



BALCA ON THE HOME OFFICE OPTION

Posted on September 23, 2013 by Cora-Ann Pestaina

It's time for another lesson, courtesy of BALCA (Board of Alien Labor Certification Appeals). In a November 2010 blog entitled [PERM AND THE ROVING EMPLOYEE](#) I discussed different types of roving employees and the existing BALCA or DOL (Department of Labor) guidance on how recruitment for these types of positions ought to be conducted. I raised the question, "What should the employer do when the employee works from home in a location that is different from the employer's headquarters?" and stated "less common issue of the home office has not yet been the subject of a BALCA decision."

In an October 2011 blog entitled, [BALCA SAYS THERE IS NO NEED TO LIST EVERY BENEFIT OF EMPLOYMENT IN JOB ADVERTISEMENTS](#), with still no definitive word from BALCA on the home office issue, I discussed [Matter of Emma Willard School](#), 2010-PER-01101 (BALCA, September 28, 2011) where the DOL's CO (Certifying Officer) had denied the employer's PERM application because the recruitment failed to state that subsidized housing was being offered to the qualified US worker. 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. In my blog, I suggested that an employer whose PERM application was denied because the recruitment did not list a "work from home" benefit, might be able to argue, under Emma Willard School, that it was not required to list all benefits in its recruitment and that the choice not to list the "work from home" benefit should not serve to deter any US workers from applying for the position because US workers are savvy and well aware of the increasing flexibility offered by employers with regard to where they perform the duties of the job. While I presented an argument that could have been made after receipt of a PERM denial, readers of that blog would likely have taken away that it is certainly better to list the "work from home" benefit in all

of the recruitment. BALCA has finally spoken on this issue and has made the requirement very clear.

In [*Siemens Water Technologies Corp.*](#), 2011-PER-00955 (July 23, 2013), the employer filed a PERM application for the position of Field Service Engineer. In all its recruitment the employer listed Houston, Texas as the location for the job opportunity and conducted recruitment from that location. The PERM was audited and in its audit response, the employer explained that the primary worksite listed on the ETA Form 9089 was the same as the foreign worker's home address because the Field Service Engineer would be permitted to work from home and travel to various client sites as necessary. The CO denied the application because the benefit of working from home was not offered to U.S. workers.

In its Request for Reconsideration, the employer argued that there is no regulation that requires advertisements to indicate that the geographic location is a home office. The employer argued that its recruitment was properly conducted based on the Texas worksite address and in support of its position cited minutes from the DOL's March 15, 2007 Stakeholders Liaison Meeting which 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.

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.

The employer argued that its recruitment did not contain any terms and conditions of employment that were less favorable than those offered to the foreign national. The CO denied reconsideration and forwarded the case to BALCA.

BALCA held that the employer's reliance on the minutes of the Stakeholders Liaison Meeting was misplaced and stated that while the employer may indeed conduct recruitment from the location where the foreign national resides and may list the foreign national's address as the primary worksite on the ETA Form 9089, the minutes of the Stakeholders Liaison Meeting are silent on what geographic location should be included in the advertisements in cases where the applicant would work from home. BALCA found that applicants reading the employer's advertisements would think that they were restricted to working in Houston, Texas when, in contrast, the foreign national was given the option to work from his home which did not necessarily have to be in Houston, Texas. BALCA held that the recruitment was unduly restrictive and misleading and could have prevented potential US applicants from applying for the job. Although the CO did not cite this in the initial denial, BALCA also found that the recruitment violated 20 CFR § 656.17(f)(3) and (4) because it was not specific enough to apprise applicants of where they would have to reside to perform the job and applicants were also not informed of the travel requirement that the employer explained in its audit response.

Time and time again we see that the fact that the PERM regulations provide no guidance on a particular issue is no defense when the DOL decides that an

error has been made. As practitioners, we are left constantly trying to anticipate potential novel reasons for denial. We cannot confidently rely on existing guidance but must somehow anticipate future guidance and comply with that! One of the main takeaways from this case is that, as a rule of thumb, it's a good idea to include in the recruitment any unusual benefit that will be given to (e.g. work from home, subsidized housing) or requirement that will be asked of (e.g. travel, relocation, mandatory week-end employment) the qualified candidate for the offered position.