

Perils of



PERM

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Wednesday, February 5, 2014 | 12:45 PM

TexasBar CLE

12th Annual Advanced Immigration Law Course

A Plethora of Pitfalls

- Precise Drafting
- A reason for everything
- Keep a handle on time
- Harmonize ETA 9141 and ETA 9089
- Essential information in the recruitment
- Normal, Foreign and Business Necessity
- PWR is your building block

Calculation of Time

- 180 day window
- 30 day quiet period
- 30 day job order (state specific concerns)
- 10 day posting notice per 20 CFR 656.10(d)
- When can I count the day?

PERM Account Registration

- Initiate early, anticipate possible delays
- FEIN Verification
- Support documentation may be required

Completing Section H. Job Opportunity Information

- **Summarizes the Job Requirements**
 - Education
 - Experience
 - Primary and alternative requirements
 - Kellogg “Magic” Language
- **Thinking about Form I-140 Immigrant Petition**
 - Support experience verification letters
 - Education credentials, transcripts
 - Dissimilarity and support charts
 - Compare job duties, requirements

Preparing the Prevailing Wage Request- ETA 9141

- What is involved?
 - online via iCert Portal
- How long does it take to receive a determination?
 - Approximately 8 weeks
 - How long is it good for?
 - No less than 90 days and up to 1 year

What Information is Required?

- **Travel and telecommuting**
 - Where will job be performed?
- **Employer's Job Description**
 - Concrete Requirement – what are the minimum versus preferred skills?
 - Resources OOH, ONET, and OES
- **“Special Requirements”**
 - Supervision: peer or subordinate
 - License requirements

- Request for Information (RFI)
 - Sent via email (check spam filters)
 - 7 days to respond (denial for failure)
 - Request confirmation of receipt
 - How is the information provided to the RFI treated down the road?
 - Is information a substantive addition and/or would the information impact the labor market test?
- Options for Review:
 - Redetermination Request by CO
 - Center Director Review
 - BALCA

Documentation of Recruitment

- Professional and Non-Professional Recruitment
 - Which to use?
 - Caution: Employee Referral Program
- Index of Required Recruitment for Audit File
- Acceptable evidence
- Evidence of good faith recruitment

Lawful and Job Related

- Detailed notes by the employer documenting the review process

Audits and SR

- OFLC monitors:
 - Audits
 - Layoffs
 - OFLC receives notices of large layoffs
 - Outcomes in SR cases
 - Denials
 - Employer w/d pre-recruitment
 - Employer w/d post-recruitment

Supervised Recruitment

- Increase in denials and withdrawal rates
- Combined denial and withdrawal rates:
FY2012: 52% FY2013: 69%
- Denial rate post audit: 33% during same time
- Withdrawal reasons are not tracked
 - Examples: passage of time, employee(s) leaving to join another employer

Audit and SR Triggers

“OFLC is responsible for maintaining the integrity and compliance of the primarily attestation-based PERM Program through the use of certain measures, including audit and supervise requirement, under a broad integrity review authority...”

69 Fed. Reg. 77326 (Dec. 27, 2004)

- “Targeted for Audit”
 - Less than a Bachelors degree (excl. dairy)
 - Trade Related Occupations
 - Public Schools
 - Degree with No Experience (50%)
 - Employer Indicated Layoffs on 9089 (50%)
- “Tagged for possible Supervised Recruitment”
 - Re-submitted After Denial
 - Re-submitted Audit Cases After Withdraw
 - Mailed in Applications

EB-3 Degree Equivalency

- Many foreign bachelor's degrees are obtained in 3 years, which MIGHT not be equivalent to a U.S. bachelor's degree
- Conflict between CIS and DOL interpretations of acceptable equivalency of degrees
- Can raise *Kellogg* issues (next slides)

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).

Recruitment Review Process – the Regs and Good Faith

- Who can review resumes?
 - Probably not you!
- Attorneys, agents, and foreign workers are generally prohibited from interviewing and considering U.S. workers during the permanent labor certification process, as described in 20 C.F.R. § 656.10 (b)(2)(i) and (ii).
 - However, the DOL does not prohibit attorneys and agents from performing the analyses necessary to counsel their clients on legal questions that may arise with respect to this process. The employer, and not the attorney or agent, must be the first to review an application for employment, and must determine whether a U.S. applicant's qualifications meet the minimum requirements for the position, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed.

Some Steps that Can Cause Denial

- Here are some "**don'ts**" that can cause an application to be denied due to a Department of Labor (DOL) finding that the employer is not acting in good faith:
 - Advising an applicant that the position is not really open because there is an existing company employee already in the job. Employers must treat the position advertised as fully open even if it is currently filled by an employee holding temporary visa status (such as H-1B, L-1B);
 - Allowing the sponsored foreign national employee to be involved in the recruiting and applicant assessment process, including but not limited to, reviewing and critiquing the resumes of job applicants;
 - Following a course of action different from the normal course of action in terms of evaluating and handling applicants. Resumes should be screened and any interviews should be conducted by the company personnel – whether human resources, recruiters or line managers, or a combination thereof – that normally would do this; or
 - Discarding resumes of job applicants. The employer in a PERM case must retain all **resumes** and provide **copies** of them to us, even from applicants who are not qualified.

Strategic Considerations to Keep the Pitfalls and Perils of PERM at Bay

- 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?"

- 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
- Have a detailed schedule of recruitment and documentation
- Attorney should draft text and structure of advertisement

- 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 a DOL SVP analysis on the position

Payment of Attorney Fees, Expenses in the Labor Certification Case – An Ethical Question for You, with a Not-So-Hypothetical Hypothetical

- Sanjay, citizen of India, is a math teacher at Delta High School in rural Mississippi. With a Masters degree in Mathematics, Sanjay is certified to teach calculus and trigonometry. Delta has had considerable difficulty in hiring and retaining math teachers for their underperforming school, so the administration is anxious to accommodate Sanjay in any way necessary, concerning his immigration status.
- Sanjay would like to obtain US permanent residence and Delta HS is willing to sponsor him, but they have no money available in their budget to pay an attorney fee or to pay for placing expensive newspaper ads.
- Sanjay is willing to pay all of these fees himself and he wants to begin the process as soon as possible in order to establish a priority date.
- Sanjay has stated that he has an uncle who is a successful US physician, and that Dr. Gupta is willing to provide funds for the payment of attorney fees and expenses.

Reference

656.12(b) An employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application, except when work to be performed by the alien in connection with the job opportunity would benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer. For purposes of this paragraph (b), payment includes, but is not limited to, monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor.

Questions?

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