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BALCA HOLDS THAT FAILURE TO DISCLOSE A 'WAGE ADJUSTMENT' IS NOT A VALID DENIAL GROUND

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Recently, in the representative case, *Matter of Cognizant Technology Solutions US Corp*, 2013-PER-01488 (BALCA, September 29, 2016), the Board of Alien Labor Certifications Appeals (BALCA) reversed 382 PERM denials finding, most significantly, that the employer's failure to apprise US workers of its wage adjustment – a variable amount of money to be paid to the employee depending on where they're geographically based – was not a valid ground for denial.

In the representative case, the employer, in response to an audit notification, submitted a copy of an offer letter that was sent to a U.S. applicant. This offer letter stated a base salary of $117,707.20 and also described a "Cost of Labor Adjustment" or "COLA" as follows:

As eligible, you may be paid a geographically based Cost of Labor Adjustment (COLA) of $250.00 per pay period for Washington, D.C., which is an annualized amount of $6,000. Your COLA on the 15th and last day of each month in accordance with the Company's current payroll policies and practices, along with your regular base salary. If your work location changes, then there will be an adjustment to COLA effective the first day of work in your new work location. COLA is subject to regular review and may be increased or decreased, or replaced by another compensation component upon certain promotions.

The Certifying Officer (CO) found that the employer's Notice of Filing (NOF), which advised of a long and short term travel requirement, failed to also appropriately apprise US workers of the actual terms and conditions of employment. The CO found that the NOF violated 20 CFR §656.17(f)(3) which states that advertisements must "provide a description of the vacancy specific enough to apprise the U.S. worker of the job opportunity for which certification

is sought" and 656.10(d)(4) which requires that the NOF "contain the information required for advertisements by §656.17(f)." The CO also found that the job order, Sunday newspaper advertisements, local newspaper advertisement, job search website advertisement and private employment firm advertisement failed to apprise US workers of the COLA and therefore did not appropriately apprise them of the job opportunity in violation of 656.17(f)(3). The CO, in denying the application, held that US workers were not properly notified that they would be appropriately compensated based on the specific geographic area of assignment, which could have impacted whether or not they were willing to apply for the job opportunity.

In its Request for Reconsideration/Request for Review, the employer argued that COLA was a "per diem benefit payment" which did not need to be disclosed based on BALCA's previous decision in *Matter of Emma Willard School*, 2010-PER-01101 (BALCA, September 28, 2011). In *Emma Willard*, 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. I previously blogged about this decision here. The employer argued that COLA is a not a guaranteed benefit and can be increased, decreased or replaced by other compensation at any time and to insist that such a benefit be disclosed would be similar to insisting that the employer also disclose benefits such as parking and gym memberships, which the regulations do not require.

BALCA found that the CO correctly classified COLA as a wage adjustment because it is a set amount "per pay period", even if the exact amount may change, and is paid on the 15th and last day of each month along with the base salary. BALCA further found that this is different from a per diem benefit, which refers to something paid on a daily basis (citing Mirriam-Webster's definition of "per diem" as "by the day") or to reimbursements for travel receipts or meals (pointing to the U.S. General Services Administrations' definition of "per diem" as an allowance for lodging...meals and incidental expenses). BALCA cited the case of *Crowley v. U.S.*, 57 Fed. Cl. 376, 381 (2003) where the court cited a 1990 Conference Report discussing the Federal Law Enforcement Pay Reform Act which stated that a locality adjustment was considered part of base pay. BALCA therefore held that, based on the federal government's characterization of a locality benefit as part of base pay, COLA must also be considered part of base pay. Since COLA is a wage and not a benefit, BALCA held that the holding in

Emma Willard did not apply.

If COLA is a wage adjustment then isn't the employer required to list it in all its advertisements and on the NOF? BALCA held that since there is no requirement that an employer list a wage in its newspaper advertisements, the employer's failure to do so is not a violation of the regulations. Also, citing its decision in *Symantec Corporation*, 2011-PER-01856 (Jul. 30, 2014) which I previously discussed here, BALCA held that the job order and additional recruitment steps could not held deficient pursuant to 656.17(f)(3) because 656.17(f) applies only to newspaper advertisements. If the advertisements were not deficient, then 656.24(b)(2) is not a valid ground for denial because the employer did properly recruit for the position.

But BALCA has left a pretty bloody trail when it comes to lack of disclosures in the NOF. In *Matter of KFI, Inc.* 2009-PER-00288 (Aug. 25, 2009) BALCA affirmed a PERM denial based on the employer's failure to list the CO's address on NOF in violation of 656.10(d)(3)(iii). In *Servion Global Solutions, Inc.,* 009-PER-00282 (Jun. 23, 2009) BALCA held that failure to state the rate of pay constituted grounds for denial. In *Matter of Innopath Software*, 2009-PER-00153 (Sept. 2, 2009), BALCA held that the absence of the employer name on the NOF, although it was posted in a conspicuous location at the place of employment, was not harmless error. In *Matter of G.O.T. Supply, Inc.,* 2012-PER-00429 (Oct. 6, 2015) BALCA affirmed the CO's denial where the company president's name but not employer's name was listed on the NOF. BALCA said persons providing information to the CO need the employer name as it appears on Form 9089. The NOF is required to contain certain information as specified in 20 CFR § 656.10(d) which provides that the NOF "must state the rate of pay (which must equal or exceed the prevailing wage entered by the SWA on the prevailing wage request form)." Failure to list the rate of pay wage in the NOF usually constitutes grounds for denial of certification. But this time, the deficiencies of the PERM process and the Form 9089 could not be overcome.

Despite its conclusion that the regulations could reasonably be interpreted to require an employer to state a wage adjustment on a NOF, BALCA declined to affirm the denial because the Employment and Training Administration (ETA) has issued no guidance whatsoever alerting employers that this type of wage adjustment needs to be specifically disclosed in the advertising and on the ETA Form 9089. BALCA also noted that there is "neither an instruction nor a current mechanism by which an employer may enter this information on the Form

9089 and cited *Federal Insurance Co.,* 2008-PER-00037 (Feb. 20, 2009) in which case the fact that certain mandatory language pertaining to an alternative requirement under *Matter of Francis Kellogg,* 1994-INA-465 (Feb. 2, 1998) (en banc), did not appear on the ETA Form 9089 was not fatal as there is no space on the form for such language. Because employers have not been provided with notice of its regulatory interpretation concerning the requirement that COLAs be disclosed and a mechanism by which to disclose COLAs, BALCA could not find the NOF defective.

As an aside, it is also interesting to note that the foreign national resided in Florida rather than in Washington, DC, but BALCA did not attach any significance to this fact. It still raises a question about the importance of differentiating between a future job opportunity in a labor certification and a foreign national's current employment. It was not clear in the representative case whether Washington DC, which was the subject of the COLA, would be the future position. The PERM labor certification was presumably filed using the employer's headquarters, and indicated that it would involve working at "unanticipated client locations throughout the US." If the current position provides a COLA, but the future position that is the subject of the labor certification does not, then the fact that the employer submitted a job offer letter with respect to the current position should not undermine the outcome of the labor certification. In responding to an audit notification, employers must clearly specify whether a job offer letter sent to a US worker applicant is applicable to the future PERM position or to the current position in order to attempt to stave off a similar denial.

Also quite interesting is BALCA's insertion of a footnote acknowledging that the employer, in its prevailing wage request, negatively answered the question about whether the position will be performed at multiple worksites but then indicated on the Form 9089 that work would also be performed at "unanticipated client locations throughout the US." BALCA acknowledged that the prevailing wage issued by the National Prevailing Wage Center may have been affected had the employer disclosed the roving nature of the position. BALCA provided no explanation as to why this did not constitute grounds for denial. Possibly because the immigration bar continues to beg in vain for clarification on issues related to roving employees.

This decision follows the trend of *Infosys Ltd*., 2016-PER-00074 (May 12, 2016), also cited in *Cognizant,* where BALCA held that it was not fundamentally fair to

require an employer's advertisements and Form 9089 to disclose the possibility of relocation in absence of notice or guidance especially since the DOL had previously approved over 500 similar PERM applications by the employer. In *Infosys,* BALCA recognized that PERM, an attestation-based program places a heavy burden on employers to be careful in preparing their applications but also places a related burden on the CO to ensure that employers are given adequate guidance on what will be demanded of them. These decisions highlight the frustrating deficiencies in the existing PERM regulations and Form 9089. Updates to the PERM program have long been anticipated by both employers and foreign nationals who each expect to benefit from the PERM modernization. DOL officials previously commented that they expect the new regulation to be finalized and implemented before the end of President Obama's administration in January 2017.