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LABOR CERTIFICATION: MUSTN'T THE US JOB APPLICANT BE ABLE TO PERFORM THE JOB EVEN IF QUALIFIED ON PAPER?

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PERM labor certification operates outside of the realm of typical real world recruitment efforts. Whereas employers in the real world normally look to hire the most qualified applicant, PERM requires employers to only assess whether a worker is minimally qualified for the position, regardless of whether they're a good fit for the job. But even if a US worker applicant met the minimum requirements of the position, it is reasonable to expect this individual to perform the duties of the position. There are certain requirements that are so inherent to the position that it would be redundant to even list them in an advertisement. One example is the ability to speak English or to not be addicted to video games in the workplace so that the employee ceases to be effective. There is an inherent requirement for an applicant to properly perform the job. Can the employer lawfully reject the applicant if she or he cannot perform the job duties after the employer discovers this in an interview even though the inherently obvious requirement was not listed in the advertisement?

As background, under Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (INA), the Department of Labor (DOL) has the authority to determine whether there are insufficient US workers who are "able, willing, qualified, and available" to perform a job that has been offered to a foreign worker, and to ensure that the admission of the foreign worker will not adversely affect the wages and working conditions of those similarly situated. In order to demonstrate to the DOL that there are no "able, willing, qualified, and available" US workers to perform the proffered role, employers must go through the labor certification process, which requires, among other things, a good faith

recruitment. 20 CFR § 656.17(e)(1)(i) describes the mandatory recruitment steps for professional occupations that an employer must take ahead of filing the ETA Form 9089, Application for Permanent Employment Certification. These include the posting of a job order with the relevant State Workforce Agency (SWA), two Sunday advertisements, and three additional recruitment steps (such as postings on job search websites, on-campus recruitment, local newspaper ads, etc.). The advertisements must clearly apprise US workers of the offered position and the minimum requirements for the role. Thereafter, the employer must prepare a recruitment report signed by the employer describing the recruitment steps taken, how many applicants applied for the role, and if those applicants were rejected, an explanation of why they did not qualify for the role. Critically, 20 CFR § 656.17(g)(2) states that "a US worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training."

Key to labor certification is the job advertisement. The advertisements must be carefully drafted to ensure that US workers are apprised of the position and also to demonstrate what the minimum qualifications are for the role. Under Board of Alien Labor Certification Appeals (BALCA) decisions, employers may only reject US workers for not possessing the skills as listed on the ETA 9089, or not meeting the reasonable minimum education or experience requirements of the position. However, employers may feel that there are many skills that are so inherent to an employee's ability to perform the job that would qualify as lawful business reasons for rejection, despite the fact that they are not explicitly listed on the Form ETA 9089.

In *Matter of Transamerica Life Insurance Company*, 2015-PER-00274 (Feb. 22, 2017), BALCA upheld the denial of a labor certification where US workers were rejected based on an inability to perform the job duties in Section H.11 on the ETA 9089. BALCA reasoned that because the employer had stated that experience in the job offered was not required in H.6, it was "precluded from imposing specific job duties listed in H.11 as requirements that US applicants had to meet." This holding has been reaffirmed in a number of BALCA decisions. *See, e.g.*, *Matter of Nam Info, Inc.*, 2017-OER-00058 (holding that although the employer could not reject the applicant based on an inability to perform the job duties in H.11 where no experience in the job is required, they could reject the applicant for failure to meet its education requirements for the

position); *Matter of IBM Corp.,* 2015-PER-00483 (Mar. 28, 2018) (holding that an employer may not reject an applicant who does not have experience in the duties listed in H.11 where the employer did not indicate that experience in the job offered was required). However, BALCA also added that denial of the labor certification in *Matter of Transamerica* was proper because the job duties in H.11 were not normal for the job according to O*Net, and if the employer wanted the workers to be able to perform the job duties in H.11, the skills to perform such should have been listed in H.14. Thus, this leaves open the question of whether one can lawfully reject a US worker for inability to perform the job duties listed in H.11 if those duties are listed as normal on O*Net.

As we've previously blogged, in *Matter of Los Angeles Unified School District*, 2015-PER-03153 (Jan. 23, 2017), BALCA upheld the denial of a labor certification where the employer denied a US worker based on a failure to satisfy an inherent job requirement. The position at issue was for a Special Education Teacher. The job advertisement listed a Bachelor's degree and teaching credential as the sole requirements for the role. The employer received a resume for a US worker who met these minimum requirements; however, the employer rejected the applicant because she could not "teach special education classes competently" and because the employer had also received a negative reference from the applicant's previous employer. BALCA held that the employer's actual minimum requirements needed to be listed on the ETA Form 9089, and since nothing in the employer's stated requirements indicated that an applicant cannot have a negative performance evaluation, BALCA determined that the rejection was unlawful.

It is rather unreasonable to force employers to list every inherent skill in its PERM advertisements, otherwise employers would spend thousands of dollars on lengthy advertisements, which would still not be able to capture every inherent requirement. Indeed, in several pre-PERM BALCA and Court decisions, it was determined that not all inherent skills need be listed in advertisements. See, e.g., *Ashbrook-Simon-Hartley v. McLaughlin*, 863 F.2d 410 (5th Cir. 1989), *Matter of Ron Hartgrove*, 1989 BALCA Lexis 6 (BALCA May 31, 1989), *Matter of La Dye & Print Works*, 1995 BALCA LEXIS 59 (BALCA April 13, 1995).

In *Ashbrook-Simon-Hartley*, the Court held that the DOL could not flatly ignore job duties listed by the employer in determining that employer did not have job-related reasons for rejecting a US worker who otherwise satisfied the minimum experience requirements. Here, in its labor certification application,

the employer listed the minimum education requirements, training, and experience for the position, which included "two years' experience in the job offered or four years' experience as a mechanical design engineer." The employer received two resumes from individuals who had four years' experience as mechanical design engineers. The employer rejected the first worker for inability to speak English, where the position required the supervision of other employee which inherently required the ability to speak English, as well as on the grounds that he had no experience in the field of wastewater and sewage treatment. The second worker was similarly rejected for lack of experience in wastewater and sewage treatment. The DOL determined that the rejection of the first applicant who could not speak English was lawful because ability to speak English was inherent to the position. However, the DOL denied the labor certification based on rejection of the second worker because the employer stated that a person with four years of experience as a mechanical design engineer was acceptable for entry into the position.

On appeal, the Fifth Circuit held that the DOL inappropriately ignored other aspects of the labor certification application, and the fact that the employer did include experience in the wastewater treatment industry in its job description. The Court found that the DOL cannot cherry-pick inherent skills, such as the ability to speak English, and flatly ignore others, such as experience in the wastewater industry. BALCA in *Matter of Transamerica* sought to distinguish *Ashbrook-Simon-Hartley* in footnote 8, stating that "the requirements which the court found that the CO impermissibly ignored referred to 'experience in the wastewater treatment industry' when describing the duties of the job. In this case, the Employer stated that experience in the job offered is not required which precluded it from imposing specific job duties listed in Section H.11 as requirements." However, this distinction is unconvincing. In *Ashbrook-Simon-Hartley*, the employer listed experience in the wastewater treatment industry in the job duties section, and listed as its minimum requirements "two years' experience in the job offered or four years' experience as a mechanical design engineer." The applicant had four years of experience as a mechanical design engineer, but no experience in the wastewater treatment industry. The Fifth Circuit found that such inexperience, as required in the job duties, was a lawful reason to reject the worker. In other words, the applicant had the minimum experience of four years as a mechanical design engineer, but did not satisfy

the inherent requirement of experience in the wastewater treatment industry.

So what does this mean for employers? It is critical that attorneys ask employers what the actual minimum requirements are for the role. Some employers may feel that certain experience and skills are inherent to the role, and may not feel that it is necessary to list these minimum requirements, as they may take up too much space in the advertisement, costing the employer thousands of dollars. Although this would be rational in an ordinary recruitment context, PERM labor certification is anything but rational or ordinary. Although there are certainly arguments to be made that certain skills are inherent to a position under *Ashbrook-Simon-Hartley*, such as the ability to speak English or having experience in the relevant context in which the position takes place, one may want to include as many required skills as possible in H.14 and the advertisements to prevent an audit or denial. Thereafter, as we've previously suggested, when reviewing resumes, the employer ought to err on the side of caution and interview any applicants who appear to meet the stated minimum requirements, even if not all experience is listed on the resume. Thereafter, the employer can zero in to determine whether the US applicant meets the requirement of the position. In those instances where the US applicant meets all of the requirements of the position, but the employer discovers through a good faith interview that the applicant would not be able to perform the duties of the position, the employer can try to make the case that the US applicant was lawfully rejected. It remains to be seen, however, whether the employer will be successful with such an argument after *Transamerica.*