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DOL POLICY ON LAID-OFF U.S. WORKERS FOR PERM LABOR CERTIFICATION APPLICATIONS

Posted on February 28, 2014 by Cyrus Mehta

The filing of a labor certification application is normally the first step when an employer sponsors a foreign national employee for permanent residence. Under the labor certification process, the employer is required to demonstrate that it unsuccessfully conducted a good faith recruitment of the US labor market at the prevailing wage before it can proceed to sponsor the foreign national employee.

The Department of Labor, under the slim authority given to it in INA 212(a)(5) has promulgated complex rules in 20 Code of Federal Regulations (CFR) Part 656 that govern how an employer must establish a good faith test of the US labor market. These rules, which have created a huge "labor certification bureaucracy", also reflect a concern for US workers who were laid off within 6 months of filing the labor certification application. Specifically, 20 CFR 656.17(k) provides:

1) If there has been a layoff by the employer applicant in the area of intended employment within 6 months of filing an application involving the occupation for which certification is sought or in a related occupation, the employer must document it has notified and considered all potentially qualified laid off (employer applicant) U.S. workers of the job opportunity involved in the application and the results of the notification and consideration. A layoff shall be considered any involuntary separation of one or more employees without cause or prejudice.

(2) For the purposes of paragraph (k)(1) of this section, a related occupation is any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is sought.

The requirement for an employer to have notified and considered all potentially qualified laid-off workers has always been a touchy issue for employers. It is easier for an employer to broadcast advertisements and undertake other prescribed recruitment steps for prospective US workers than for an employer to contact its own prior workers regarding a job opportunity that is the subject of the labor certification application. The notification requirement of all laid off workers in the specific occupation or related occupation has also been open to varying interpretations. Would it suffice if the laid off worker was told to check job opportunities in the future on the employer's website or must the worker be actually notified when labor certification is being sought in the same job opportunity?

The Department of Labor's Employment and Training Administration has added a new question and answer (Q&A) to its frequently asked questions (FAQ). The new Q&A concerns notification and consideration of laid-off U.S. workers for PERM labor certification applications.

The new Q&A asks, "How does an employer demonstrate that it notified and considered laid-off U.S. workers for the job opportunity listed on the ETA Form 9089?" The answer notes that some employers have misconstrued the regulations to require only that they inform workers when laid off that the employer may have future positions and invite the worker to monitor the employer's job postings and apply, rather than their actively notifying and considering the laid-off workers. In fact, the Q&A notes, misapplication of the regulatory requirements will result in denial of a PERM application. The employer must make a reasonable, good-faith effort to notify each potentially qualified worker who has been laid off during the six months preceding the application whenever a relevant job opening exists and invite the worker to apply.

The Q&A notes that an employer who files multiple labor certifications can satisfy its responsibilities under the relevant regulation by notifying each laid-off worker (in the manner chosen by the worker) at least once a month that a list of current relevant job openings is maintained electronically on a website operated by the employer. "Simply informing a laid-off worker to monitor the employer's website for future openings and inviting the worker, if interested, to apply for those openings, will not satisfy the employer's regulatory obligation to notify all of its potentially qualified laid-off U.S. workers of the job opportunity," the Q&A states.

The Q&A adds that an employer must maintain documentation showing that it has met its notice and consideration requirements, including copies of all relevant letters, e-mails, faxes, Web pages (including those listing details of the relevant job openings and applications by laid-off workers for those openings), and other contemporaneous documents that show when and how notice and consideration was given. In addition, an employer must obtain and maintain written documentation that a laid-off worker has declined to receive notices, requested discontinuation of the notices, or refused to give or update contact information.

While the DOL has clarified the notification requirement for laid-off workers, must an employer contact all laid off workers in the specific or related occupation for which labor certification is sought even if the employer knows that the laid-off worker's qualifications do not objectively meet the requirements of the position? For example, the job opportunity for which labor certification is being sought, let's say a Software Engineer, requires five years of experience in certain computer programming languages like C++, Java and Python. The employer knows that a former worker, also a Software Engineer, who was laid off 3 months ago only had 1 year of experience in C++, but not Java and Python. Is the employer required to notify this worker under 20 CFR 656.17(k) when the employer knows that the laid off worker is not qualified for the position?

The employer must also check off a box on ETA 9089, Section 1.e.26, which broadly asks whether the employer had a layoff in the area of intended employment in the occupation of the job opportunity or a related occupation within 6 months of filing the application. The checking off the "yes" box is likely to trigger an audit and further scrutiny. The next box Section 1.e.26A, asks "were the laid off U.S. workers notified and considered for the job opportunity for which certification is sought?" If the employer checks off the "no" box or the "NA" box, would that be permissible if the laid off worker is clearly not qualified for the position? In other words, when an employer knows that a laid-off worker is not potentially qualified, may it only consider the worker's qualification or does it also need to notify that prior worker? If the labor certification is audited, the DOL will request documentation to establish the number of US workers in the occupation or in a related occupation that were laid off by the employer; a listing of all occupations relevant to the layoffs; an explanation as to why notification or consideration of the employer's

potentially qualified laid-off US workers was not applicable; and proof that any laid off US workers not notified and considered by the employer were not potentially qualified for the job opportunity.

The Board of Alien Labor Certifications in *Matter of Federal Home Loan Mortgage Corp*, 2011-PER-02902 (BALCA February 10, 2014) held that an employer was justified in rejecting a laid-off worker who was not qualified for the position. While it is not clear from this decision whether the employer had notified the laid off worker, it is clear from the resume that the laid off worker was not qualified for the position, according to BALCA. The position in the instant case required a very deep knowledge of SAS, including SAS on Unix and SAS for Windows. The laid-off worker did not have experience with these program tools. Although the Certifying Officer in denying the labor certification assumed that the laid off worker would have obtained the same skills and knowledge for the position for which labor certification was sought, having worked with the employer for three years, BALCA found that the CO's assumption was unfounded and unsupported by the record. *Cisco Systems, Inc*, 2011-PER-02900 (BALCA April 26, 2013), however, provides more clarity regarding whether an employer needs to notify a laid-off worker who is not qualified for the position. There BALCA held that the employer who had not notified a laid-off worker was justified in its rejection of that worker who clearly lacked the qualifications for the position.

It may thus be defensible for an employer to not notify all laid off workers in the occupation for which labor certification is sought, or a related occupation, unless the laid off worker is potentially qualified for the position. Of course, when in doubt, the employer must contact the laid-off worker per the new DOL FAQ. Unfortunately, in the world of labor certification, the DOL imposes unrealistic requirements and burdens upon employers, and one can never know how the DOL will react when an employer justifies that its reason for not notifying laid-off workers was because they were unqualified for the position. The DOL has publically indicated that BALCA does not speak for it, and it may not consider itself to be bound by *Matter of Federal Home Loan Mortgage Corp or Cisco Systems*. Therefore, employers are advised to tread very cautiously when workers have been laid off within six months prior to filing a labor certification on behalf of a foreign national employee.