



# DO WE STILL NEED PERM LABOR CERTIFICATION? AN ANALYSIS OF THE MERITS-BASED POINTS SYSTEM IN BSEOIMA

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We continue to analyze the provisions of the [Border Security, Economic Opportunity and Immigration Modernization Act of 2013, s. 744](#) (BSEOIMA), which seeks to bring about dramatic changes to the existing immigration system in the United States. One of the most transformative changes that BSEOIMA will bring, if enacted, is a merits-based points system. For previous blogs on BSEOIMA, we refer readers to [Workable or Unworkable: The H-1B and L-1 Provisions in BSEOIMA, s. 744](#) and [Some Preliminary Observations Regarding The Proposed Border Security, Economic Opportunity And Immigration Modernization Act.](#)

There will be a two track merits-based system under BSEOIMA. The first track points-based merits system will have 120,000 to 250,000 merit-based visas. The second track non-points merits system applies to long term residents, and this track does not have a cap. By creating a points system, Congress has voted “No Confidence” in the labor certification program as a way to provide US employers with the talent they and the economy needs. This lack of confidence is also evident in other parts of BSEOIMA where STEM graduates with advanced degrees can be directly sponsored for green cards by employers without going through the arduous labor certification process.

Perhaps, it has also dawned on Congress about the futility of the labor market test that is conducted on behalf of a foreign worker for green card sponsorship who is already hired by the employer. A good faith test of the labor market even if conducted by a well-intentioned employer will likely fail, at least from the Department of Labor’s (DOL) view, if the foreign worker is already in the

position. The statutory basis for labor certifications, which in its current form is known as PERM (Program Electronic Review Management), is provided in INA §212(a)(5) of the Immigration and Nationality Act ("INA"). Under INA §212(a)(5), an alien is deemed "inadmissible unless the Secretary of Labor" certifies, inter alia, that "there are not sufficient workers who are able, willing, qualified...and available at the time of application" among the U.S. workforce. Out of this simple mandate in the INA, the DOL has built a complex regulatory structure that has delegated to the employer to conduct a good faith text of the US labor market. While in the real world an employer selects the best workers based both on an objective and subjective set of criteria, the DOL requires employers to demonstrate that only minimally qualified workers are available for the position. The labor certification process neither compels nor incentivizes an employer to hire the best workers, but it also does not result in the creation of US jobs. If a minimally qualified worker applies for the position, all that happens is that the labor certification cannot be filed.

The first track points-based system moves away radically from the labor certification system as it allows a foreign national to apply for permanent residency without a specific employer's sponsorship. It will take effect five years after the enactment of BSEOIMA. During the first four years from enactment, visas shall be made available to the backlogged EB-3 preferences. From the fifth year onwards, 50 % of visas shall be allocated to applicants who get the highest number of points under Tier 1. The remaining 50% of visas shall be allocated to applicants who get the highest number of points under Tier 2.

### **Under Tier 1, points will be assigned as follows:**

#### **A. Education**

- 15 points for a doctoral degree
- 10 points for a master's degree
- 5 points for a bachelor's degree from an institution of higher education in the US

#### **B. Employment Experience**

No more than 20 points can be allocated as follows:

- 3 points for each year an alien has been lawfully employed in a zone 5 occupation
- 2 points for each year the alien has been lawfully employed in a zone 4

occupation

### **C. Employment Related To Education**

An alien who is in the US and is employed full time or has an offer of full time employment in a field related to the alien's education

- In a zone 5 occupation shall be allocated 10 points
- In a zone 4 occupation shall be allocated 8 points

### **D. Entrepreneurship**

An alien who is an entrepreneur in a business that employs at least 2 employees in a zone 4 or zone 5 occupations shall be allocated 10 points

### **E. High Demand Occupation**

An alien who is employed full-time or has an offer of full-time employment in a high demand 1 shall be allocated 10 points

### **F. Civic Involvement**

An alien who has attested that he or she has engaged in significant amount of community service shall be allocated 2 points

### **G. English Language**

An alien who received a score of 80 or more on the Test of English as a Foreign Language, or an equivalent score on similar test, shall be allocated 10 points

### **H. Siblings and Married Sons and Daughters of Citizens**

An alien who is the sibling of a citizen of the United States or who is more than 31 years of age and is the married son or married daughter of a citizen of the United States shall be allocated 10 points

### **I. Age**

An alien who is:

- between 18 and 24 years of age shall be allocated 8 points
- between 25 and 32 years of age shall be allocated 6 points
- between 33 and 37 years of age shall be allocated 4 points

### **J. Country of Origin**

An alien who is a national of a country of which fewer than 50,000 nationals

were lawfully admitted to permanent residence in the US in the previous 5 years shall be allocated 5 points.

**Under Tier 2, points will be assigned as follows:**

**A. Employment Experience**

An alien shall be allocated 2 points for each year the alien has been lawfully employed in the US, for a total of not more than 20 points

**B. Special Employment Criteria**

An alien who is employed full-time, or has an offer of full-time employment

- in a high demand tier 2 occupation shall be allocated 10 points
- in a zone 1 occupation or zone 2 occupation shall be allocated 10 points

**C. Caregiver**

An alien who is or has been a primary caregiver shall be allocated 10 points

**D. Exceptional Employment Record**

An alien who has a record of exceptional employment shall be allocated 10 points

**E. Civic Involvement**

An alien who has demonstrated significant civil involvement shall be allocated 2 points

**F. English Language**

An alien who received a TOEFL score or an equivalent score on a similar test:

- 75 or more shall be allocated 10 points
- More than 54 and less than 75 shall be allocated 5 points

**G. Siblings and Married Sons and Daughters of Citizens**

An alien who is the sibling of a citizen of the US or is over the age of 31 and is the married son or married daughter of a citizen of the US shall be allocated 10 points

**H. Age**

An alien who is:

- Between 18 and 24 years of age shall be allocated 8 points
- Between 25 and 32 years of age shall be allocated 6 points
- Between 33 and 37 years of age shall be allocated 4 points

## I. Country of Origin

An alien who is a national of a country of which fewer than 50,000 nationals were lawfully admitted to permanent residence in the US in the previous 5 years shall be allocated 5 points.

There is also a second merit based track system that does not depend upon points beginning October 1, 2014. The second merits non-points system cleverly acts as a safety valve to reduce the existing backlogs in the system, and also ensures that we do not experience the same horrendous backlogs as we see under the existing system. People whose employment-based petitions and family-based petitions filed before the Act have been pending for more than 5 years will begin to become eligible for merit-based visas on that basis. Those who have been lawfully present for not less than 10 years will also be eligible for this non-points based side of the merit-based visa system. Registered Provisional Immigrants (RPIs) will be able to adjust status based on 10 years of lawful presence under this second merit non-points track system.

Labor certification will undoubtedly survive even after BSEOIMA as beneficiaries under the EB-2 and EB-3 preferences still need an employer to obtain labor certification. Moreover, not everyone will be able to make it under the merits system, such as ethnic cooks for example, who may not even need to speak English but are still vital for the success of the restaurant. The merits based points system will compliment labor certification if BSEOIMA is enacted.

Congress, and probably DOL itself has realized, as the authors have previously noted in their [prior article](#), that the very notion of a "good faith" recruitment seems oddly out of place when used with reference to a recruitment effort that achieves its desired objective by failing to locate any qualified job applicants. Only in PERM do you win by losing. Unable to utilize real world recruitment standards, compelled to base evaluations upon the entirely artificial concept of "minimal qualifications" that does not exist outside the cordon sanitaire of 20 CFR §656, wedded to an inflexible job description that can never change regardless of an employer's business needs or a worker's evolving talents, and effectively prohibited from taking into consideration the very subjective character traits whose presence or absence is the most reliable predictor of

effective job performance, the labor certification process is fundamentally at odds with the very economic system it allegedly seeks to serve. Justification of labor certification can extend no further than a test of the relevant job market. The DOL has also failed to provide jobs to U.S. workers even though it forces the employer to conduct elaborate tests of the labor market to retain the foreign national employee. Indeed, as presently conceived and administered by the DOL, labor certification is a job killer, hurting the employment prospects of the domestic work force by artificially preventing US employers, most especially emerging companies who are the engine of job creation, from treating the foreign national as an asset to be maximized in way that promotes job growth and strengthens the very economy on which we all depend. Indeed, no intellectually honest examination of the labor certification system can fail to detect the pervasive distrust of the entrepreneurial spirit and the very ethos of capitalism itself that the DOL brings to each phase of the PERM process.

As the PERM labor certification appears to wither in BSEOIMA, giving way to a merits based points system, one can also learn from the [Canadian points system](#) where the points based system first started. A points based system may not necessarily be ideal. It could potentially encourage PhDs to win the highest points only to immigrate and not find jobs that are commensurate to their skills. Moreover, gaining the requisite points under specific criteria are not an end unto themselves, and that their effectiveness cannot be measured apart from the overall ability of the new immigrant to integrate into the economy and culture of the receiving nation . It is this that ultimately will determine if the immigrant will be put into a position to succeed for themselves and their adopted home.

A [Maclean's article](#) on the failure of the Canadian points system is revealing. According to a study conducted by the Organization for Economic Co-Operation and Development (OECD), only 60% of Canadian immigrants found jobs in their chosen areas of specialization compared to an OECD average of 71%; in matching up skills with employment, Canada ranked near the bottom, worse than Estonia, Italy, Spain and Greece.

The labor certification system seeks to match the employer's demand with the foreign national's skills. Even here, however, it seems clear that PERM is not the best way for employers to express their interest in potential new hires. An independent assessment of language and credentials after which applicants can be placed in a pool for employers to draw from may be a promising third

way between a free-standing points system (Canada) and immigration linked to specific job offers (USA). This “expression of interest” as applied in Australia and New Zealand avoids the frustrations of the Canadian approach and the economic illiteracy of PERM.

The frustrations of the Canadian model suggest strongly that recruitment of even the most skilled knowledge workers cannot be divorced from domestic demand. Not only has this produced long waiting lines in Canada but the bias towards highly educate STEM professionals has deprived those industries which are booming, such as the oil fields in Alberta, of the blue collar talent that they so vitally need. According to a [New York Times](#) article that was written when the points based system was first proposed in the failed 2007 bill:

Part of the backlog in Canada can be traced to a provision in the Canadian system that allows highly skilled foreigners to apply to immigrate even if they do not have a job offer. Similarly, the Senate bill would not require merit system applicants to have job offers in the United States , although it would grant additional points to those who do. Without an employment requirement , Canada has been deluged with applications.

According to a [Huffington Post](#) article, the chronic underemployment of advanced degree professionals in Canada underscores the need for employers to play an active role in the immigration selection process. Since 2004, the Provincial Nominee Program (PNP) where provinces sponsor immigrants to designated job vacancies has expanded six fold. In Australia, 81% of immigrants obtained employment in their chosen disciplines within six months. A pure points system not anchored to what employers are looking for will produce lower income and higher unemployment. Once again, according to the [Maclean’s article](#), a comparison with Canada is instructive:

*In contrast to the Canadian experience, immigrants to the US have virtually closed the income gap with American-born workers. In 1980, US immigrants earned about 80 per cent of American-born workers, a gap that was roughly the same in Canada. By 2011, US immigrants earned 93% of native-born workers, while foreign-born college graduates now out-earn their American counterparts. During the last recession, the unemployment rate for foreign-born university grads in Canada topped out at 8.4 per cent in 2010( Among those who lived in the country less than 5 years, it was more than 14 per cent.) By comparison, unemployment among foreign-born graduates in the US was 4.4 per cent.*

BSEOIMA keeps intact the traditional labor certification system under the employment-based second and third preferences, but also introduces a merits based points and non-points system. Within the merits-based points systems, plenty of points will be given to those who have jobs, offers of employment, and even US-based employment in the area of the alien's education, but it does not require the employer to file a "pointless" labor certification (no pun intended!). Under the non-points merits based visa system, long term residents waiting in the pipeline for a green card can avail of visas, thus creating a safety valve in case of backlogs. BSEOIMA thus provides several pathways for foreign nationals to obtain permanent residence without obsessively focusing on labor certification. The goal we seek is not to replace PERM with a points system but to find an alternative to both that is ethical, transparent and realistic providing the economy with the human capital it needs to grow but doing so in a manner that allows immigrants to be productive while respecting the legitimate interests of US workers.

We now have a new world. The merit based system in the bill provides this missing alternative. BSEOIMA is a transitional document and the number of options to obtain green card status without labor certification is bound to grow in future years. The virtue of BSEOIMA is that it is hybrid system combining a points system with employer selection. This offers the best of both worlds, and we refer readers to a [Migration Policy study](#) that thoughtfully provides models for such hybrid systems. As the global competition for top talent in science and technology intensifies, in order for the United States to attract and retain the best and the brightest, PERM will increasingly be relegated to a less important place, although it may still be important for certain occupations who cannot avail of the new pathways to permanent residency. PERM will not disappear but it will never again enjoy the dominance of old. It is this third way that will define America's immigration policy in the 21st century.