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BALCA SAYS ECONOMIC BENEFITS SHOULD BE LISTED IN PERM RECRUITMENT

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PERM is an exacting process. We've read those words over and over in various Board of Alien Labor Certification Appeals (BALCA) decisions. The Department of Labor (DOL) Certifying Officers (CO) and BALCA continually use those words to justify the most heartless denials; callously brushing aside employers' good faith efforts in favor of citing PERM regulations to justify denials for harmless technical errors. Yet, at other times, the employer cannot rely only on the PERM regulations but must look to the purpose *behind* the regulations to know what to do. PERM can sometimes be more of an *exhausting* than an exacting process.

As a background, an employer has to conduct a good faith recruitment of the labor market in order to obtain labor certification for a foreign national employee. Under 20 C.F.R. §656.17(f)(7), advertisements must "not contain wages or terms and conditions of employment that are less favorable than those offered the alien." In October 2011, I wrote a blog entitled BALCA SAYS THERE IS NO NEED TO LIST EVERY BENEFIT OF EMPLOYMENT IN JOB ADVERTISEMENTS discussing BALCA's decision in *Matter of Emma Willard School,* 2010-PER-01101 (September 28, 2011). In that case, BALCA held that there is no obligation for an employer to list every item or condition of employment in its advertisements and listing none does not create an automatic assumption that no employment benefits exist. The employer had recruited for the position of "Spanish Instructor" and had failed to indicate in any of its advertisements that "subsidized housing" would be offered. It was so nice to see BALCA give U.S. workers credit for being intelligent enough to recognize that a tiny advertisement could not possibly list all the terms and conditions of employment and not penalize the employer for "confusing", "deterring" or somehow "adversely affecting" the US worker. BALCA analogized

the issue to the case of an employer not listing the offered wage in its advertisements. Since the choice not to list the offered wage would not lead to an assumption, on the part of the U.S. worker, that the employer is offering no wage, similarly, the employer's choice not to list employment benefits would not lead a U.S. worker to assume that there are no benefits involved in the position. BALCA held that the employer's recruitment did not contain terms or conditions less favorable than those offered to the alien simply because the employer did not list wages or benefits of the position.

While *Emma Willard* was a step in the right direction, BALCA timidly limited its decision to the facts of the case and stated that "this decision should not be construed as support for an employer never having to offer or disclose a housing benefit to US workers." Unsurprisingly, a different BALCA panel has seized on that as reason not to follow *Emma Willard*.

In *Matter of Needham-Betz Thoroughbreds, Inc*. 2011-PER-02104 (December 31, 2014) BALCA considered what employee benefits for the position of "Farm Manager" could be considered "terms and conditions" of employment that should be included in advertisements under PERM. In that case, in response to the CO's audit request, the employer explained that the foreign national lived at the employer's address because the employer offers employees an option to live rent-free, onsite at the job location which is a horse farm and the foreign national took advantage of this option. The CO denied the PERM because none of the PERM recruitment or the Notice of Filing (NOF) indicated the potential for applicants to live in or on the employer's establishment. The CO argued that the terms and conditions offered to US workers were therefore less favorable than those offered to the foreign national and that this was in violation of 20 CFR § 656.17(f)(7).

The employer filed a request for reconsideration arguing they were not in violation of 656.17(f)(7) because that regulation does not obligate the employer to list every aspect of the offered position. The CO denied the case and forwarded it to BALCA with a Statement of Position which cited Blue Ridge Erectors, Inc., 2010-PER-00997 (July 28, 2011) which held that the option to live on Employer's premises is a term and condition of employment that creates a more favorable job opportunity and that U.S. workers who might have responded to an ad if on-premises housing was an option were not given the opportunity to do so. The CO

also distinguished the holding in *Emma Willard* by arguing that in *Emma Willard*, a "significant majority" of its boarding school teachers, including its U.S. workers, lived in employer-provided housing, whereas in the matter at hand, the employer failed to establish that housing would be equally available to U.S. applicants. The CO made sure to point out that the BALCA panel in Emma Willard limited their holding to the facts of that case.

In response to the CO's Statement of Position, *Needham-Betz Thoroughbreds* argued that the CO is not required to speculate whether recruitment efforts beyond those required by 20 CFR Part 656 might possibly have induced other U.S. workers to apply for the position.
In its decision, BALCA agreed with the CO that *Emma Willard* was not controlling because it is not a binding en banc decision. BALCA found *Blue Ridge Erectors* to be more persuasive along with Phillip Dutton Eventing, LLC, 2012-PER-00497 (Nov. 24, 2014). In *Phillip Dutton*, BALCA reasoned that while benefits like wages are not required to be listed in the advertisements, wages are a legal requirement of work in this country whereas no-cost, on-site housing is not. BALCA stated that no reasonable potential applicant would have assumed that no-cost, on-site housing was a benefit associated with the job opportunity and therefore, qualified U.S. workers may have been dissuaded from applying.

In response to *Needham-Betz Thoroughbreds*' argument that 656.17(f)(7) regulates only what is contained in an advertisement and does not address silence about certain aspects of the job opportunity, BALCA held that such an interpretation is too narrow and inconsistent with the purpose behind the PERM program which is to ensure that there are insufficient U.S. workers who are able, willing, qualified and available for a job opportunity prior to the granting of a labor certification. BALCA held that a more consistent interpretation of 656.17(f) is to review the terms and conditions of employment in the ad and whether they are less favorable than those being offered to the foreign national. BALCA reasoned that free housing isn't a standard benefit that can be readily assumed, so it should have been included in the advertisements.

What we have now learned at *Needham-Betz Thoroughbreds'* expense is that any unusual economic benefits should be listed in PERM recruitment. While U.S. workers usually expect benefits like wages, health insurance and vacation days and these need not be listed, U.S. workers need to be informed of other benefits

that might induce them to apply. But this begs the question, how do we know what could induce a U.S. worker to apply for a position? The employer in *Needham-Betz Thoroughbreds* argued that this could be a slippery slope! Would U.S. workers be enticed by the promise of free lunch on Wednesdays? What if a law firm offers sleeping pods so that its attorneys can work all week and never have to waste time going home? What about cheese tasting Fridays? How do we know that a U.S. worker doesn't really, really love cheese and would be induced to apply because of it? Sure, this may be taking it too far and the DOL may indeed have a point. But, as the DOL always says, PERM is an exacting process. If an employer who conducted good faith recruitment argues that omission of its name on the Notice of Filing (NOF) did not make a difference since only its own employees saw the NOF and that the purpose behind the NOF has been met, the PERM will still be denied and the employer will be told that PERM is an exacting process. Yet, in cases where the employer has complied with the regulation, the DOL says that the employer should look to the purpose behind the regulation.

It really can become exhausting. As PERM practitioners, we must prepare PERM applications defensively; always trying to stay one step ahead of the DOL and imagine new reasons for denial and new reasons to discount previously upheld methods. If there is anything unusual about the offered position, the employer should err on the side of caution and include it in the advertisements. This includes work from home benefits; housing benefits; travel; relocation; on call hours; week-end employment; free day care or other economic benefits; and whatever might be deemed to be different from the "usual" job benefits.

So is *Emma Willard* still good for anything? I think *Emma Willard* can still be used to show that U.S. workers are intelligent. Too often PERM denials speak of the "confused" and "adversely affected" U.S. worker when in some cases that is the same U.S. worker who supposedly potentially qualifies for a professional position requiring a minimum of a 4-year Bachelor's degree. In those cases, one can't help but think that if a U.S. worker cannot read and understand a simple advertisement and is so easily "deterred', "confused" and "adversely affected" then how could he possibly be qualified for an offered professional position? Moreover, *Emma Willard* may also stand for situations where the benefit is obvious, and it all depends on context. A boarding school teacher can be expected to get subsidized housing. On the other, it is unusual for farm managers to get free housing.

What is so interesting about PERM is the same thing that can drive you crazy, if you let it. These BALCA decisions show that we can never let our guards down for a minute.