



## HOW BINDING ARE DOL FAQs?

*Posted on August 22, 2017 by Cora-Ann Pestaina*

As PERM practitioners, we are all familiar with Department of Labor's (DOL) Frequently Asked Questions (FAQs). Going as far back as 2005, the year of the inception of the PERM program, there have been various rounds of DOL FAQs on a wide range of topics including on how to file or withdraw a PERM application; how to prepare a PERM Recruitment Report; on the best practices for appeals to the Board of Alien Labor Certification Appeals (BALCA); on what constitutes a familial relationship; on Supervised Recruitment; and on and on. PERM practitioners rely on these FAQs to explain DOL's requirements and expectations in the preparation and filing of PERM applications. These FAQs can even be used to remind the DOL of its own requirements when an erroneous PERM denial has been issued. But, at the end of the day, how binding is a DOL FAQ? Can the DOL deny a PERM application solely because the instruction in an FAQ was not followed? This issue was discussed in the following cases.

In [\*Matter of Guess?, Inc.\*](#) 2015-PER-00504 (June 28, 2017) the Employer filed a PERM application seeking to sponsor the foreign national for the offered position of Senior Financial Analyst. The Employer listed the job requirements as a Bachelor's degree in Finance and 60 months of experience in the job offered. In Box. H.14 of the Form 9089, the Employer further stated that CPA licensure is required. However, when the Employer listed the foreign national's qualifications in Sections J and K of the Form 9089, there was no indication that the foreign national was a licensed CPA. The Certifying Officer (CO) denied the application because the foreign national's qualifications listed on the Form 9089 failed to demonstrate that he met the requirements for the offered position, specifically CPA licensure. The CO noted that Section K of the Form 9089 instructs employers to list all jobs the sponsored foreign national has held as well as any other experience that qualifies the foreign national for the job

opportunity. The CO further pointed out that the Office of Foreign Labor Certifications (OFLC) had published guidance through an FAQ on July 28, 2014, prior to the Employer's submission of the Form 9089. To read the FAQ, click [here](#) and scroll to "Alien Experience." The FAQ states:

When the employer lists specific skills and other requirements for the job opportunity in Section H, Question 14, the employer must also demonstrate on the ETA Form 9089 that the foreign worker possesses those skills and requirements. In order to do so, the employer should list separately in Section K all the foreign worker's qualifications, such as certificates, licenses, professional coursework, or other credentials that meet the requirements to perform the job opportunity listed in Section H, if those qualifications have not already been explicitly identified under information about the jobs held in the past three years. If not listed elsewhere, the list of certificates, licenses, professional coursework, or other credentials held by the foreign worker and required in order to perform the job opportunity, should be entered after all jobs held in the past three years are listed, under Question 9, "Job Details (duties performed, use of tools, machines, equipment, etc.)"

Since the Employer did not list on the Form 9089 that the foreign national possessed a CPA license, as instructed by the FAQ, the CO concluded that denial of the Form 9089 application was authorized by 20 C.F.R. §656.17(i)(1) which states that the "job requirements, as described, must represent the employer's minimum requirements for the job opportunity." Essentially, the CO found that by including a CPA licensure requirement the Employer had indicated requirements which exceeded the foreign national's qualifications.

The Employer requested reconsideration of the CO's denial and submitted evidence of the foreign national's CPA license. The Employer also argued that Section K of the Form 9089 only allows for entry of the foreign national's work experience and that the CPA license could not have been submitted online. The Employer also argued that since the CPA license existed prior to the submission of the PERM application and since the CO did not issue an audit to request a copy, then the CO ought to accept proof of the CPA license submitted as part of the request for reconsideration in accordance with BALCA's decision in [Denzil Gunnels](#), 2010-PER-00628 (Nov. 16, 2010) which we previously blogged about [here](#).

The CO upheld the denial and stated that:

n FAQ is sufficient to adequately apprise the general public of changes in the Department of Labor, Office of Foreign Labor Certification policy or processing of Permanent Employment Certification Applications (PERM). Therefore, in accordance with the Department's FAQ published on July 28, 2014, for applications filed on or after July 28, 2014, an employer seeking Permanent Employment Certification must demonstrate the foreign worker identified on the application meets all license, certificate, and requirements listed on the ETA Form 9089, at the time the application is submitted for processing.

The Employer filed a request for Board review and argued that (1) the July 28, 2014 FAQ does not cure the deficiencies in the Form 9089 and its instructions. (2) that the DOL cannot establish a substantive new rule that applications will summarily be denied for failure to list a foreign national's licenses because the FAQ was not promulgated through the notice and comment process required to comport with due process in rulemaking; (3) that the DOL posts and removes FAQs without notice and in an inexplicable manner and that FAQs can be hard to find; and (4) that the CO erred in refusing to consider the copy of the CPA license submitted with the Employer's request for reconsideration.

BALCA acknowledged that its panels have consistently upheld denials of certification where the employer ignored the clear directive in the Form 9089 instructions to list "all" of the foreign national's qualifying experience. But BALCA also acknowledged that it has also ruled that applications cannot be denied based solely on an employer's failure to include information on the Form 9089 where it is not apparent how that information could be included on the application and cited, among other cases, *Smartzip Analytics*, 2016-PER-00695 (Nov. 9, 2016) and *Apple Inc.*, 2011-PER-01669 (Jan. 20, 2015) which I previously blogged about [here](#).

BALCA found that the July 28, 2014 FAQ was an attempt by the OFLC to correct the deficiency in the Form 9089 and its instructions in regard to listing special skills, certificates, licenses and professional coursework that are not included in the required recitation of the foreign national's qualifying job experience and that no changes have been made to the Form 9089 to address the deficiency. BALCA noted that neither the Form 9089 nor its instructions say anything about including special skills, certificates, licenses and professional coursework that

are not included in the listing of the foreign national's qualifying job experience. BALCA also found that the FAQ was silent regarding the consequences an employer may face for non-compliance with the FAQ guidance. Finally, BALCA held that the FAQ is not an appropriate and legally effective method of correcting shortcomings in the Form 9089 and its instructions and it was therefore arbitrary and inconsistent with the requirements of due process and fundamental fairness for the CO to deny the Employer's PERM application based on a failure to state on the Form 9089 that the foreign national has a CPA license. BALCA found that the CO should have asked the Employer to submit supplementary information/documentation through the audit procedure. In the absence of an audit request, BALCA found that the CO ought to have accepted the Employer submission of a copy of the CPA license as part of its request for reconsideration.

Similarly, in [Solar Turbines, Inc.](#), 2016-PER-00025 (June 2, 2017), the CO denied the Form 9089 application, without an audit, because the Form 9089 did not establish that the foreign national possessed the skills required to perform the job. Specifically, the Form 9089 indicated that the position required academic or industry experience in the full use and application of "heat transfer, Finite Element Analysis, drafting/CAD (Pro-E), or applied thermodynamics" and the Employer did not list these skills in Section K of the Form 9089. The Employer sought reconsideration supplying the missing information and contending that there was no space on the application form to include such information. However, the CO reaffirmed the denial noting that an FAQ issued in July 2014 explained how the information could have been added to the form. BALCA reversed the denial concluding that the CO had erred in not considering the information submitted along with reconsideration request since the employer had not had a prior opportunity to submit the information. 20 C.F.R. §656.24(g)(2)(ii). BALCA agreed with the Employer that the limitations of the Form 9089 and its instructions "effectively prevented the presentation of the documentary evidence concerning the Alien's specific qualifications to the CO."

BALCA also spoke on FAQs in [Matter of Arbin Corporation](#), 2013-PER-00052 (Jun, 29, 2017). In that case, after review of the Employer's audit response, the CO denied the Form 9089 application based on a determination that the recruitment advertisements in a newspaper and on a job search website did not provide a description of the job vacancy specific enough to apprise U.S. workers of the job opportunity as required by 20 C.F.R. § 656.17(f)(3).

Specifically, the CO found that the Employer's newspaper and job search advertisements failed to mention "delivery of products" as described in the job duties listed on the Form 9089. The CO characterized "delivery of products" as a travel requirement, and he stated that had the Employer disclosed this travel requirement "to U.S. workers for the same job description which was provided to the foreign worker, potential U.S. applicants may have been interested in a company which would afford them the opportunity to travel."

The Employer acknowledged that its advertisements did not refer to "delivery of products" and instead contained a "shortened" description of job duties. In addition, the Employer argued that if the CO believed that a hidden travel element should be disclosed then the Employer had done so by virtue of the fact that its advertisements indicated that the job requires the applicant to "maintain and repair Arbin battery testing systems" and also by virtue of the job title of "Customer Support Engineer." These two things, the Employer argued, fully advised potential job applicants that this position requires a certain level of travel. Finally, the Employer argued that its shortened description of the job opportunity in the advertisements complied with the requirements of Section 656.17(f) as clarified in FAQ guidance published on the OFLC website that advertisements are not required to enumerate "every job duty, job requirement, and condition of employment" and that "an advertisement that includes a description of the vacancy, the name of the employer, the geographic area of employment, and the means to contact the employer to apply may be sufficient to apprise potentially qualified applicants of the job opportunity." To read the FAQ, click [here](#) and scroll to "Advertisement Content."

BALCA ultimately held that the Employer's reliance on the FAQ is misplaced. BALCA cited the case of [CSI International, Inc.](#), 2012-PER-00614 (Nov. 4, 2015) in finding that the FAQ is a merely an *expansion* on the requirement at Section 656.17(f)(3) that advertisements "provide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought..." And the fact that Section 656.17(f)(3) does not require great detail about the job opportunity does not mean that an employer is exempt from including the content requirements directed by Section 656.17(f)(4) which mandates that the Employer apprise applicants of travel requirements.

The subject of FAQs also arose in [Matter of Oracle America, Inc.](#), 2015-PER-00308 (May 4, 2017), a case in which the CO denied the PERM application, after audit,

based on the Employer's failure to properly notify and consider workers it had laid off in the occupation as required by 20 CFR §656.17(k)(1). In its audit response, regarding how it notified and considered laid off workers, the Employer stated that laid-off U.S. workers had been given a notice in their termination packet with instructions on how to view and apply to any and all labor certification job opportunities that the Employer is offering. BALCA held that §656.17(k) requires specific notice to laid off workers of a job opportunity for which the employer has sought permanent labor certification. The Employer raised the subject of an FAQ (to read the FAQ, click [here](#) and scroll to "Recruitment Report") which it argued presented an alternative to the requirement that a specific notice be provided to laid-off workers. However, BALCA held that the Employer had not complied with the guidance in the FAQ but rather, had provided the type of notification expressly rejected in the FAQ, that is, notice that simply informs the laid-off worker to monitor the Employer's website for future openings and inviting the worker, if interested, to apply for those openings.

To what extent can the DOL utilize its FAQs as a substitute for actual rulemaking? In these cases we see BALCA find for the Employer and hold that an FAQ does not hold the power and force of the regulations. In other cases, we see BALCA indicate that the FAQ provided the Employer with means by which to comply with the existing regulations or that the FAQ represented an expansion of the existing regulations rather than a new directive. So where does that leave us? Can PERM FAQs be ignored? Certainly not. PERM FAQs have always been and will continue to be extremely important and useful to provide PERM practitioners with much needed clarity on the DOL's requirements and expectations in the preparation and submission of PERM applications. It would serve no practical purpose to ignore FAQs only to potentially face the hurdle of a denial and an appeal to BALCA. However, to the extent that the DOL wishes to rely on one of its FAQs to create new rules and ascribe to them the force of the regulations then the DOL ought to be reminded that FAQs cannot be used to change the regulations and the issuance of an FAQ does not rise to the level of a substantive new rule because an FAQ is not promulgated through the notice and comment process required to comport with due process in rulemaking.