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US IMMIGRATION & NATIONALITY LAW

PERM AND THE ROVING EMPLOYEE

Posted on November 8, 2010 by Cora-Ann Pestaina

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Practitioner to Employer Client: We can certainly assist you in the filing of a PERM application for your employee. Where will the employee be working?

Employer Client: Well, he will work out of his home in New Jersey and additionally at three different client sites in Pennsylvania, New York and Connecticut.

Practitioner: *silent groan* This will require some special attention.

Filing a labor certification for a roving employee is akin to navigating a minefield. One tiny "mistake" and BOOM! It doesn't matter that there is precious little guidance from the DOL to begin with. The DOL will happily issue you that denial listing in nice, bold print the various "obvious" reasons why you did not draft the advertisement correctly, recruit correctly or use the proper prevailing wage, etc.

A lot of what we now know about filing a labor certification for a roving employee has been learned through trial and error. The above scenario is merely one type of roving employee. The most common type of roving employee is the IT consultant who will not work at the employer's headquarters but instead will be assigned to one or more known or unanticipated client sites. As described in the scenario above, a roving employee could also work from home and visit various client sites confined to one region or spread throughout the US. The issues surrounding roving employees include ensuring that the advertisements contain all the required language and choosing the location out of which to base the recruitment and the prevailing wage determination and deciding where to post the Notice of Filing.

In the ordinary course, a labor certification is filed in the area of intended

employment. The Department of Labor's regulations require an employer to prove through a test of the labor market that there are not sufficient workers in the US who are able, willing, qualified, and available at the place where the alien is to perform the work, and that employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. In the case of the roving employee, where the area of intended employment is presently unknown or subject to constant change, it becomes difficult to determine the location where the labor certification should be filed and thus where the recruitment should be performed and the prevailing wage obtained. The statute or the regulations are both silent on this issue. As indicated in a paper analyzing recent BALCA decisions by Cyrus D. Mehta for the AILA New York Immigration Symposium on December 1, 2010, the most recent guidance comes from a decision by the Board of Alien Labor Certification Appeals (BALCA) in *Amsol, Inc*., 2008-INA-00112. In *Amsol*, the employer filed several labor certifications listing its address as Casper, Wyoming and the address where the aliens would work as “Casper, WY and any other unanticipated location in the US.” The employer argued, and BALCA agreed, that the employer should be governed by the Employment and Training Administration’s Field Memorandum No. 48-94 (May 16, 1994) § 10, which provided that "pplications involving job opportunities which require the alien beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer’s main or headquarters office is located." In *Amsol*, BALCA referenced *Paradigm Infotech*, 2007-INA-3,4,5 and 6 (June 15, 2007) and pointed out that the mere business presence of an employer in a location is not, in itself, sufficient justification for filing the labor certification from that location. In Paradigm the employer’s office in Erie, PA was not the appropriate location for a labor market test where the offered position involved unanticipated locations because the prevailing wage in Erie, PA was lower than the prevailing wage at the employer’s headquarters in Columbia, MD. Accordingly, at least in the most common case of the roving employee, where a job will involve various unanticipated work sites, the employer’s headquarters is accepted as the appropriate location for filing the labor certification. Following that, it is also therefore acceptable to obtain the prevailing wage determination from that location and to post the Notice of Filing at the employer’s headquarters. In *Amsol*, it was also important that the employer advertised in a national magazine, demonstrating that the employer

did not choose Casper, WY in an attempt to test the market least likely to provide qualified US workers.

The less common issue of the home office has not yet been the subject of a BALCA decision. What should the employer do when the employee works from home in a location that is different from the employer's headquarters? Thus far, the only DOL guidance can be found in the minutes of a March 15, 2007 DOL Stakeholders meeting which can be found at AILA Doc. No. 07041264. On the subject of the home office, the minutes read as follows:

19. If an employer requires an employee to work from home in a region of intended employment that is different from the location of the employer's headquarters (i.e. work is required to be performed in a designated county or state that differs from the employer's headquarters), please confirm that the prevailing wage determination and recruitment can take place in the location of the employee's region of intended employment. Please confirm that the notice of posting under this circumstance should be posted at the company's headquarters.

If the 9089 form shows the worksite at a designated location other than headquarters, the PWD and recruitment would be for the worksite.

AILA note: This issue essentially requires a strategy decision. The PERM form can state that the worksite is the home office, in which case the PWD and recruitment can be for the area of the home office, but the fact that the worksite is the same as the foreign national's home address will be picked up by the PERM system and the case will likely be audited. This can then be addressed in the audit response and should not be a problem, if the case is otherwise approvable. Alternatively, the PERM form can state that the worksite is the headquarters office, but then the PWD and recruitment must be done for that location.

The DOL's response to the Stakeholders' query indicates that the choice is left to the employer. If the employer lists the worksite as the employee's home then the employer can perform recruitment and also request the prevailing wage from the location of the employee's home. Alternatively, the employer can list the worksite as the employer's headquarters and recruit out of that location. However, if adopting this alternative strategy, the employer should be mindful to conduct recruitment that also covers the home office (e.g. recruitment that is

national in scope). Additional guidance was also provided in the following question which was asked and answered as follows:

20. In the case of a telecommuter or an employee whose location is not specific to the job, please confirm that the notice of posting, recruitment, and prevailing wage determination should be based on the location of the employer's headquarters.

Please see answer to number 19 above.

This guidance also indicates that whenever the job requires work in various locations, the employer may post the Notice of Filing at the company's headquarters.

But what should the employer do when the employee will work from home, in a location different from that of the employer's headquarters and will also work from unanticipated locations throughout the US? From the DOL's response to the Stakeholders' queries, it would appear that the employer could recruit in the location of the employee's home. However, in such a case, the employer should take pains to show that it is not filing from the employee's home location in an attempt to lower the prevailing wage or to minimize US worker applicants. As in the Amsol case, the best course of action would be to obtain prevailing wages for both the employer's headquarters location and the employee's home location and ensure that the offered wage exceeded the higher of the two and, also ensure that at least one of the additional three forms of professional recruitment is national in scope. The Notice of Filing can be posted at the employer's headquarters. The above mentioned Stakeholders Meeting minutes provided further guidance as follows:

21. For purposes of completing ETA-9089, if an employee works from home, what address should be identified in H.1 and H.2--the actual home address of the employee or the address of the employer's headquarters or office from which the employee is based/paid?

Please see answer to number 19 above.

Final Note: When a job is regional, such as an employee working out of a home office but travelling throughout a specific geographic area, the analysis of where to obtain the prevailing wage and recruit can be thorny. Prior to PERM guidance was

that the prevailing wage would be determined where the majority of duties are performed. Best practice under PERM would be to use the highest wage within the region/MSA and recruit in the regional edition of a nationwide paper. This gets complicated as there are few nationwide papers with regional editions or newspapers that could be considered regional.

As in the scenario described at the beginning of this article, what if the employer is located in one state, the employee will work from home in another state and also in three other specific states in the region? Again, this issue has not been directly addressed by the DOL. But, employers should ensure that recruitment is performed in the manner best likely to discover qualified US workers. As described above, the employer could recruit from the location of the employee's home choosing the regional edition of a national newspaper as one form of recruitment; ensure that prevailing wage exceeds the highest of the prevailing wages for each state in which the employee will work; and post the Notice of Filing at the employer's headquarters.

With regard to roving employees, it is critical that the employer's advertisement inform US workers that a "home benefit is available" or that the worker "must be willing to work anywhere in the US" or that "travel is required." Any such requirement must also be included in the prevailing wage request and in Box H.14 on the ETA Form 9089 lest the employer be accused of offering conditions in the advertisements that were less favorable than those offered to the alien in violation of 20 CFR § 656.17(f)(7).

It would seem that the DOL has adopted a "You will know if you made the wrong choice when the PERM gets denied" attitude to the issue of the roving employee. At the recent AILA PERM Conference in New Orleans, many practitioners expressed ongoing frustration with the lack of guidance. Learning through trial and error is not acceptable for a process as costly as PERM and practitioners can ill-afford to demonstrate an inability to correctly advise clients. Another AILA Stakeholders meeting was held last week and roving employee issues were certainly on the list of questions for the DOL. While holding one's breath is not suggested, the minutes of that meeting will hopefully shed some well-needed light on this tricky issue.