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BALCA, WHAT HAVE YOU BEEN UP TO SO FAR IN 2015?

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I'm sure all PERM practitioners would agree that it's always good (in fact necessary!) to check in with the Board of Alien Labor Certification Appeals (BALCA). One never knows what issues BALCA will comment on next and as we navigate those often treacherous PERM waters, we need all the help we can get! Here are a couple of recent BALCA tidbits.

BALCA applies *Matter of Symantec*

In *Computer Sciences Corporation*, 2012-PER-00642 (Jul 9, 2015) the Certifying Officer (CO) denied the PERM on the grounds that the Employer's inclusion of the language, "Willingness to travel; may require work from home office" in its recruitment advertisements posted on its website and on a job search website, constituted terms and conditions of employment that exceeded those listed on the ETA Form 9089 in violation of 20 C.F.R. §656.17(f)(6).

As background, employers recruiting under PERM for a professional position must complete the mandatory recruitment steps required by 656.17(e)(1)(i) as well as three additional recruitment steps provided in 656.17(e)(1)(ii).

The Employer's advertisements posted on its website and on the job search website were in satisfaction of two of the three required additional recruitment steps. In reversing the CO's decision, BALCA simply cited its en banc decision in *Symantec Corp.*, 2011-PER-1856 (July 30, 2014) which I previously blogged about in greater detail here, and held that 656.17(f) does not apply to additional forms of recruitment. The Employer dodged a bullet here.

BALCA finds that Employer's letter was within the record and can be considered on appeal

Once a PERM is denied, if the Employer files a motion for reconsideration,

under 656.24(g)(2), this motion can only include (i) documentation that the Department actually received from the employer in response to a request from the CO to the employer; or (ii) documentation that the employer did not have an opportunity to present to the CO, but that existed at the time the PERM was filed and was maintained by the employer to support the PERM application in compliance with 656.10(f).

In *New York City Department of Education*, 2012-PER-02753 (June 19, 2015), the CO first denied the PERM application on the grounds that the Employer failed to provide a recruitment report that accurately accounted for the number of applicants for the job opportunity. The Employer filed a motion for reconsideration arguing that it properly accounted for all applicants. The CO, ignoring this request for reconsideration, issued a second denial letter, finding that the Employer did not provide job-related reasons for its rejection of US workers. Based on the documentation the Employer had submitted with the audit response, it appeared that US workers were rejected because they expressed disinterest in the position but the CO also reviewed the Employer's interview notes that stated the candidates were available "immediately" or "soon." The Employer filed a second motion for reconsideration explaining, not only that the CO cannot ignore the first motion and issue a second denial, but, moreover, that it had indeed lawfully rejected the US workers. Along with its motion the Employer provided a letter from its Executive Director explaining the company's interview process and the fact that the Employer made the determination to reject the applicants after they expressed their disinterest at a second interview.

Since the Employer failed to properly explain its interview process and reasons for rejection in its audit response, BALCA found that the CO was justified in his denial of the case. However, in forwarding the case to BALCA, the CO acknowledged the letter that the Employer submitted along with its second motion explaining its hiring process. The CO did not refuse to accept it on the grounds that it was barred under 20 CFR 656.24(g)(2). Under that regulation, since the Employer's had previously had a chance to submit this letter with its audit response but did not and since this letter was not documentation that existed at the time the PERM was filed, the CO would have been justified in refusing to accept it. But since the CO did not, the letter became part of the record that BALCA had to consider upon appeal. With the letter fully explaining the Employer's interview process, BALCA had no choice but to find that the US

workers had been lawfully rejected.

The take away from this case is how important it is to fully respond to an audit request. Had the CO rejected the Employer's letter, the denial would have been upheld. As BALCA pointed out, the CO's audit letter very clearly requested a report that lists the date(s) the employer contacted the US worker; the dates the employer interviewed the US worker; the specific reasons the US worker was rejected; and information that documents the employer contacted the applicant(s). In its audit response, the Employer failed to provide this detailed information.

BALCA held that an original signature is not required on the recruitment report but the report must be signed

In another case involving *New York City Department of Education*, BALCA upheld the denial of three PERMs finding that the typed name of the Executive Deputy Director at the bottom of the recruitment report did not constitute a valid signature. The CO had denied the Employer's PERM after audit for failure to submit a signed report as required under 656.17(g)(1). The Employer, in its request for reconsideration, explained that it had a physically signed recruitment report in its audit file and this report, due to administrative error, simply was not included in the audit response. The Employer alternatively argued that the regulations do not require a handwritten signature and the typed name of the Employer's Deputy Executive Director was satisfactory. The CO transferred the file to BALCA where each of the Employer's arguments were shut down.

BALCA held that the fact that the Employer had a physically signed copy of the recruitment report speaks to the fact that the typed name on the bottom of the report submitted with the audit response was not intended to be a signature. The Employer argued that "original signatures" are not required. BALCA agreed that 656.17(g)(1) does not require an original signature but again stated that the typed name on the bottom of the report was not intended to be a signature – original or otherwise. The Employer argued that fundamental fairness ought to prevail as it had only failed to submit the physically signed report due to administrative error. BALCA held that the Employer had been given an opportunity to submit the signed report with the audit response and failed to do so. Finally, the Employer argued that each statement in the recruitment report was verified by other documentation submitted with the audit response

and therefore the omission of the physically signed report was immaterial. BALCA, using one of its favorite quotes, held that "PERM is...an exacting process." Essentially, because a signature is a regulatory requirement under 656.17(g)(1), then there must be a signature, no matter how unfair it may seem in light of all the facts of the case.

It's really a shame whenever something so simple and unintended leads to a PERM denial or in this case, three PERM denials. But it highlights the importance of checking and rechecking an audit response before it is submitted and the importance of having, if possible, more than one pair of eyes review the response prior to submitting it. PERM can be a very unforgiving process.

BALCA says US workers can be lawfully rejected for "lack of experience"

In *Presto Absorbent Products, Inc.*, 2012-PER-00775 (May 26, 2015), the CO denied the PERM finding that the Employer failed to provide lawful reasons for rejection. The Employer's recruitment report stated that the Employer received eight resumes and that the applicants lacked experience. The Employer also stated that "All applicants were reviewed to determine if they would be able and qualified to perform the duties of the position within a reasonable amount of on-the-job training. All applicants were determined not to have been able and qualified for the position even with a reasonable amount of on-the-job training." BALCA held that the regulation does not indicate a level of specificity beyond what the Employer provided and that "lack of experience" is a lawful reason for rejecting applicants.

While it is indeed heartening anytime BALCA errs on the side of reason, I don't think PERM practitioners ought to rely too heavily on this decision and it's always best to be as specific as possible in providing the reasons for rejection of US workers. For instance, instead of "lacks the technological experience" it would be clearer to state, "lacks experience in the required technologies such as C++, Java & PL/SQL" and instead of "lacks experience" it might be better to say "applicant possesses only 2 years of experience but the position requires 5 years of experience." Even if it may appear silly to have to spell out the obvious, it might be valuable time and money saved by preventing an erroneous denial.

BALCA comments on newspaper circulation and distance to the area of intended employment

In *Pentair Technical Products*, 2011-PER-01754 (Aug. 5, 2015), the Employer used

the *San Antonio Express* newspaper (the *"Express-News"*) for its first Sunday newspaper advertisement to recruit for a professional position in Pharr, Texas. The CO denied the PERM on the grounds that the *Express-News* is circulated in San Antonio, Texas and not in the area of intended employment – Pharr, Texas.

Under 20 CFR § 656.17(e)(1)(i)(B)(1), one option for an employer's mandatory print advertisements for a professional position is "lacing an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, willing, qualified, and available US workers."

In a motion for reconsideration, the Employer argued that the *Express-News* is circulated in Pharr, Texas. The Employer argued that it chose the *Express-News* as it is the largest newspaper with general circulation in Pharr in order to reach the largest number of US workers. The Employer's attorney also argued that he had personally contacted the *Express-News* and a representative at the newspaper had verified that the paper is circulated in Pharr, Texas. The CO nevertheless found that his denial was valid because San Antonio is four hours away from Pharr, well outside commuting distance and so the Employer had failed to advertise in the area of intended employment.

BALCA found that the issue of whether or not San Antonio is outside normal commuting distance from Pharr is relevant only if the *Express-News* were only available in San Antonio and not in Pharr. However, the record established that the *Express-News* is a newspaper of general circulation in Pharr. Accordingly, the fact that it is published in San Antonio is of no legal consequence.

BALCA pointed out that when a single area of intended employment is served by multiple newspapers, the CO ought not to be concerned with which paper reaches the most people but rather with whether the newspaper reached the intended audience and is a "newspaper of general circulation in the area of intended employment." As an example, BALCA stated that if Trenton, NJ is the area of intended employment, whether *The New York Post* is more "appropriate" than *The Trenton Times* because it has more readers is irrelevant and there is nothing in the regulations that requires an employer to utilize the newspaper with the highest circulation in the area of intended employment or the newspaper published closest to the area of intended employment.

At first look, the case appears to be very encouraging. As long as the

newspaper reaches its intended audience, all is well. Not so fast. This is another one of those cases where BALCA's decision is expressly limited to the precise facts of the case. BALCA takes time to point out that in this case the CO did not deny the PERM based on a finding that the Employer had failed to utilize the "most appropriate" newspaper. The only issue raised in the denial was whether the Employer placed a newspaper advertisement in the area of intended employment so that is the only issue that BALCA has addressed. As to whether *Express-News* was the newspaper "most appropriate" to the occupation for which the Employer was recruiting, we will never know.

It can be very difficult for employers to decide where to advertise. This case answers the question of whether it is permissible to advertise in T*he New York Times* for a position in New Jersey. Yes, it is permissible because *The New York Times* is a newspaper of general circulation in New Jersey. But this case does not provide any guidelines for an employer struggling to determine which newspaper is "most appropriate." For instance, in recruiting for a professional position in New York City, how does an employer decide between *The New York Post vs. The New York Times*? It is significantly more expensive to advertise in The New York Times and so an employer may not want to do that unless that newspaper is the only newspaper that would be permissible under the regulations. What statistics would that employer need to examine? Should that employer just assume that *The New York Times* is the newspaper most read by professionals and therefore *The New York Times* will always be "most appropriate" in recruiting for any professional position? In a footnote, BALCA mentioned that the Employer utilized *The Monitor* as the newspaper for the second Sunday advertisement and that this was not challenged by the CO. BALCA pointed out that the regulations refer to "newspaper" in the singular in requiring advertisements to be placed "in the newspaper of general circulation in the area of intended employment." BALCA commented that the regulations do not appear to contemplate a situation where more than one newspaper is circulated in the area of intended employment and the newspapers are equally appropriate given the employment at issue and the workers likely to apply for the job. BALCA conveniently declined to comment on that issue. So while it is great that employers can choose any newspaper as long as it is one of general circulation in the area of intended employment, employers need to remain concerned about ensuring that the paper chosen is the "most appropriate" paper and it's probably just best to use the same paper for both of the Sunday

ads.

These recent cases highlight the “little” things that can lead to a big denial of a PERM. Just reading these cases creates heightened awareness of potential issues and naturally leads to better and more focused reviews of documentation prepared during the PERM process and documentation submitted to the Department of Labor.