CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

BALCA GETS IT RIGHT!! RECRUITMENT AND THE PREVAILING WAGE DETERMINATION'S VALIDITY PERIOD

Posted on June 7, 2011 by Cora-Ann Pestaina

Cora-Ann V. Pestaina

Pardon me while I take a moment to pump my fist! I am just really excited (and also relieved that sanity finally prevailed!) over the Board of Alien Labor Certification Appeals' (BALCA) recent decision in *Matter of Horizon Computer Services, Inc.* 2010-PER-00746 (May. 25, 2011), http://j.mp/jAQRfO. Along with many fellow practitioners, I have long been irked by the Department of Labor's (DOL) continued erroneous and hypertechnical interpretation of the rule found in 20 C.F.R. §656.40(c). I first wrote on this issue in August 2009 on www.cyrusmehta.com, in my article entitled, "How the Definition of the Word "Begin" Could Affect Your PERM Application." http://j.mp/k1e5e6.

The DOL has long interpreted 20 C.F.R. §656.40(c) to mean that the employer must begin the earliest recruitment or file the PERM labor certification application within the prevailing wage determination's (PWD) validity period. The DOL has consistently denied PERM applications where the employer commenced recruitment before the PWD's validity period and filed the PERM application after the PWD had expired. Rather than fight with the DOL (and suffer through the long wait in the appeals queue!), most employers simply conducted new recruitment and filed a new PERM application. In my article, I argued that the DOL's interpretation of the rule was (1) overly narrow and contrary to the plain meaning of the regulation; and (2) contrary to the Employment and Training Administration's (ETA) intent when promulgating the regulation which was to have the employer conduct at least one form of recruitment within the PWD validity period. I expressed the hope that a well-crafted Motion to Reopen and Reconsider would bring forth a more definitive

statement from BALCA.

We finally have this statement in *Matter of Horizon Computer Services*! In this case, the employer began its earliest recruitment by placing a job order on January 22, 2007. The employer obtained a PWD with a validity period from January 25, 2007 to June 30, 2007. The employer filed the PERM application on July 20, 2007, after the PWD had expired. The DOL denied the application because the employer did not begin its earliest form of recruitment during the PWD's validity period and cited 20 C.F.R. §656.40(c) as authority for the denial. The employer fought back in a Request for Review and cited to the ETA's notice of proposed rulemaking for PERM regulations wherein the ETA sought to explain the need for specific PWD validity periods and stated:

2. Validity Period of PWD
We are proposing that the SWA must specify the validity period of PWD on the PWD form, which in no event shall be less than 90 days or more than 1 year from the determination date entered on the PWDR. Employers filing LCA's under the H-1B program must file their labor condition application within the validity period. Since employers filing applications for permanent labor certification can begin the required recruitment steps required under the regulations 180 days before filing their applications, they must initiate at least one of the recruitment steps required for a professional or nonprofessional occupation within the validity period of the PWD to rely on the determination issued by the SWA. Employment and Training Administration, Proposed Rule, Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States , 20 CFR Part 656, 67 Fed. Reg. 30466, 30478 (May 6, 2002).

Based on the ETA's statements, the employer in *Matter of Horizon Computer Services* argued that the ETA did not intend that the employer's first recruitment step begin during the validity period but only that some recruitment step be initiated during that time. In fact, with the exception of the job order, the employer had initiated all of its recruitment during the PWD validity period.

BALCA agreed with the employer, vacated the DOL's denial and held that the timing of the employer's recruitment complied with the regulations and that regulatory history and fundamental fairness precluded the DOL's interpretation of the regulation. BALCA agreed that the ETA intended only that the employer initiate some recruitment during the PWD validity period and not the earliest recruitment.

Accordingly, under *Matter of Horizon Computer Services*, in order to rely on an expired PWD in the filing of a PERM application, the employer must have initiated at least one recruitment step during the PWD's validity period. That is, the first day of at least one form of recruitment must fall within the PWD validity period. Conducting or initiating all recruitment prior to the PWD's validity period and then filing after the PWD has expired will likely still result in a denial of the PERM application.

Matter of Horizon Computer Services is an important decision especially at this time of the year when the DOL issues PWDs with only a narrow 90-day validity period. The DOL updates its prevailing wage databases on July 1st. PWDs issued around this time of year have only a 90-day validity period as opposed to PWDs issued after July 1st which are typically valid until June 30th of the following year. Employers who initiated recruitment prior to obtaining the PWD, initiated additional recruitment during the PWD's 90-day validity period but were then unable to file the PERM application within the brief 90-day validity period of the PWD, would previously have had no recourse.