PERM application, we filed it in good faith, asserting to the USDOL under penalty of perjury that:

You have enough funds available to pay the wage or salary offered the alien and you will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States.

Both these assertions were true when we filed the PERM application on your behalf. So, we have followed the laws to the letter. Now, several months later, circumstances have changed. Do we have an affirmative duty to withdraw the PERM application? I do not see such a duty in the law.

Having a PERM in process, gives your employee an opportunity to continue extending their H-1 with any employer beyond 6 years. That is a considerable benefit.

The government could take the position that your application is now void on two grounds.

First, you no longer have a job open, which is a continuing requirement. Second, you had an interruption in your ability to pay the intended wage, which is also a continuing requirement.

We could lose the green card on both counts, but I see nothing illegal in letting the application stay pending. My opinion could change if we get an audit request from the USDOL. At that

point, it may be inappropriate for us to continue. That is something we will review carefully at that time. Please do remind us. We will also post a note to your file.

Q2. Question from the employee, Mr. Smith:

If Mr. Smith filed an immigration benefit (e.g. visa, petition, change of status), does he need to answer YES / NO to the following question: "Has an immigrant petition ever been filed for you?" Basically: does submitting PERM/LC mean filing an immigrant petition? This question is often asked in application.

A2. A PERM is not a visa application or an immigrant petition, a Form I-140 (the step after PERM) is.

Green Card:

[PERM - Labor Certification](#) [2]

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[1] <https://immigration.com/blog/perm-labor-certification/must-we-withdraw-a-perm-application-if-employee-laid>

[2] <https://immigration.com/greencard/green-card/perm-labor-certification>