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DEALING WITH SECTION H.10-B LABOR CERTIFICATION DENIALS

Posted on March 28, 2023 by Cyrus Mehta

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In recent weeks, reports of PERM labor certification denials concerning the manner in which question H.10-B was completed on Form ETA 9089 have abounded from many immigration lawyers and their clients. This question asks employers to "identity the job title of the acceptable alternate occupation" if an alternate exists. The DOL has promulgated little guidance on this question, so immigration lawyers have been accustomed to completed it in a variety of ways. While some employers may prefer to list related job titles in H.10-B, a candidate's qualifying experience may have been gained in positions with various nondescriptive job titles. Thus, employers may choose to respond by instead describing the experience such as "2 years of experience in engineering management" and then referring to section H.14., which lists the requirements of the offered position, rather than attempting to list specific job titles. The DOL has historically accepted PERM applications that respond to question H.10-B in this way, and this approach is consistent with guidance that it has previously issued by the DOL's Office of Foreign Labor Certification (OFLC), so the wave of recent denials is puzzling.

The uptick in PERM denials concerning question H.10-B seems to have begun between October and December 2022, when the percentage of PERM applications denied by the DOL nearly doubled when compared to data from the first quarter of FY 2022. The denials seem to focus on the idea that question H.10-B is not properly completed unless specific job titles are listed. Because DOL takes the position that this field in the form was not properly completed if an employer uses alternate language, it asserts that the entire PERM application is rendered incomplete. The DOL cites to 20 CFR § 656.17(a), which

states that incomplete applications will be denied, as the authority for the denials.

On November 17, 2022, OFLC communicated the following guidance to the American Immigration Lawyers Association (AILA) in response to reports of numerous denials on this issue: "OFLC understands that there may be a variety of relevant specific job titles in which required experience may be gained. Employers may list a specific job title, a number of related job titles, or even language such as 'any occupation in which the required experience was gained.' The answer does not have to be an exact job title, but employers still have to answer the question. If employers reference H.14 to answer the question in H.10-B, employers must be sure to answer the H.10-B question. Just providing a list of requirements is not acceptable." *See* AILA Doc. 22092601. Interestingly, AILA received reports of continued denials on the question H.10-B issue well into March 2023, even when the PERM application contained language similar or identical to that prescribed by OFLC in November 2022. *Id*.

Historically, BALCA's decision in *Matter of Francis Kellogg*, 94-INA-465 (Feb. 2, 1998), has been the prevailing guidance concerning alternative requirements. In *Kellogg*, BALCA held that employers should indicate that it will accept "any suitable combination of education, training or experience" if the primary and alternate requirements for the position are not "substantially equivalent". 20 CFR §656.17(h)(4)(ii) broadened the holding of *Kellogg* to apply whenever there are alternate requirements, providing as follows:

"If the alien beneficiary already is employed by the employer and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable."

However, in *Matter of Federal Insurance Co*., 2008-PER-00037 (Feb. 20, 2009), BALCA held that failure to include the *Kellogg* language on an ETA 9089 should not be a basis for denial, noting that there is no suitable place on the form to include the language. Nothing in the holdings of *Kellogg* or its progeny, however, seems to be instructive regarding whether specific job titles must be listed for alternate occupations.

The DOL is aware of inconsistencies in the adjudication of PERM applications, and has communicated to AILA that it will review applications where an

employer has filed a Request for Reconsideration ("RFR") for a denial based on the manner in which question H.10-B was completed. According the AILA, "where the reason for denial is Question H.10-B only, OFLC will pull the case out of the usual order to review and certify the application where appropriate. OFLC has indicated that there are several hundreds of these cases. While OFLC will start reviewing these cases immediately, it may take several weeks to process them all." *See* AILA Doc. 22092601. It thus seems that immigration lawyers and their clients who are dealing with an H.10-B denial may be able to get resolution simply by filing an RFR.

The recent denials still pose a number of complications, though. If the PERM was filed in the sixth year in H-1B status, because the DOL is likely to take at least several weeks to process RFRs, some employees may reach the end of their sixth year in H-1B status and be forced to leave the U.S. during this extended waiting period, even if the DOL ultimately certifies the PERM. On the other hand, if the PERM was filed one year or more prior to the end of the sixth year, the PERM that is the subject of an RFR is still considered pending and can provide the basis for a one-year H-1B extension under § 106(a) of the American Competitiveness in the 21st Century Act. Moreover, immigration lawyers and their clients who process many PERM applications have been left wondering whether other pending PERM applications that use the same language for question H.10-B will be denied. If that is so, then employers should continue to file RFRs each time there is a denial. If a Prevailing Wage Request or recruitment such as job orders and newspaper ads are already in progress and use general language like "5 years of experience in the biotechnology industry", it is hoped that DOL will no longer deny such a PERM in light of its announcement that employers may file RFRs. It would be in violation of the Administrative Procedure Act for the DOL to deny pending and future applications without notice and the opportunity to comment on the change.

In general, it is a best practice to ensure that the Prevailing Wage Determination on Form 9141, all recruitment, and the ETA 9089 itself use identical language. While it would easier said than done for the employer to start all over again by requesting a new Prevailing Wage Determination if the language is not consistent with DOL's latest guidance, obtaining a new 9141 Prevailing Wage Determination could take 12-14 months. If the prevailing wage request is pending and indicates experience rather than titles that have resulted in denials, or if the advertisements are already running with that

language, it would be defensible to not change course and list the experience in the same way in H.10-B. Alternatively, the employer may include the “magic” language as suggested by OFLC to AILA in its November 17, 2022 guidance by stating in ETA 9089 H.10-B “any occupation in which the required experience or skills were gained as specified in H.14” . H.14 can list the skills or experience required for the position that was stated in the advertisements or the prevailing wage request. This modification would likely not be inconsistent with the way the job requirements were set forth in the 9141 or the recruitment.

Although it is salutary that the DOL has allowed employers with denied PERMs based on how H10-B was completed to submit RFRs, until this issue is resolved, employers must also find ways to prevent further denials by drafting the language in H.10-B to hew as closely as possible to the DOL guidance provided to AILA while also not veering too far off from the way the requirements have been listed in the prevailing wage determination and ongoing recruitment.

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