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

WHY WAS MY PERM SELECTED FOR AUDIT AND/OR SUPERVISED RECRUITMENT? #THATAWFULMOMENT

Posted on February 10, 2014 by Cora-Ann Pestaina

Cora-Ann V. Pestaina

The filing of a labor certification is often the first step when an employer sponsors a foreign national for permanent residency. The purpose of the labor certification process, known today as PERM, is to ensure that the employer has tested the US labor market for qualified and available US workers at the prevailing wage rate prior to filing an I-140 petition to classify the foreign national under either the employment second preference or the employment third preference.

Foreign nationals (and their employers) often want to know why their PERM was selected for audit while PERMs filed on behalf of their colleagues were approved without audit. Many PERM practitioners are familiar with that awful moment when the PERM application for the foreign national who desperately needed a quick approval was issued a Notification of Supervised Recruitment signaling another year, or maybe even two!, on the scary PERM roller coaster. The mystery behind the PERM audit and supervised recruitment process has been no coincidence. The Department of Labor (DOL) has purposefully left employers in the dark about their selection process and frequently shifts their mechanisms all to protect against fraud. Solicitor of Labor Gregory F. Jacob once stated, “Supervised Recruitment is one of many tools the uses to safeguard the integrity of the permanent labor certification process and protect job opportunities for American workers. The department takes seriously its statutory responsibility to ensure that American workers have access to jobs they are qualified and willing to do.”

Nevertheless, through trial and error, certain triggers have been identifiable. We know that PERM applications can be selected for audit for reasons such as random selection; a foreign language requirement; a family relationship between

the employer and the alien; an alien with ownership interest in the employer; layoffs in the same or related occupation; a combination of occupations; and more recently because the alien will telecommute; or the employer utilized an employee referral program. Some audits may also be chosen based upon the industry, the employer or the occupation. In recent times, the DOL has increased Supervised Recruitment for IT employers who will employ the foreign national in a roving or telecommuting position.

The DOL has now shed some much appreciated light on its audit and supervised recruitment selection mechanisms. On January 31, 2014, the DOL's Office of Foreign Labor Certification (OFLC) published the following statement on its website (http://www.foreignlaborcert.doleta.gov/):

> *Section 212(a)(5)(A) of the Immigration and Nationality Act requires the Secretary to certify the admissibility of a foreign national for employment only when the Secretary can certify that the employment of that foreign worker will not adversely impact the wages and working conditions of US workers similarly employed, and that there is a job opportunity for which a US worker is unavailable. As the regulated community knows, the Department of Labor's Office of Foreign Labor Certification (OFLC) is responsible for maintaining the integrity and compliance of the primarily attestation-based PERM Program through the use of certain measures, including audit and supervised recruitment, under a broad integrity review authority. At the time of PERM's implementation, the Department stated that OFLC would select certain applications for audit, employing "auditing techniques that can be adjusted as necessary to maintain program integrity", as well as for quality control. 69 Fed. Reg. 77326, 77328 (Dec. 27, 2004). The Department noted at the time the need for changing audit criteria to focus integrity efforts on program abuse and adjust the audit mechanism as necessary as we gained program experience. 69 Fed. Reg. 77359. Finally, the Department reserved the process of supervised recruitment for a broad application "in any case in which the C O deems it appropriate" as a reasonable quality control mechanism. 69 Fed. Reg. 77360, 77362.*

> *In response to a recent Freedom of Information Act (FOIA) request, we*

> *are releasing and making available to all of the regulated community the following documentation regarding the areas in the PERM Program that have in the past warranted this closer examination. Click here to view the OFLC Audit Plan. These areas were deliberately chosen to ensure we are carrying out our statutory responsibilities while also recognizing the evolving nature of program integrity and quality control.*

> *We hope the publication of this information assists filers, especially first-time filers, comply with the PERM Program's various requirements.*

The OFLC Audit Plan presents Audit and Supervised Recruitment Tiers which specify the types of cases that will be targeted for Audit Review and tagged for Supervised Recruitment. As the DOL has indicated, this plan is being released in response to a FOIA request. Past practice informs us that the DOL would certainly have preferred to continue keeping us in the dark. The plan is dated March 19, 2013 and there is no way to know whether these audit and Supervised Recruitment tiers remain active or whether new tiers have since been added. However, this information does reveal the DOL's thinking with respect to audits and Supervised Recruitment and helps shed some light on the reasons why certain PERM applications are selected. According to the plan, there are eight (8) active tiers and (4) suspended tiers.

The active audit tiers are as follows:

> *TIER ONE: PERMs will be audited if the primary requirement in Section H, Field 4 of the ETA Form 9089 is less than a Bachelor's degree, e.g. "none", "Associates" or "High School" AND the position is not classified under SOC Code 45-2093.00 - Farmworkers, Farm, Ranch, and Aquacultural Animals in Section F on the ETA Form 9089.*

> *TIER TWO: PERMs will be audited where the SOC Code in Section F, Field 2 on the ETA Form 9089 matches one or more of the trade related occupations contained in an attachment.*

The attachment was not published. However, this list would presumably include

positions like Plumber, Electrician, Helpers-Carpenters or Helpers-Painters. It is conceivable that these cases would be audited so that the employer can present its proof that an available US worker could not be found since it is typically easier to find U.S. workers in the trade occupations.

> *TIER FOUR: PERMs will be audited where the employer is a public school listed on an attachment entitled PUBLIC SCHOOLS TO AUDIT.*

The attachment was not published.

> *TIER FIVE: The DOL will audit 50% of PERMs where the offered position requires a degree but does not require any experience. This will be determined by the information presented in Section H, Field 4 and Section H, Field 6 of the ETA Form 9089.*

The logic behind this tier is confusing. It is possible for the employer to indicate a degree requirement in Section H.4; indicate "No" in Section H.6 and yet require experience for the offered position. Section H.6 asks "Is experience in the job offered required for the job?" Section H.10 asks "Is experience in an alternate occupation acceptable?" It is therefore possible for an employer to require no experience in the offered position but instead to require experience in an alternate occupation. Employers commonly offer positions where experience in the job offered is not required but experience in a related position is required. For example, ABC, Inc. may require two years of experience as a Marketing Analyst for the offered position of Marketing Manager. Accordingly, the ABC, Inc. will indicate "NO" to the question in Section H.6 regarding whether experience in the job offered is required and then answer "YES" to the question in Section H.10 indicating that experience in an alternate occupation is acceptable. Also, in Section H.10-A, ABC, Inc. will indicate the number of months of experience required in the alternate occupation. This means that the experience listed in Section H.10-A is the primary experience requirement rather than an alternate requirement. In FAQs Round 10, the DOL, in the context of a question concerning the need to include the Kellogg language (language well-known to practitioners filing PERM applications as the Kellogg language based on Matter of Francis Kellogg, 94-INA-465 (Feb. 2, 1998) (en banc)) on the ETA Form 9089, confirmed that it is perfectly acceptable for an employer to require experience in an alternate occupation and not in the job offered. But based on the information

provided on the OFLC Audit Plan, there is a 50% chance that ABC, Inc.'s PERM application will trigger an audit for supposedly requiring a degree and no experience.

Considering the additional processing time brought on by an audit (currently, in its audit queue, the DOL is only processing PERMs filed in October 2012!), the DOL ought to amend its review under this tier so as not to cause unfair processing delays for employers who actually do require a degree and experience for their offered positions.

> *TIER TWELVE: The DOL will audit 50% of cases where the employer has indicated on the ETA Form 9089 that they have had a layoff. Specifically, if the employer has answered "YES" in Section I, Field 26 which asks "Has the employer had a layoff in the area of intended employment in the occupation involved in this application or in a related occupation within the six months immediately preceding the filing of this application?"*

The ETA Form 9089 goes on to ask, "If yes, were the laid off U.S. workers notified and considered for the job opportunity for which certification is sought?"

Layoffs have long been considered an audit trigger. With the economy continuing to flounder and many employers still reducing their workforce in order to remain competitive, the DOL will continue to more closely examine the employer's good faith recruitment of U.S. workers. The PERM regulations at 20 C.F.R. § 656.17(k)(1) state: If there has been a layoff by the employer 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.

The issue of layoffs is one that PERM practitioners ought to discuss with employers at the outset of the PERM process. If it has been determined that layoffs have indeed occurred (even just one) then the practitioner must go

through the PERM regulatory analysis with the employer.

The active Audit and Supervised Recruitment tiers are as follows:

> *TIER SEVEN: A PERM may be tagged for audit and supervised recruitment if it was submitted after a denial within the same calendar year. Specifically, if the employer's name in Section C, Field 1 is equal to one or more of the employer names listed in the DOL's "Denied _Cases table" AND the alien's name in Section J, Field 1 is equal to one or more of the foreign worker names listed in the "Denied _ Cases table."*

This trigger is interesting because if a PERM is erroneously denied, the employer will usually have to decide whether to re-file the application or file a Request for Reconsideration with the Certifying Officer based on which process appears faster. Clearly, refiling may not always prove to be a faster route.

> *TIER EIGHT: A PERM may be tagged for audit and supervised recruitment if it was re-submitted after it was withdrawn after audit. Specifically, if the Employer's name in Section C, Field 1 is equal to one or more of the employer names listed in the DOL's "Withdrawn_Cases table" AND the alien's name in Section J, Field 1 is equal to one or more of the foreign worker names listed in the "Withdrawn_ Cases table" AND the "Audit Notification Date" in the "Withdrawn_ Cases table" is not null.*

Employers may not be saving themselves any time by withdrawing and re-submitting an audited PERM but in fact, may be delaying the processing of the application by a year or more if it gets selected for Supervised Recruitment.

> *TIER ELEVEN: A PERM may be tagged for audit and supervised recruitment if it was not filed electronically and had to be manually entered by staff at the Atlanta National Processing Center.*

No employer should knowingly venture down this road.
The OFLC Audit Plan also lists some inactive tiers which are currently suspended and therefore are not triggers for audits or supervised recruitment. These

include:

> *TIER THREE: H-1B Dependent Employers.*

Hopefully this remains where it belongs as a non-trigger.

> *TIER SIX: Requiring a degree and indicating that the alien's Class of Admission as H-2A, H-2B or EWI (Entered Without Inspection).*

> *TIER NINE: Employers who recently issued layoffs.*

The DOL has apparently moved away from auditing every PERM indicating a layoff to now auditing only 50% of PERMs which indicate a layoff.

> *TIER TEN: Employer with a history of roving.*

Practitioners who routinely file PERMs involving roving employees have definitely noticed that the DOL has calmed down its onslaught of audits and Supervised Recruitment Notifications on these types of PERMs. And it didn't come a moment too soon.

This OFLC Audit Plan can be extremely helpful. Rather than waiting until the employer or foreign national demands an explanation as to why a PERM was selected for audit or Supervised Recruitment, the above list of active and inactive tiers allows practitioners to better advise employers thereby making the PERM process a tad less fraught with danger. Just a tad though.