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7 POINTS TO REMEMBER REGARDING RESUME REVIEW IN THE PERM PROCESS

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The employer's review of resumes received from applicants continues to be one of the trickiest issues in the PERM labor certification process. The process might seem straightforward enough because, after all, employers filing PERM applications are likely quite used to evaluating resumes from applicants. But such thinking is probably where the first wrong step is taken. I last blogged on this issue on December 2012 and my blog entitled, Resume Review in the PERM Process is still very relevant. However, I find that this issue continues to be a problematic one and worthy of a follow up. Improper resume review continues to be one of the Department of Labor's (DOL) most popular reasons for PERM denials.

By way of background, under the Immigration and Nationality Act, the DOL has a statutory responsibility to ensure that no foreign worker is admitted for permanent residence based upon an offer of employment absent a finding that there are not sufficient U.S. workers who are able, willing, qualified and available for the work to be undertaken and that the admission of such worker will not adversely affect the wages and working conditions of U.S. workers similarly employed. INA §212(a)(5)(A)(i). The DOL fulfills this responsibility by determining the availability of qualified U.S. workers before approving a permanent labor certification application and by ensuring that U.S. workers are fairly considered for all job opportunities that are the subject of a permanent labor certification application. Accordingly, the DOL relies on employers who file labor certification applications to recruit and consider U.S. workers in good faith. Under 20 C.F.R. §656.10(c), the employer must certify that U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons. While the DOL has indicated that good faith recruitment requires that an employer's process for considering U.S. workers who respond to

certification-related recruitment closely resemble the employer's normal consideration process, operating under this belief will most likely lead to problems. I have always found that it is infinitely more effective to counsel the employer ***not*** to consider PERM as resembling any type of real world recruitment process whatsoever.

Review of the Board of Alien Labor Certification Appeals (BALCA) is a good place to stay up to date on the DOL's reasoning on any PERM issue. Based on recent BALCA decisions, here are **7** points regarding resume review that are worth discussing with the employer at the outset of the PERM process, even before the job duties and requirements are finalized and the advertisement is drafted.

1. ***Be certain that use of the Kellogg language is warranted and reflective of the actual minimum requirements for the offered position.***

2. ***An applicant cannot be rejected simply because their cover letter or resume clearly states that they are seeking a completely different position.***

In *Global Teachers Research and Resources, Inc.* 2015-PER-00396 (March 30, 2017), the employer's job requirements for the position of Elementary Teacher were a Bachelor's degree in Elementary Education and 60 months of experience in the job offered. In addition, the qualified applicant also had to demonstrate eligibility for a Georgia Teaching Certificate. In section H.14 of the ETA Form 9089, the employer had also listed, "Employer will Accept any Combination of Experience, Training or Education." This is commonly referred to as the Kellogg language based on *Matter of Francis Kellogg*, 1994-INA-465 (Feb. 2, 1998) (*en banc*).

After reviewing the employer's response to an audit, the DOL denied the PERM application finding that the employer failed to properly consider one applicant who possessed a Master's degree in Education/Special Education, 60 months of experience and a GA teaching license. The Certifying Officer (CO) reasoned that since the employer had indicated "Employer will Accept any Combination of Experience, Training or Education" then the employer had to consider the applicant even if she did not have a degree in Elementary Education. Oftentimes, an employer will insert the Kellogg language on the ETA Form 9089 when it is totally unnecessary. It is important to remember that this is specific language that is only required on the ETA Form 9089 when the foreign national qualifies for the offered position only on the basis of the employer's alternative

requirements. In addition, *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009) held that the failure to include this language was not fatal as there is no space on the form for such language. Some employers recall receiving PERM denials due to lack of this language prior to the decision in *Federal Insurance* and, not fully comprehending the issue, they feel better to just include it. It is therefore very important to discuss the meaning of the Kellogg language with the employer and whether the insertion of this language would reflect the employer's true minimum requirements for the offered position.

The employer in *Global Teachers Research and Resources* filed a request for reconsideration and argued that the applicant had clearly indicated on her resume that she was seeking employment as Special Education Teacher and that this information prevented them from actually considering applicant for the offered position. However, BALCA held that since the Applicant had applied for the Elementary Teacher position and since it would be illogical for a person to apply for a position in which they were not interested, the employer was obligated to give the application due consideration. Citing a long list of precedent decisions which would make for required reading, BALCA held that an applicant is presumed to be interested in a job for which he or she applies.

3. Be careful of rejection for lack of an unstated, "inherent" requirement.

4. Even if an applicant may lawfully be rejected for various reasons, always list ALL reasons for rejection in the recruitment report.

In *Matter of Los Angeles Unified School District*, 2012-PER-03153 (Jan. 23, 2017) the employer recruited for the position of "Teacher, Special Education" for which it required a Bachelor's degree in any field, a valid California Education Specialist teaching credential, and no training or experience. After two audits, the PERM application was denied because the employer rejected an applicant finding that the applicant failed to meet the minimum requirements for the offered position because the applicant had a below satisfactory performance evaluation on her most recent student-teaching assignment.

The employer requested reconsideration and, listing several pre-PERM administrative law decisions, argued that some qualifications are simply inherent and need not be expressly stated in the job description. The employer argued that the ability to "teach special education classes competently" is one such inherent requirement that need not be expressly stated. The employer

also pointed to a negative confidential reference from the applicant's most recent teaching assignment.

BALCA dismissed all of the administrative law decisions as non-binding and stated that the PERM program demands strict compliance with the regulations which require that the job requirements described on the ETA Form 9089 represent the employer's actual minimum requirements for the offered position. BALCA found it debatable whether one negative performance evaluation over the course of a career could demonstrate a lack of competency. But ultimately, since nothing in the employer's stated minimum requirements indicated that an applicant cannot have a negative performance evaluation or a negative reference of any kind, BALCA found the rejection of the applicant to be unlawful. Basically, any qualification that can form the basis of a rejection ought to be listed in the advertisement. If it is not, then it cannot be used as the basis for a rejection.

However, this decision does not make sense as every inherent skill cannot be listed in the advertisement, the ability to speak English, being the prime example. There are a line of cases to support this proposition. *See Ashbrook-Simon-Hartley v. McLaughlin*, 863 F.2d 410 (5th Cir 1989), *Matter of Ron Hartgrove*, 1989 BALCA Lexis 6 (BALCA May 31, 1989), *Matter of La Dye & Print Works*, 1995 BALCA LEXIS 59 (BALCA April 13, 1995).

In its appellate brief the employer had also tried to insert a new argument that the applicant was also not qualified because she did not have the required teacher credential. The employer stated that it did not initially consider this but that is nevertheless a basis for rejection. BALCA dismissed this evidence finding that its review is restricted to timely submitted evidence that was part of the record when the CO made his decision. It is therefore very important that an employer conduct a complete review of each applicant's qualifications and list each and every lawful reason for rejection of any applicant. In the instant case, despite the employer's rejection for lack of what it considered to be an inherent requirement, if the employer had also lawfully rejected the applicant for lack of the teaching credential and demonstrated that the applicant indeed lacked the credential, the PERM might not have been denied.

5. Never put the duty to follow up on the applicant.

Matter of Unisoft International, Inc. 2015-PER-00045 (Dec. 29, 2016) is a

supervised recruitment case. The offered position was that of Network Administrator. The employer's PERM application was eventually denied for four reasons but only reason number 4 regards resume review. Essentially, the CO found that the employer did not conduct a good-faith recruitment effort because the employer sent out a form letter to each of 20 applicants. This letter stated, "After a preliminary review of your resume, we have determined that you do not have a few of the desired skills we are looking for including experience with MCP and SPO for OS2200." Putting the onus of additional communication on the applicant, the letter then stated, "Please contact us immediately to schedule an interview if you do have these qualifications." The CO found that the employer had failed to "intensively" recruit and had not sufficiently established that there were no US applicants who were able, willing, qualified and available to perform the work.

BALCA pointed to case law which held that an employer may lawfully reject an applicant when the resume is silent on whether he or she meets a *major* requirement such as a college degree. However, when the qualification is something a candidate may not indicate explicitly on his or her resume though he or she possesses it, the employer carries the obligation to inquire further whether the applicant meets the requirements. BALCA found that the employer had rejected these 20 candidates because they did not list a subsidiary requirement on their resumes and the employer had an obligation to inquire further. The employer's letter to these 20 applications did not fulfill this obligation because it placed the responsibility of following up and requesting an interview on the shoulders of the applicants. Moreover, BALCA found that the employer failed to inquire whether there were any available training options for these candidates especially for two candidates who the CO identified as already possessing networking experience. BALCA found that the employer's letters to the candidates were perfunctory and not made in good faith.

This case displays another strong example of how resume review in the PERM process does not resemble resume review in the real world. In the real world, an applicant is expected to demonstrate his or her actual interest in the offered position. In the real world, putting the onus of additional communication on the applicant could very well be a test of the applicant's dedication and interest. No so under PERM. In the PERM process, the employer has to understand that it must bend over backwards to ensure that it has done everything in its power to

fully determine whether an applicant is qualified for the offered position notwithstanding that applicant's failure to respond to a telephone call (email and then send a certified letter); that applicant's lack of awareness of who the employer is or of the offered position (the employer must now inform them again!); or that applicant's request to be contacted at a later time (the employer must comply!).

6. Over qualification is never a lawful reason for rejection.

7. An applicant may be rejected based on their unwillingness to accept the salary only if the employer can show that the employer offered the position to the applicant at the listed salary and the applicant then refused to accept the position.

BALCA has long held that an employer may not reject a US worker applicant based on a belief that the applicant is over qualified for the position. This is still one rejection reason that almost all employers instinctively want to use. And again, this is where the PERM process breaks away from the real world. It is hard for most employers to comprehend why the DOL would require that they classify as qualified, an applicant who clearly would be taking a "step down" because their qualifications indicate that they are qualified for a higher level position. Employers feel that such applicant use lower level positions as a stepping stone. However, BALCA has always held that such applicants are qualified to perform the core job duties. *See Bronx Medical and Dental Clinic,* 1990-INA-00479 (Oct, 30, 1992) (*en banc*) and most recently, *Kohn Pedersen Fox Associates PC*, 212-PER-02772 (Nov. 25, 2016).

Also in *Kohn Pederson Fox Associates*, the employer, having advertised listing the offered salary, then rejected applicants who applied for the position requesting a higher salary. While the employer's reasoning here makes real world sense, BALCA held that an employer may reject a qualified US applicant as unwilling to accept the position at the offered wages only if the position was actually offered to the applicant and the applicant refused to accept the position at the offered wages. The employer must have documentation of the offer and refusal.

Overall, employers must always bear in mind that the DOL serves to protect the interests of the US worker. Accordingly, while the real world may be a dog eat dog world where one typo can cause an applicant's resume to quickly hit the trash, in the PERM world, applicants must almost be cuddled. The employer

must set aside all normal reasoning; all normal industry expectations; all expectations that a US worker applicant can understand basic things like a requirement for 2-3 years of experience means that 2 years would be acceptable. The employer must consider what is in the best interest of the US worker applicant and ensure that it has sufficiently described the offered position and all its requirements to fully apprise the US worker of all he or she needs to know in order to determine whether to apply for the position. Once that application has been received, the employer is obligated to examine every aspect of that applicant's qualification; to reach out to that applicant using multiple forms of communication if the most convenient form fails; to verify that the applicant, though lacking in a certain requirement cannot be trained within a reasonable time; and to remember, above all else, that the employer is never supposed to seek the "best" candidate for the position, but rather, must consider a candidate qualified if he or she even barely meets the stated minimum requirements.