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BALCA UPDATE: RECENT NOTABLE CASES

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While we have no idea what the labor certification process will look like under the Trump administration, it still behooves all PERM practitioners to keep up with the Board of Alien Labor Certification Appeals (BALCA) decisions as they continue to directly affect how we prepare and file PERM applications. To that end, this blog will provide a brief summary of recent notable BALCA decisions.

Listing non-quantified skill requirements on the ETA Form 9089

At a December 7, 2016 meeting between the Department of Labor (DOL) Liaison Committee of the American Immigration Lawyers Association (AILA) and the DOL's Office of Foreign Labor Certification (OFLC), OFLC representatives stated that pending review of the BALCA decision, *Smartzip Analytics*, 2016-PER-00695 (Nov. 9 2016), they have **suspended the issuance of denials** involving the issue presented in that case and are preparing an FAQ relating to unquantified experience in Section H.14.

As background, after issuing PERM approvals dating back more than a decade to the inception of the PERM program, the DOL suddenly started to deny PERM applications where the employer included a requirement for a specific amount of work experience in sections H.6 and H.10 of the ETA Form 9089 and also a non-quantified skill requirement in section H.14. For example, in addition to indicating a requirement of a Bachelor's degree plus 5 years of experience, an employer might also indicate in section H.14 that qualified applicants "must have experience in C++, Java & COBOL." The DOL started denying labor certifications where the foreign national's work experience in Section K of the ETA Form 9089 indicated the required work experience (in this example 3 years) but not also a full 3 years of experience in the specific technologies listed in section H.14.

While an indication of the quantified experience required is requested in

sections H.6 and H.10, which ask whether experience in the job offered or in an alternative occupation is required, and "if yes, number of months of experience required" the same is not required in section H.14. The ETA Form 9089 indicates that H.14 should be used to list “specific skills or other requirements." The instructions to the ETA Form 9089 also state that, in this section, the employer should "Enter the job related requirements. Examples are shorthand and typing speeds, specific foreign language proficiency, and test results. The employer must be prepared to document business necessity for a foreign language requirement." Nowhere does it state that a specific number of months or years must be indicated in H.14.

In recent denials, the DOL argued that a failure to quantify the experience in H.14. left the Certifying Officer (CO) unsure as to how much experience was actually being required and uncertain of how to review applicants’ qualifications.

Then, in *Smartzip Analytics*, the employer listed the minimum requirements on the ETA Form 9089 as a Bachelor’s degree in Computer Science, Engineering or a related field and 60 months of experience in the job offered with 60 months of experience in any related occupation also being acceptable. In section H.14, the employer listed the following:

> Experience must include experience with: delivering native mobile products at scale; publishing iOS application; Objective-C, iOS SDK, Cocoa Touch, Xcode, Interface Builder, and Auto-Layout; knowledge of Apple Human Interface Guidelines; Java.

The CO denied the application because Section K of the ETA Form 9089 did not demonstrate that the foreign national had 60 months of experience in the specific skills listed in section H.14. In a request for reconsideration the employer argued that it did not require any specific amount of experience for the skills listed in H.14. The CO held his ground and argued that by not qualifying the skills experience the employer could require more experience or proficiency of US worker applicants than it required of the foreign national and that the CO had no way of determining whether the foreign national met the employer’s requirements for the position. The employer appealed to BALCA.

BALCA relied on reasoning employed in another case, Apple, Inc., 2011-PER-01669 (Jan. 20, 2015) where BALCA considered whether the information presented in Section K of the ETA Form 9089 established that the foreign

national met the special skills requirements listed in section H.14 and held that the ETA Form 9089 only solicited information about the foreign national's work experience and did not solicit information regarding his skills gained outside of employment. Following the same reasoning, the panel in *Smartzip* similarly held that, unlike sections H.6 and H.10, in section H.14 the ETA Form 9089 does not solicit a statement of a duration requirement for the special skills. BALCA held that failure to provide a duration requirement for the special skills cannot be the basis for a denial without legally sufficient notice of a requirement to do so.

Hopefully, the forthcoming FAQ will clearly specify how special skills ought to be listed and make a clear distinction between skills like Java versus skills like the ability to type 50 words per minute or to speak French. While it might make sense for an employer to require 6 months of experience in using Java, there really would be no point to a requirement that the employer also issue a duration requirement for the ability to speak a foreign language or type at a certain speed.

Use of terms like "Depends on Experience (DOE)", "Competitive", "Negotiable" or similar language in recruitment in lieu of listing the actual wage

In late 2015, the 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, 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. I previously blogged about this here. The DOL claimed 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. 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 claimed that the employers, by listing terms that potentially deterred US workers from applying, did not adequately test the labor market. Numerous motions to reconsider were filed.

Recently, *Matter of Tek Services LLC*, 2016-PER-00332 (Nov. 17, 2016), the employer's recruitment did not specify a particular salary but indicated that the employer was offering a "competitive salary." For reasons similar to those described above and in my previous blog, the CO denied the application. BALCA reversed the denial finding that the CO did not cite a specific regulatory requirement that had been violated by the employer. BALCA was not convinced by the CO's argument that reading the words "competitive salary" creates a burden on US workers to identify the competitive wage because these applicants are under no obligation to identify this wage before applying for the position. BALCA pointed out that reading "competitive salary" in an ad also does not prevent applicants from making an informed decision on their interest in the job because this is more informative than an advertisement that is totally silent regarding the wage, an approach perfectly permissible under the regulation.

OFLC representatives have informed that they are currently reviewing the BALCA decision in *Matter of TekServices* and they have suspended all denials involving this issue.

Rejecting an applicant based on salary expectations

It is completely lawful to reject a US worker who desires a salary that is higher than the offered wage. But, the case of Techorbits, Inc., 2015-PER-00214 (Dec, 9. 2016) serves as a cautionary tale.

The employer filed a PERM application for the position of Business Development Manager. The application was audited. After reviewing the audit response, the CO denied the application finding that the employer had unlawfully rejected two applicants without interview claiming that the applicants desired a higher salary than the salary offered for the position. The CO stated that the employer was required to follow up with the applicants to verify whether they would accept the position at the offered salary.

In a Request for Reconsideration the employer argued that both applicants had been interviewed through interview questionnaires and phone interviews. The employer submitted an affidavit from the interviewer as to what was discussed in his interview with Applicant S.T. The employer also argued that Applicant M.D. rejected the job opportunity stating that "he would have considered this salary a few years ago, but not now."

The CO denied the Request for Reconsideration. Regarding Applicant M.D., the CO found that he was indeed lawfully rejected based on the minimum salary he stated on the interview pre-screening form. However, Applicant S.T.'s pre-screening form indicated that his minimum salary was "open to discussion" and his resume indicated a wide range as his desired salary. The CO held that the employer had ample opportunity to submit the affidavit from the interviewer of Applicant S.T. in the audit response but did not do so. Therefore, the CO refused to consider it in the Request for Reconsideration. Without considering this affidavit, there was nothing else in the record to demonstrate that wages were ever discussed in an interview with Applicant S.T. and a rejection based on his requested salary listed as "open to discussion" was unlawful.

BALCA agreed with the CO. Without evidence to the contrary, it appeared that Applicant S.T. was rejected based on his responses to the employer's pre-interview questionnaire. Even the employer's email to Applicant S.T. stated, "Your minimum salary requirement you indicated on the questionnaire is higher than what is being offered for the position." This did not help the employer in trying to prove that the applicant had been rejected based on his answers during an actual interview. The employer also tried to argue that Applicant S.T. never responded to the employer's rejection email to dispute the employer's statements. BALCA shut down this argument stating that the onus is not on the applicant to correct an employer's erroneous assumption.

BALCA also pointed out that an employer may reject an applicant as unwilling to accept the salary offered **only after** the position has been offered to the applicant at the salary listed and there is documentation of the offer and the applicant's refusal. BALCA cited various cases that stand for the requirement that the position must first be offered to the applicant and the applicant must actually decline based on the low salary.

It's interesting that BALCA did not comment about Applicant M.D. The CO found that he was lawfully rejected based only on his indication of a higher salary on his pre-interview questionnaire. But he did not actually receive and decline a job offer.

This case provides some helpful tips and reminders. An employer's reliance on a US worker's statements or demands as a lawful reason(s) for rejection must be very carefully documented. Pre-interview questionnaires are a great tool but employers need to carefully review them and follow up in an interview with the

applicant on any statements that could potentially be used to reject the applicant. A statement indicating that the applicant will discuss wages with the employer is obvious but it might be best to also discuss an applicant's indication of desired wage that is higher than the offered wage. This way the employer has a chance to actually inform the applicant of the offered wage and get his withdrawal of his application if he finds the wage too low. And, as the employer learned in the instant case, an interviewer's affidavit is an important part of the audit file and best practice dictates that it should be prepared and executed right after the interview and submitted as part of the employer's audit response.

Is a PERM position really a "future" position if the Beneficiary is already employed in the position?

In Bally Gaming, Inc., 2012-PER-10729 (Sept. 2, 2016) the employer filed a PERM application for the position of Software Engineer located in Egg Harbor Township, NJ. The CO noted that the foreign national resided in Kennesaw, Georgia and in an audit notification requested documentation demonstrating the location of the offered position.

In the audit response, the employer explained that the foreign national currently performs the duties of the position at both locations based on the employer's business needs but the offered permanent position will in fact be located in NJ. The employer's application for a prevailing wage determination (PWD) indicated the New Jersey location and no travel requirement.

The CO denied the case finding that the employer had failed to obtain the proper PWD since the foreign national would also be working in Kennesaw, Georgia and failed to indicate a travel requirement on the ETA Form 9089. The employer filed a Request for Reconsideration and explained that the CO had actually misinterpreted its audit response. The employer explained that the foreign national holds H-1B status and is permitted under his H-1B to work in both locations but the permanent position does not entail any travel between the two locations.

The CO denied the reconsideration request based again on its incorrect interpretation of the PWD. The CO also stated that since the employer is permitting the foreign national to live in Georgia and travel to New Jersey to perform the job duties then the foreign national is receiving a benefit of travel or remote work that applicants for the job opportunity were not offered. The

CO forwarded the case to BALCA.

The employer submitted a brief to BALCA arguing that the temporary H-1B position and the permanent position offered on the labor certification are different and that there is no legal requirement that the PERM application be for the same position in which the foreign national is employed in nonimmigrant status. BALCA found that the employer's PWD was indeed fully consistent with the ETA Form 9089 and also agreed with the employer that there is no requirement in the PERM regulations or in the Immigration and Nationality Act that both positions be identical. The case was remanded for certification.

What's interesting about this case is contained in footnote 7 where BALCA suggests that there remains the question of whether the CO could deny certification on the basis of the employer's failure to offer US workers the same benefit of travel or remote work that the foreign worker was already receiving. Due process concerns prevented BALCA from examining this issue. Since the CO initially asserted this basis for denial on a request for reconsideration, the employer was effectively denied any opportunity to address the new basis and, if appropriate, supplement the record in its request for reconsideration by the CO. BALCA also declined to address this question since it already made the determination that the CO had erred in requiring that the permanent position and the temporary position be identical.

At this point in time, we have the benefit of guidance which was not available to the employer in *Bally Gaming.* We know that the DOL has confirmed that the 1994 Barbara Farmer memo remains the controlling guidance on issues relating to employees who do not work at a fixed location. The DOL is still flagging cases where the foreign national's residence is not within commuting distance of the work location. Inasmuch as a PERM position is an offer of "future" employment, if the foreign national already holds the position and is afforded a benefit in order to perform in the position, employers must be careful to offer that same benefit to US workers. I previously blogged here and here about employers' obligation to list items or conditions of employment in its advertisements.

Other interesting cases

Micron Technology, Inc., 212-PER-02116 (Aug. 1, 2016) – BALCA held that an employer may not reject applicants for not having taken specific courses when

the ad only required "knowledge of..." The employer was obligated to explore other ways in which the applicants may have gained the required knowledge.

Humetis Technologies, Inc., 2012-PER-02098 (Aug. 4 2016) - In response to an audit notification, the employer submitted email correspondence between the employer and the newspaper of general circulation. The correspondence indicated the title of two occupations to be advertised along with a description of the requirements for each position. The email confirmed that an ad would be placed online in the newspaper but did not verify the dates of publication or confirm the employer's payment for the publication.

The regulations at 20 CFR 656.17 provide that an employer "can" document its placement of two Sunday ads by furnishing copies of the newspaper pages or proof of publication furnished by the newspaper. Various BALCA cases have established that other types of documentation could also be accepted but must be reasonably equivalent to the proof listed in the regulations. However, BALCA held that the employer's failure to product tear sheets, a publisher's affidavit or additional proof of publication deprived the CO of concrete evidence of the timing of the ads and the publication actually used.

Robert Bosch LLC, 2012-PER-01739 (Aug. 25, 2016) – The CO denied certification because of a discrepancy between the total number of resumes (62) stated in the recruitment report submitted with its audit response and the total number of job applicants (61) for which rejection reasons were cited in the recruitment report. The Employer requested reconsideration, explaining that the discrepancy was the result of a typographical error in its "recruitment chart" and it offered a corrected version of the recruitment report. BALCA held that the CO properly refused to accept and consider the employer's corrected recruitment report which was prepared after the initial denial and thus barred by 20 C.F.R. §656.24(g)(2)(ii) which precludes an employer from submitting in an Request for Reconsideration, documentation that it previously had an opportunity to submit.

One tiny and unintentional mistake could bring a quick and unfortunate end to what is a costly and often lengthy process for an employer and foreign national. But reviewing only one BALCA case can make all the difference. Despite the fact that the DOL continues to constantly shift the goal posts in the PERM process, reviewing these cases can not only assist with avoid pitfalls but can also provide encouragement when considering appealing to BALCA.