

Drafting an approvable Job Description

Initial Considerations

There are several strategic decisions that must be considered when crafting the job description and requirements.

- EB-2 v. EB-3, What is the expected delay between approval of the PERM application and filing the adjustment application?
- Consider the Prevailing Wage.
- Determine the appropriate O*NET classification.
- Determine the Specific Vocational Preparation (SVP) Classification.

Prepare the Job Description

Development of a Program Electronic Review Management (PERM) application begins with the job description.

This description, entered on the Employment and Training Administration (ETA) Form 9089 forms the core of the application.

The Job Description has 10 core components:

1. Employer information.
2. Job Title.
3. Job Duties.
4. Education Required.
5. Experience Required.
6. Special Requirements.
7. Travel Requirements.
8. Work Hours.
9. Salary.
10. Supervision.
11. Location of Employment.

1. Employer Information

The ETA 9089 requests information about the employer, including:

- The employer's name (C.1.);
- The employer's address (C.3.);
- The employer's FEIN (C. 14.);
- Any ownership interest by the beneficiary or familial relationship with the employer;
- The current number of employees.

2. Job Title

- The job title must have a “logical relationship to the actual duties of the job.” If it does not, DOL assumes there was no good faith recruitment directed towards reaching the greatest number of qualified U.S. applicants.
- The job title must be descriptive.
- Avoid generic job title. Ex: avoid “Manager” or “Engineer”, instead, use “Department Manager, Food and Beverages.”
- Avoid vague and misleading Job Titles.

3. Job Duties

The requirements “must represent the employer’s actual minimum requirements for the job opportunity,” which in turn “are those prerequisites to the ability to perform the duties with little or no additional training or experience.”

When drafting the job duties:

- Limit the number of job duties to 15 bullet points. Form ETA 9089 has a character limit.
- Do not overstate the job duties. State the duties for a layman audience.
- Describe the position in greater detail to avoid the basic skill set commonly available in the workforce.
- Avoid sentences longer than 1 or 2 lines long.
- Avoid repetitive sentences.
- Start each sentence with a verb. Ex: create, perform, implement, review, provide, manage.
- Avoid duplicative language.
- Avoid overly technical terms.
- Write out acronyms. Ex: instead of NEC, state NEC (National Electrical Code). Instead of EHV, state EHV (Extra High Voltage).

3. Job Duties *continued*

- The job duties must be specific enough to ensure that a candidate who meets them is capable of performing the job duties, as the employer may not lawfully reject an application for lacking a requirement that is not clearly stated.
- Avoid job duties that are neither helpful, nor necessary.
- Avoid job duties that may already be included as a prerequisite to another job duty. Ex: 'preparing budgets' may be unnecessary, if there is already a 'prepare budgetary projections.'

4. Education Required

- State the level of education and the major required to adequately perform the duties of the job.
- Do not state preferred level of education. Preferred will be considered mandatory by DOL. Ex: B.S. in Electrical Engineering required and M.S. in Electrical Engineering preferred, will be interpreted as M.S. in Electrical Engineering required.
- List specific field of study. Do not state general fields of study. Ex: B.S. in Electrical Engineering, instead of B.S. in Engineering.
- List all appropriate majors. Ex: B.S. in Electrical Engineering or Instrumentations Engineering.
- If will accept additional fields of study, list “or closely related field.”

4. Education Required *continued*

- When listing appropriate majors, consider having a nexus between each. Ex: B.S. in Software Development, Software Engineering, or closely related field, instead of B.S. in Mathematics, Engineering, Software Development.
- Work backwards from the educational documents that the beneficiary is able to present. State the requirements that the beneficiary meets. Ex: if the requirement is B.S. in Accounting, the beneficiary's diploma needs to state Accounting.
- If foreign degree, the beneficiary will need to obtain an evaluation of his foreign credentials.

5. Experience Required

- Clearly define the years of experience necessary to perform the job.
- Clearly define the title of the position in which those years are required. Ex: 3 years of experience as an Electrical Engineer.
- Do not tailor this requirement to the beneficiary.
- Do not state overly burdensome requirement. An overly burdensome requirement will trigger an Audit.
- Do not overstate the years of experience. This will trigger an Audit.
- Do not list more than one area of expertise. Ex: do not list 15 years of experience as an Electrical Engineer, 8 years of experience as an SCADA engineer, 5 years of experience as a Manager, and 2 years of experience as a department manager. This will be considered overly burdensome and tailored and will trigger an Audit. Instead, consider stating: 10 years of experience as an Electrical Engineer, to include 5 years as an Engineering Manager in Electrical Engineering field.

6. Special Requirements

Arguably, this is the most important section of the job description.

And this is the most important aspect to remember:

- When articulating the special requirements, remember that any requirement listed in this section, must appear within the job duties.

Ex: If there is a special requirement: “Demonstrable ability to use CAD and project management software”,

There must be a job duty: “Manage development and delivery of custom build semi-autonomous mining equipment using CAD and project management software”.

- If we list skills that are not found in the job duties, DOL assumes we are tailoring them and they are not part of the day-to-day duties.

6. Special Requirements *continued*

- “Preference” should not be stated. DOL will interpret preference as a requirement. Ex: *B.S. in Electrical Engineering required. M.S. in Electrical Engineering is preferred*, will be interpreted as *M.S. in Electrical Engineering is required*.
- If the employer wishes to impose **a test requirement** upon U.S. applicants, then the same test must have been given to the beneficiary before he/she was hired by the employer. See Matter of Dr. Frank Storts, 1998.
- A requirement must be stated as a job requirement, and not as a possibility. DOL will interpret a possibility as a requirement. Ex: *possible travel to client worksite*, will be interpreted as *travel to client worksites*.
- If the employer wishes to impose **a test requirement** upon U.S. applicants, then the same test must have been given to the beneficiary before he/she was hired by the employer. See Matter of Dr. Frank Storts, 1998.
- If the employer requires a willingness to work overtime, then this must be stated as a requirement.

6. Special Requirements *continued*

- The job requirement should not be tailored to the qualifications of the beneficiary. Avoid even the perception of such tailoring. Ex: the requirement that a qualified applicant have a degree with more than one major will lead DOL to question why more than one degree is necessary.
- Avoid “general knowledge” or “familiarity” requirement and opt for “experience” requirement. A general knowledge of familiarity with... is closely scrutinized. Ex: Don’t state “Familiarity with C++”, instead, state “Experience in C++”.
- Do not use Subjective Requirements. Subjective criteria should not be used as requirements, because it is difficult to quantify.
- Do not use personality traits. Ex: must be a good communicator. This is not a legitimate reason for not considering the U.S. applicants.
- No “Grocery List” or “Tailoring” of requirement. A long list of requirements may lead DOL to question whether the employer tailored the requirements to beneficiary’s qualifications.

Qualifications Possessed by the Beneficiary at the Time of Hire

The regulations generally prohibit an employer from requiring U.S. workers “to possess training and/or experience beyond what the alien possessed at the time of hire.” 20 CFR 656.17(i)(3). The rationale is that an “employer is not allowed to treat the alien more favorably than it would a U.S. worker.” See Matter of Century Wilshire Hotel, 2007.

Exception

The exception to this rule is if the employee gained experience with “the employer, including as a contract employee, in a position not substantially comparable” to the position stated on the labor certification application.” 20 CFR 656.17 (i)(30)(i).

Substantially comparable is not clearly defined. Use more than 50% different job duties for Job A v. Job B analysis. Outline the duties and skills, assign percentages, and see the overlap. In the event of the Audit, submit to DOL.

Can the Beneficiary prove qualifications of the position?

DOL considers the qualifications of the beneficiary to determine the actual minimum requirements for the position. If the beneficiary did not meet the minimum requirements when hired, FOL may conclude that the actual minimum requirements for the position have not been properly identified.

- USCIS will require proof the beneficiary met the requirements at the time the PERM application was filed before approving the I-140 petition.
- Beneficiary will need to present experience letters, signed and on letterhead, from previous employers, outlining the following:
 - 1) start and end date of employment,
 - 2) title while employed,
 - 3) the position of individual signing the letter,
 - 4) the supervisory relationship of the author to the beneficiary,
 - 5) a brief description of the job duties performed, including specific skills listed in the PERM job.

7. Travel Requirements

- Describe travel with detail. Any of the examples below are acceptable.
 - Ex: Travel nationally to client worksites, 8 days each month. Travel internationally 20 days each year.
 - Ex: Travel to unanticipated locations, 10 days each month.
 - Ex: Domestic travel up to 2 trips per month, for a maximum of 14 days. International travel up to 2 trips annually, for a maximum of 14 days.
 - Ex: Travel: None.
 - Ex: Possible domestic travel at short notice for up to 4 trips per month for up to 5 days per trip, and possible international travel at short notice for up to 6 trips per year for up to 10 days per trip.

8. Work Hours

- Describe work hours with detail.

Ex: Monday to Friday, 8:00am to 5:00pm.

9. Salary

- List the salary currently received by the employee.
- Avoid listing incentives, such as bonuses. These are not guaranteed.
- The Prevailing Wage of the labor certification application does not need to be paid to the beneficiary until he obtains permanent residence (green card) as a result of the approved labor certification application.
- For worldwide numbers, this is approximately 2-3 years down the road. For backlogged countries, this can be 10+ years, depending on the country and category.

10. Supervision

Describe supervision in detail.

- The Prevailing Wage will ask the following: the name and title of the person supervising the beneficiary currently.
- The Prevailing Wage will also ask: Does the beneficiary supervise other employees, if so, the number and titles of each supervised employee.

11. Primary Worksite

- Primary worksite, or area of intended employment, is defined as the “area within normal commuting distance of the place (address) of intended employment.” 20 CFR 656.3.
- List the exact address where the employee is performing work.

If remote option is available:

- Indicate “Work from home benefit available” in job duties.
- Indicate “Worksite unanticipated” in job duties.

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