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LISTING THE FOREIGN NATIONAL'S QUALIFICATIONS ON THE PERM FORM

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One of the most surprising lessons to learn for practitioners who regularly file PERM labor certifications is that past certifications do not always mean future certifications. In other words, just because 10 PERM labor certifications prepared in the same way have all been certified without issue does not mean that the 11th one will also be certified. That is the nature of PERM. The Department of Labor (DOL) is notorious for suddenly coming up with new and previously unheard of reasons for denial.

Most recently, there have been reports of a slew of PERM denials, primarily for physician and teaching occupations, on the basis that Section H.14 of the ETA Form 9089 indicates that a medical or other license is required, but Section K does not list that the PERM beneficiary holds a license. What makes these denials even more baffling is that in many of these cases, the foreign national's work experience practicing medicine or teaching in the US was listed in Section K thereby providing proof that the foreign national was indeed licensed. Moreover, the ETA Form 9089 does not provide any specific section in which to list licenses. Most disturbing is the fact that the DOL did not previously deny any PERM applications for failing to list a license on the form. But that did not stop the denials from coming. The American Immigration Lawyers Association (AILA) recommends that denials of a PERM labor certification solely because of not listing a license should be reported to the AILA-DOL liaison committee. A motion for reconsideration should be filed at the same time.

The DOL has promised to issue an FAQ (Frequently Asked Questions) on this issue. But since the ETA Form 9089 will remain unchanged, it is anticipated that the FAQ will advise practitioners to list the foreign national's qualifications in Section K.9. AILA raised the issue of the denials in a DOL Stakeholders Meeting

on December 12, 2013 (AILA Doc. No. 14011449). In sum, the DOL responded with:

In general, if an employer states that a specific position requires a license, the employer should indicate that the beneficiary has the license. The appropriate place to list the license is under K.9 so that the analyst can compare the requirements and the beneficiary's qualifications. OFLC will issue an FAQ to spell this out more clearly. When stakeholders asked OFLC to consider in the future, issuing an FAQ in advance of the change in practice, OFLC agreed to take this into consideration if there is a decision to make a policy change. OFLC is continuing to examine how to address cases already denied on the basis that Section K did not list the license or certification. Employers with denials on this basis may wish to file a Request for Reconsideration of the denied case to at a minimum preserve the issue until OFLC develops further guidance.

At the recent AILA National Immigration Conference in Boston on June 18-21, 2014, representatives of the DOL indicated that the instructions in Section K.9 of the ETA Form 9089 already instruct practitioners to list *"job duties performed, use of tools, machines, equipment, skills, qualifications, certifications, licenses, etc."* Accordingly, the DOL expects practitioners to list all the experience and qualifications gained with a particular job under the particular job experience listed on the ETA Form 9089. At the AILA national conference, it was also suggested that Section K of the ETA Form 9089 can be completed to only indicate the foreign national's license or other special qualification earned during a specific time period when he was not also earning work experience and the ETA Form 9089 will not be denied for failure to list an employer's name and other details. Other qualifications that need to be included in Section K.9 of the ETA Form 9089 include (See AILA InfoNet Doc. No. 14041655. (Posted 04/16/14):

- Licensure, or eligibility for license, e.g., Medical License, Teacher Certification, Professional Engineer (PE).
- Knowledge or coursework acquired in a course of study.
- Professional certificates or diplomas, e.g., Microsoft certification, Health and Safety Certificate, CPR Certificate, Engineer-in-Training Certificate.
- Board Certification, or Certification Eligible, e.g., Board Certification in Internal Medicine, Board Certification in Immigration Law.

- Second degree, if required by employer, e.g., Bachelor's in Civil Engineering, in addition to a Ph.D.
- Degree or other credential required at H.4, "education: minimum level required," does not match the foreign national's credential at J.11, "highest level achieved relevant to the requested occupation" .

The issue of making every attempt to set forth the foreign national's qualifications on the ETA Form 9089 in a manner that ensures the Certifying Officer's (CO) comprehension was also highlighted in the Board of Alien Labor Certifications (BALCA) case, *Matter of The Clariden School*, 2011-PER-02857 (January 30, 2014). In that case, the primary job requirements for the position of "AMI Montessori Elementary Teacher" as listed on the ETA Form 9089 included a Bachelor's degree in any discipline and AMI (Montessori) Certification. The Employer indicated in Section H.7 of the ETA Form 9089 that an alternative field of study was acceptable; specifically a Bachelor's in Education plus AMI Certification. In Section H-8 the Employer also indicated that it would accept the alternative combination of a Master's degree, and one year of experience. In Section H-14, the Employer noted that AMI Certification is required.

In Section J.11 of the ETA Form 9089 which requires the Employer to list the highest level of education achieved relevant to the occupation, the Employer checked "Other" from a list of options that included "None," "High School," "Associate's," "Bachelor's," "Master's," "Doctorate," and "Other." The Employer specified in Section J.11-A that the "Other" classification was AMI Certification. The Employer reported that the Alien obtained the AMI Certification in 2006 at the Montessori Institute of Milwaukee. The CO denied certification under 20 C.F.R. § 656.17(i)(1) on the ground that the application did not indicate that the foreign national met either the primary or the alternative educational requirements of a Bachelor's degree in any discipline or a Master's degree in any discipline.

In its request for reconsideration/review, the Employer argued that it answered Section J.11 accurately because AMI Certification was the highest education level achieved by the foreign national and that such a certification is a level of education higher than Bachelor's but lower than a Master's or a Doctorate. The Employer pointed out that the motion for reconsideration was its first opportunity to explain and clarify its answer on the ETA Form 9089, Section J,

and that it was supplying supporting documentation which included a document from the Montessori Training Center of Minnesota stating that one of the admission requirements for its AMI Montessori Diploma program is that the applicant holds a Bachelor's degree.

The CO refused to bend and affirmed the denial arguing that the employer's representation on the ETA Form 9089 that Other – AMI Certification is the highest education level achieved by the foreign national did not enable the DOL to verify from the face of the application that the foreign worker earned a Bachelor's degree which is the minimum education level required. The CO then went on to present the novel argument that "there is sufficient free form space on the ETA Form 9089" for the employer to disclose, for example, that the foreign national possessed a Bachelor's degree (or its equivalent) in addition to AMI Certification.

BALCA thankfully saw reason and held that while the initial denial could be understood since it is hardly intuitive that AMI Certification is a higher level of education than a Bachelor's degree, the CO's insistence that the Employer disclose the foreign national's holding of a Bachelor's or Master's degree be disclosed on the ETA Form 9089, even in the face of documentation on a motion for reconsideration showing that a Bachelor's degree is a prerequisite for the foreign national's admission to the Minnesota Montessori Training Facility for its AMI certification program, was unreasonable and unsupported by the regulations. BALCA was not persuaded by the CO's claim that the ETA Form 9089 had adequate free form text fields finding, as any reasonable person would, that the form actually does not have any obvious free form space for clarifying why a person would necessarily have at least a Bachelor's degree to have obtained an AMI certification.

Matter of Clariden and the recent PERM denials highlight the fact that practitioners need to find some way to list all of the foreign national's credentials somewhere on the ETA Form 9089. While we await the DOL's forthcoming FAQ, it is important to make every attempt to alert the CO that the foreign national possesses the qualification required for the offered position. If the offered position requires experience in specific technologies then these technologies need to be listed somewhere in the job descriptions of the foreign national's past experience. If the offered position requires any license, certification, knowledge or anything other than work experience, it needs to be listed in Section K. This information can be listed in Section K.9 between

asterisks or in capital letters or in any manner at the bottom of any job description for the foreign national's past experience or it can be listed on its own in Section K.9.

The moral of the story is basically that anything which could remotely be unclear to the CO should be explained somewhere on the ETA Form 9089, notwithstanding the space limitations. But with regard to the recent Section K denials, the hope is that once the FAQ has been published the DOL will apply its requirement prospectively rather than to already pending cases. In such matters, the DOL really ought to hold itself accountable for setting a precedent for how the ETA Form 9089 should be completed merely by its certification of all prior cases.