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BALCA REVERSES LABOR CERTIFICATION DENIALS BY UPHOLDING REAL WORLD JOB ADVERTISEMENTS

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Late last year, just in time to ruin the holidays for those affected, the Department of Labor (DOL) started a round of PERM denials setting forth another new and previously unheard of reason for denial. Despite having certified these types of PERMs for years (lulling practitioners into another false sense of security), the DOL started denying PERM applications where the employers, in their PERM recruitment, used terms such as "Competitive," "Depends on Experience" (DOE), "Negotiable," "Will Discuss With Applicant," "Other," or similar verbiage in lieu of stating the offered salary.

To provide some background, an employer has to conduct a good faith recruitment of the labor market in order to obtain labor certification for a foreign national employee. Obtaining labor certification is often the first step when an employer wishes to sponsor a foreign national employee for permanent residence. The PERM regulations do not require the employer to state the offered salary in any of its recruitment. In its list of frequently asked PERM questions (FAQs) on the Office of Foreign Labor Certification's website, question number 5 under the heading of "Advertisement Content" is asked and answered as follows:

> ***Does the offered wage need to be included in the advertisements?***
>
> *No, the offered wage does not need to be included in the advertisement, but if a wage rate is included, it can not be lower than the prevailing wage rate.*

The Preamble to PERM Regulations, 69 Fed. Reg. at 77347 also discusses the elimination of the requirement that the wage offer must be included in

advertisement.

In filing a PERM application, the employer, under 20 C.F.R. §656.10 (c), must certify to the conditions of employment listed on the Application for Permanent Employment Certification (1) “he offered wage equals or exceeds the prevailing wage determined pursuant to §656.40 and §656.41” and (8) ‘he job opportunity has been and is clearly open to any U.S. worker.” And 20 C.F.R. §656.24(b)(2) requires the Certifying Officer (CO) to make a determination as to whether there “is in the United States a worker who is able, willing, qualified and available for and at the place of the job opportunity.” Using these regulations as authority for some of its denials, the DOL, after acknowledging the fact that the employer is not required to list a wage in its advertisements, goes on to state that the employer’s indication of "Competitive," "Depends on Experience (DOE)," "Negotiable," "Other," etc. is in fact an expression of a salary and that any discussion concerning wages must sufficiently inform applicants of the job opportunity outlined in the PERM application. The DOL claims that terms like “Depends on Experience” and “Negotiable” could be vague and could place a potential burden on the US worker to reasonably determine the wage rate for the position or could indicate that an applicant’s experience might potentially cause the employer to offer a salary which is lower than the salary offered to the foreign worker. Incredulously, according to the DOL, a term like a “Will Discuss With Applicant” could prevent a potentially qualified US applicant from making an informed decision on whether he/she would be interested in the actual job opportunity, and could deter a number of such applicants from applying. The denials claim that the employers, by listing terms that potentially deterred US workers from applying, did not adequately test the labor market.

Under the PERM regulations at 20 CFR §656.17(e)(1)(i)(A) and §656.17(e)(2)(i), the employer’s job order for both professional and nonprofessional occupations must be placed with the State Workforce Agency (AWA) serving the area of intended employment for a period of 30 days. But one of the problems many employers face is with SWAs that require the employer to list an offered wage and to make a selection from a drop down menu under “Pay Comments” choosing from comments which include “DOE,” “Will Discuss with Applicant,” “Commission Only,” “Not Applicable,” etc. The DOL has been issuing denials in cases where, for example, the employer listed the offered salary as $0 or $1 in an effort to get past this requirement and then indicated “Will Discuss With Applicant” under the pay comments. As ludicrous as it is to suggest that any US

worker would be deterred from applying for the offered position simply because the offered wage was listed as $0 – which obviously could never be the actual case – this is exactly what the DOL suggests in its denials.

The American Immigration Lawyers Association (AILA) did raise this issue with the DOL in one of its stakeholders meetings last year informing the DOL that many of its state job order systems, and many job search websites and other recruitment sources require the use of, or they automatically insert, the terms that are now the cause of the new denials. The DOL only agreed to review the issue and may possibly issue an FAQ in the future. But they declined to suspend further denials or reopen past denials.

Many motions to reconsider have been filed and remain pending. The Board of Alien Labor Certification Appeals (BALCA) has just issued a couple of decisions that will hopefully help shed light on how those pending motions should be decided. In *Bahwan Cybertek, Inc.* 2012-PER-01147 (Feb. 18, 2016) the employer filed a PERM application indicating that the offered wage was $99,500. The PERM was audited. The employer submitted copies of its SWA job order which showed that the employer had listed the minimum pay and the maximum pay as $1 per year. Under "Pay Details" the employer had indicated "Competitive Salary. Will be discussed with the candidate." The CO denied certification finding that the job order listed a wage rate lower than the prevailing wage in violation of 20 C.F.R. §§656.10(c)(8) and 656.17(f)(7). In a request for reconsideration the employer stated that it normally does not list wages in its recruitment and the PERM rules do not require it but that the Massachusetts SWA's online job order system asked for minimum and maximum pay for the advertised position and so the employer entered $1 so that the system would accept the posting but added the pay comments as clarification making it clear that the salary was not $1. The CO still found that the statements "competitive salary" and "will be discussed with the candidate" were "not demonstrably specific enough to overcome the potential chilling affect arising from advertising $1 as an annual salary." The employer appealed to BALCA.

BALCA simply pointed out that the regulation at 20 C.F.R. § 656.17(f) provides that "dvertisements placed in newspapers of general circulation or in professional journals before filing the Application for Permanent Employment Certification must … ot contain wages or terms and conditions of employment that are less favorable than those offered to the alien" and that, by its own terms, this regulation only applies to advertisements in newspapers or

professional journals, and does not regulate the content of SWA job orders.

But with regard to whether or not the job opportunity had been clearly open to any US worker as the employer attested to under 20 C.F.R. §656.10(c)(8), one of the grounds for denial being used in the slew of recent denials discussed above, BALCA confirmed that stating a wage rate below the actual wage offer for the job definitely calls into question whether the job opportunity is indeed open to US workers. However, BALCA found that in the instant case, the employer's indication of a wage rate of $1 was obviously a placeholder based on a generic data field in the SWA job order and was clearly not intended to reflect the actual wage rate. BALCA found that that "no reasonable job seeker would have been discouraged from applying for the job, especially since it was clarified that the employer is offering a competitive salary and that the salary was subject to discussion.

Similarly, as in the recent denials, where an employer has indicated a salary of $0 and had indicated that the salary will be discussed with the applicant, no reasonable job seeker would have been deterred by that.

In another case, *Global TPA LLC*, 2012-PER-00847 (Feb. 18, 2016), the offered Project Manager position required 4 years of specific experience which the employer detailed on the ETA Form 9089. Upon audit, the CO discovered that the employer had advertised on a website, as one of the three additional forms of recruitment required for professional positions under 20 C.F.R. § 656.17(e)(1)(ii), indicating that the Project Manager position requires 4-5 years of experience. The CO listed this as one of its three reasons for denial. The employer filed a motion to reconsider but the CO upheld its denial and the case went up to BALCA. BALCA referenced its *en banc* decision in *Symantec Corp*., 2011-PER-1856 (July 30, 2014) which I previously discussed here. BALCA pointed out that under *Symantec* the additional professional recruitment only requires documentation of recruitment for the *occupation* involved in the application and not recruitment for the *particular job opportunity* at issue. Therefore, the fact that the employer's website posting stated 4-5 years of experience as opposed to 4 years of experience as listed on the PERM application did not violate the regulations. In a footnote, BALCA pointed out that the CO in this case had only cited 20 C.F.R. §656.17(f)(6) as a ground for denial in regard to the discrepancy between the website posting and the ETA Form 9089 in regard to the experience required. BALCA pointed out that its decision is not an opinion on whether the website posting may have been in conflict with 20 C.F.R.

§656.10(c)(8) which requires that the employer certify that the job opportunity has been and is clearly open to any U.S. worker.

In any event, even if BALCA declined, in that case, to state that the job opportunity was nevertheless clearly open to US workers, it doesn't mean that the argument can't still be made. Under *Symantec*, the additional forms of recruitment can represent real world alternatives and can advertise for the occupation involved in the application rather than for the job opportunity involved in the application as is required for the newspaper advertisement. Therefore, when it comes to one of these forms of recruitment, an employer's use of terms like "Competitive," "Depends on Experience" (DOE), "Negotiable," "Will Discuss With Applicant," etc. does not take away from the employer's advertisement of the occupation and is therefore not in violation of any PERM regulation. BALCA specifically stated in *Bahwan Cybertek* that no reasonable job seeker would have been discouraged from applying due to the use of such terms. And to state what is probably obvious, someone that would read such terms and be left so confused as to be deterred from applying is quite likely not qualified.

After its slew of denials starting late last year and the stream of motions to reconsider that must have resulted, the DOL's ultimate stance on this issue remains to be seen. Anecdotal and unscientific evidence seems to indicate that they have stopped or slowed down the issuing of these types of denials.

Nevertheless, going forward, it would be wise to stay away from usage of any of the "problem terms" indicated above to the extent possible.