

Navigating Your Labor Certification Through

Troubled Waters: Recent Developments in PERM at the DOL and BALCA

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What is Your Objective?

- To identify a position that can be labor-certified in time to support maintenance of status and immigrant classification
- What do you have going for you?
- What do you have going against you

Some of the BALCA Standards

- *Matter of Information Industries* 88-INA-82, 1989 WL 250355 (1989) (1. Requirements must bear a reasonable relationship to employer's business 2. and are essential to perform, in a reasonable manner employer's duties)

Ability of CO to Second Guess Employer's Otherwise Permissible Evaluations

- *Matter of Bronx Medical and Dental Clinic*, 1990-INA-479 WL 324077 (Oct. 30, 1992) (en banc) (so long as an employer's job requirements are within the limits prescribed by section 656.21 (b), the rejection of a U.S. worker who does not meet all those requirements is a rejection for a lawful, job related reason, within the meaning of section 656.21 (b)(7)

Experience gained at the same employer

- *Matter of Delitizer Corp of Newton 88-INA-482, 1990 WL 300025 and PERM regulations (more than 50% different duties) expanding Delitizer to FEINs*

Combination of duties

- *Matter of Robert L Lippert Theatres* 88-INA-433, 1990 WL 300017 (1970) (infeasibility test)

Many of the recent decisions
move away from the large, basic
issues to the details

Matter of Quantifi BALCA Case No.: 2010-
PER-00894; ETA Case No.: A-07235-68661
(May 12, 2011) AILA Doc. No. 11051361
(insufficiently specific classification of reasons
why U.S. applicants did not qualify)

Content of Recruitment

- *Matter of Credit Suisse* BALCA No.: 2010-PER-00103; ETA No.: A-07261-76549 (Oct 19, 2010) AILA Doc. No. 10102033 (content requirements)
- BALCA affirmed the CO's denial, holding that all advertisements placed in fulfillment of additional recruitment steps for professional positions must comply with the 20 CFR §656.17(f)

Evidence of internal and external website postings

PSI Family Services, Inc., 2010-PER-00097;
AILA Doc. No. 10041978 (Apr. 16, 2010)

(Denial affirmed. Retained screenshot did not show dates of posting “[R]etention of reliable contemporaneous documentation of the status of a webpage on the dates attested to in the Form 9089 is essential for an employer to be able to meet the PERM documentation requirement of dated copies of company website postings.”)

Content of Recruitment

- *Matter of Emma Willard School*, BALCA Case No. 2010-PER-01101, AILA Doc. No. 11092935 (September 28, 2011)
(Employer's failure to list employer's subsidized housing was not a violation of 20 CFR 656.17(f) because the employer is not required to list any wage or benefit information in recruitment advertisements)

Content of Recruitment

- *Matter of Sanmina-Sci* BALCA Case No.: 2010-PER-00697; ETA Case No.: C-08046-24659 (Jan 19, 2011) (Jan 19, 2011) AILA Doc. No. 11012131 (For employee referral programs, an employer must document 1) the program offers incentives to employees for referral; 2) the program was in effect during the recruitment period; and 3) the employees were on notice of the job opening).

Differing Wage Levels

- *Matter of Take Solutions Inc.* BALCA Case No.: 2010-PER-00907; ETA Case No.: A-07290-86622 (April 28, 2011) AILA Doc. No. 11042966 (where the employer receives more than one prevailing wage determination based on variations of the minimum job requirements (primary and alternative, employer must pay the higher wage level))

Wage issues

- *Matter of Physiotherapy Corp.*, BALCA No 2010-PER-01078 (Dec 27, 2010) ETA9089 Item G-1 (offered Wage” \$68,000/year. F-5 “Prevailing Wage” \$66,955. SWA listed job order at a minimum wage of \$65,000. Held denial affirmed SWA listed wage in violation of 20 CFR 656.17(f)(5).

Wage issues

- *IAC Search & Media, Inc.*, 2010-PER-55 (Dec. 28, 2010) PW=\$29.56/hour, Offered Wage = \$99,360/year salary posted on NOF = “at least \$61,485/year” Held: denial affirmed alien paid more than terms offered to public)

Some battles continue, such as the implications of alternative minimum requirements,

- See, e.g. *Matter of Francis Kellogg*, 94-INA-465 and 544, 95-INA 68 (BALCA Feb. 2, 1998) (*en banc*) AILA Doc. No. 98020290 (holding that where the beneficiary does not meet the primary requirements but does meet the alternate requirements that the language, "will accept any suitable combination of education, training, or experience" should be contained on ETA form 9089)

Substantially Equivalent primary and alternate requirements

- *Matter of AGMA Systems LLC*. 2009-PER-00132, 2009 WL 2448446 (Aug 6, 2009) AILA Doc. No. 09100563. (holding that “Kellogg language” is not required where the employer’s primary and alternate qualifications are substantially equivalent)

Standard for “Equivalent”

- See, also Matter of Globalnet Management L.C. BALCA Case No 2009-PER-00110; AILA Doc.No. 09101930 (Aug 6 2009) (In a decision focusing on substantial equivalence of alternate requirements, BALCA compares employer’s reliance on USCIS 3:1 experience ratio of experience to years of education to be unfounded, when compared to DOL Field Manual 48-94 guidelines assigning one year of SVP as equivalent to one year of experience).

Harmless Error

- *Matter of Nathan Littauer Hospital*, BALCA Case No.: 2010-PER-01066 BALCA Case No.: A-10104-94567 8/16/11) AILA Doc. No. 11082960. (BALCA held that where the employer failed to check the box in Section J-23 indicating that the beneficiary was employed with the employer, but the answer was provided in Sections K-6 and L-7, the error was harmless).

Not so-Harmless error

- *The Golf Channel, Inc.*, 2010-PER-01489 (October 5, 2011) – employer indicated on the PERM form that one of its three “additional recruitment steps” was an advertisement on “the Employer’s own web site.” In response to an audit, they provided evidence that the step was in fact an advertisement on a “job search web site other than the employer’s web site.” Held: Employer indicated on the Form 9089 that it used its website to advertise the job opportunity. However, Employer provided copies of the advertisement from another website. Employer could not subsequently modify the information provided in its ETA Form 9089. Therefore, the denial of labor certification was valid.”

Obvious Error

United States Naval Academy, 2010-INA-1330 (Oct. 6, 2011). denial remanded from BALCA because the CO never asked the employer for its PWD, but simply denied because the employer had entered \$7.216 million on the prevailing wage block (as a typo, the PWD was \$72,160).

Mere Oversight

- *In the Matter of Luigi's Restaurant, 2009-PER-00357 (Aug 31, 2009). AILA Doc. No. 09102226 (in the interest of fairness" denial should be vacated and application returned to the CO, as "the preponderance of the evidence is that the audit response's failure to include the Notice of Filing was inadvertent . . .")*

Mere Oversight

- *Matter of Washington Hospital Center*, 2010-PER-007205 (May 13, 2011) AILA Doc. No. 11051664. (CO abused his discretion in refusing to consider whether the absence of a prevailing wage addendum was mere oversight as opposed to an inability or refusal to produce the document.) See also, *Matter of Core Solutions*, BALCA Case No.: 2010-PER-01013 (Aug 22, 2011) AILA Doc. No. 11082961 and *Matter of Forest View Nursing Home*, BALCA No.: 2010-PER-00106 (Feb 11, 2011) AILA Doc. No. 11022369.

Reconsider or Review

- *Matter of Denzil Gunnel* BALCA Case No.: 2010-PER-00628; ETA Case No.: A-09175-51833 (NOv 16, 2010) (BALCA held that the CO's discretion to reconsider a denial or treat it as a request for BALCA review under 20 CFR §656.24(g) cannot be exercised to preclude a meritorious argument regarding de facto compliance with the regulations)

Reconsider or Review?

- *Matter of RMS Computer*, BALCA No.: 2010-PER-00809 AILA Doc. No. 11062365, (June 16, 2011) (CO abused his discretion in treating the request for reconsideration as a request for BALCA review, thus precluding the employer from presenting evidence that the job requirements are normal to the occupation.)

Reconsider or Review?

- Matter of Keynote Systems, Inc. 2010-PER-01035; Aug 31, 2011) (Government Error Queue addressed to Mr. William Carlson was not a request for review, but a request for reconsideration; if the case is not government error, it should be placed in the reconsideration queue)

Strategic Considerations

- Know the position you are being asked to certify; get the employee's manager involved
- The employee should not drive the process unless you represent the employee and, even then, the process should reflect understanding of DOL limits
- Let manager know that s/he will be evaluating resumes and applicant's qualifications

- Ask the employer about the labor market factors
- Sometimes, running a test ad to feel the temperature of the labor market is the best way to start
- Ask, “Why did you hire the alien in the first place? What stood out?”

- Have a detailed schedule of recruitment and documentation
- Attorney should draft text and structure of advertisement
- Stick to the regulatory schedule
- Make screen shots of electronic postings and have backup plan to get print ads copied and preserved for audit file

- Do not start labor certification without possessing all of the evidence that the beneficiary possesses the qualifications of the position
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- Resist the temptation to require EB-2 level education/experience until you are sure that it complies with employer's actual minimum requirements
- Usually employer will tell you that they do not require a master's degree for any position, but if asked whether a master's degree and several years of experience is an equivalent alternative to a bachelor's degree and at least five years of post-bachelor's degree progressive experience, they will answer "yes"

- Prepare an audit file before you file the PERM application
- Draft a business necessity section to the file audit letter explaining the requirements and the method of computing equivalence
- Perform an DOL SVP analysis on the position