



# NOT SO FAST! DOL HESITANT TO FOLLOW MATTER OF HORIZON COMPUTER SERVICES ON PREVAILING WAGE VALIDITY

Posted on June 24, 2011 by Cora-Ann Pestaina

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My elation over the recent Board of Alien Labor Certification Appeals' (BALCA) decision in *Matter of Horizon Computer Services*, Inc., 2010-PER-00746 (May 25, 2011), expressed in my [last blog](#), has proven to be short-lived. Last week, I attended the American Immigration Lawyers' Association's (AILA) Annual Conference on Immigration in San Diego, CA. At the conference, one of the most popular panels is the Department of Labor (DOL) Open Forum where members of AILA are permitted to directly question such bigwigs as William Carlson, Administrator, and Elissa M. McGovern, Chief of Policy Division, both of the Office of Foreign Labor Certification, U.S. Department of Labor. Naturally, the subject of Matter of Horizon Computer Services arose.

In *Matter of Horizon Computer Services*, the employer commenced its earliest recruitment before the Prevailing Wage Determination's (PWD) validity period and filed the PERM after the PWD had expired. The DOL, citing 20 C.F.R. §656.40(c), denied the application because the employer did not begin its earliest form of recruitment during the PWD's validity period. The DOL currently interprets 20 C.F.R. §656.40(c) to mean that the employer must begin the earliest recruitment or file the PERM labor certification application within the PWD's validity period and has denied PERM applications where the employer commenced recruitment before the PWD's validity period and filed the PERM application after the PWD had expired. In *Matter of Horizon Computer Services*, BALCA held that the timing of the employer's recruitment complied with the regulations in 20 C.F.R. §656.40(c) and that regulatory history and fundamental fairness precluded the DOL's interpretation of the regulation. BALCA held that

the employer must initiate some recruitment during the PWD validity period but not necessarily the “earliest” recruitment.

At the AILA Conference, the DOL Open Forum panel was questioned as to whether the DOL would soon be issuing a new FAQ (Frequently Asked Questions) with regard to the holding in *Matter of Horizon Computer Services* and whether attorneys could safely rely on this case when conducting recruitment for purposes of a PERM labor certification application. We did not get the answer we were hoping for. Instead, Ms. McGovern explained that the DOL reviews BALCA decisions just as attorneys do and that *Matter of Horizon Computer Services* is currently being reviewed along with BALCA’s decision in [Matter of Ecoservices](#), 2010-PER-00330 (June 15, 2011), which she said has a “similar fact pattern.” Ms. McGovern informed attendees that the DOL will figure out a path “in between” the two decisions and devise a directive.

In *Matter of Ecoservices*, the employer commenced recruitment on May 6, 2007. The employer obtained a PWD valid from June 18, 2007 to September 16, 2007. The employer filed the PERM on Monday, September 17, 2007. The DOL Certifying Officer (CO) denied the PERM under 20 C.F.R. §656.40(c) because neither the earliest date listed for a recruitment step nor the date the application was filed, fell within the PWD validity period. The employer requested reconsideration and argued that because the PWD expired on a weekend, the expiration date ought to be extended to Monday, September 17, 2007. As authority, the employer cited the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ) which provides that “n computing any period of time under these rules...the time begins with the day following the act, event, or default, and it includes the last day of the period, unless it is a Saturday, Sunday or legal holiday observed by the Federal Government in which case the time period includes the next business day.” 29 C.F.R. § 18.4(a). The CO affirmed the denial and forwarded the case to BALCA finding that there was no reason why the employer could not have filed the application on Sunday, September 16, 2007 since the Permanent Online System ([www.plc.dolcata.gov](http://www.plc.dolcata.gov)) is available 24 hours a day and seven days a week. BALCA held that the OALJ Rules of Practice and Procedure cited by the employer in support of its argument that the PWD ought to be considered valid until Monday, September 17, 2007, have no bearing on the expiration date of the employer’s PWD because they only govern filings before the OALJ and, moreover, govern filings by mail on days when the office is closed. BALCA

stated that while its decision “may appear to elevate form over substance,” it is an appellate body and it “simply does not have the discretion to waive the clearly stated regulatory requirements.”

BALCA had, a mere 21 days earlier, held in *Matter of Horizon Computer Services*, that the Employment and Training Administration (ETA) did not intend that the first recruitment step begin during the validity period, only that some recruitment step be initiated during that time and BALCA vacated the denial of the PERM application filed after the PWD’s expiration date. In light of that, why didn’t BALCA similarly hold, in *Matter of Ecosystems*?

*Matter of Ecosystems* is devoid of any facts that would aid in a perfect side by side comparison of the two cases. But, in *Matter of Horizon Computer Services* the employer placed the Job Order only 2 days before the PWD validity period and then commenced every other type of recruitment within the PWD validity period. In its decision, BALCA made an effort to point out that “the employer initiated every single recruitment step during the validity period with the exception of its first recruitment step.” In *Matter of Ecosystems*, the Employer initiated its first form of recruitment 43 days before the PWD validity period. This long time period is significant. The fact that BALCA did not discuss the other forms of recruitment and when they were each initiated is significant. Since there is no discussion about the timing of the other recruitment, we can assume that no recruitment was initiated during the PWD validity period and all recruitment was initiated prior to June 18, 2007. This makes *Matter of Horizon Computer Services* and *Matter of Ecosystems* entirely distinguishable. If the employer in *Matter of Ecosystems* had initiated some recruitment within the PWD validity period, BALCA would have decided the case similar to *Matter of Horizon Computer Services*. Contrary to Ms. McGovern’s statements, the two cases do not have “similar fact patterns” and the DOL should not conflate the two decisions!

Nevertheless, at least for now and until the DOL issues a directive, it is safest for practitioners to continue to abide by the DOL’s erroneous interpretation of 20 C.F.R. §656.40(c) and ensure that our clients either begin the earliest recruitment or file the PERM labor certification application within the PWD’s validity period. In my opinion, though, *Matter of Horizon Computer Services* can indeed be relied upon if the DOL has denied a PERM application where the employer commenced recruitment before the PWD validity period, initiated at least one form of recruitment during the PWD validity period and filed the

PERM after the PWD had expired.