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ANSWERING TRICKY QUESTIONS ON THE REVISED LABOR CERTIFICATION FORM ON DUAL REPRESENTATION AND FAMILIAL RELATIONSHIPS

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By Cyrus D. Mehta

The Department of Labor's Office of Labor Certification (OFLC) has revised the Application for Permanent Employment Certification, ETA Form 9089, as well as the corresponding Application for Prevailing Wage Determination, Form ETA 9141. OFLC will begin accepting these revised forms on May 16, 2023, and has posted an "unofficial watermarked preview copy" of the form "to allow stakeholders to become familiar with changes to the form." The link to the form can be found at https://www.dol.gov/agencies/eta/foreign-labor

OFLC will no longer accept any new applications submitted via the legacy PERM Online System after May 15, 2023, at 6:59 pm ET. OFLC also will no longer accept the previous version of Form ETA-9089 after May 15, 2023, either electronically or by mail.

This will be the first in a series of blog discussing selected issues in the new ETA-9089 that are confounding practitioners.

1. How to answer the dual representation question?

The question below asks whether the employer has contracted with an attorney that also represents the foreign worker covered by the application, as follows:

> ***D.2. Has the employer contracted with an agent or attorney that also represents the foreign worker covered by this application?***
>
> ***Yes***

> ***No***

It is difficult to understand why the DOL has included this question. Many practitioners take the position that they are representing both the employer and the foreign worker, which is commonly referred to as dual representation. Representing two or more clients is appropriate if the goals of both the clients are aligned. If the practitioner is engaging in dual representation then "Yes" should be checked off rather than "No". It should not prejudice the case if "Yes" over "No" is checked.

Question D.2 also refers to an agent. It would have been good if the DOL did not include an "agent" as only attorneys admitted to a state bar in the US can engage in the practice of law. Agents should not be encouraged to represent the employer or foreign worker as they will then be involved in the practice of law and are also not bound by the ethical rules that attorneys are subjected to. The ABA Model Rules of Professional Conduct include Rule 1.7 that set forth the parameters under which an attorney can jointly represent more than one client, such as the employer and the employee, and the attorney is precluded from such dual representation if there is an irreconcilable conflict of interest. Non lawyer agents are not subject to any rules of ethical conduct.

This question piqued my interest as I once co authored an article "The Role of the Lawyer in the Labor Certification Process", a version is available at https://www.ilw.com/articles/2009,0310-endelman.shtm, which explored dual representation in the labor certification context. There are many decisions of the Board of Alien Labor Certification Appeals discussed in the article that recognize that the lawyer for the employer is also the employer for the foreign worker.

The starting point for this analysis is the DOL rule at 20 CFR 656.10(b), which provides:

> ***(i) It is contrary to the best interests of U.S. workers to have the alien and/or agents or attorneys for either the employer or the alien participate in interviewing or considering U.S. workers for the job offered the alien. As the beneficiary of a labor certification application, the alien can not represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney can not represent the alien effectively and at the same time truly be***

> ***seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative, as described in paragraph (b)(2)(ii) of this section.***
>
> ***(ii) The employer's representative who interviews or considers U.S. workers for the job offered to the alien must be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.***

This rule precludes attorneys from interfering in the recruitment process by interviewing or considering US workers who apply for the job offered to the foreign worker. Only the employer is allowed to interview and consider the resumes of US worker candidates. Even the foreign worker cannot be involved in the recruitment process. Although most of the verbiage in the rule prohibits the attorney of the foreign worker form interfering in the recruitment process, the rule was amended in the fall of 2008 to also include "It is contrary to the best interests of U.S. workers to have the alien and/or agents or attorneys **for either the employer** or the alien participate in interviewing or considering U.S. workers for the job offered the alien." (emphasis added). Thus, even the attorney for the employer is prohibited from interfering in the recruitment process since 2008 after the DOL slipped in the phrase "for the employer" in 20 CFR 656.10(b)(i).

Regardless of this amendment to the rule, there are a number of BALCA decisions even before 2008 that have acknowledged dual representation, and thus recognizing that the attorney for the employer is also considered the attorney for the beneficiary. In *Sharon Lim Lau*, 90-INA-103 (BALCA 1992), the attorney for the employer sent letters to the only two applicants who responded to the advertisements inviting them to interviews and also presided over the initial interviews to screen the applicants. The foreign beneficiary, who was the subject of this labor certification application, lived in Taiwan, and the attorney argued that he was the foreign worker's agent only for purposes of providing a mailing address and to facilitate the foreign worker's responses to

requests by the government for information or documents. BALCA disagreed by holding that it was common in labor certification cases for the same attorney to be listed as the attorney for both the employer and the foreign worker on the labor certification form.

Contrast *Sharon Lim Lau* with the earlier BALCA decision in *Matter of Marcelino Rojas*, 87-INA-685 (BALCA 1988). In *Rojas*, the employer contended that his attorney interviewed U.S. applicants because he had difficulty communicating effectively in the English language. Here too, the certifying officer alleged that 20 CFR §656.20(b)(3)(i) had been violated because the attorney had interviewed a U.S. applicant for the position. BALCA initially noted:

> ***In labor certification cases, the employer's attorney is almost automatically the alien's pro forma attorney. The employer's attorney "represents" the alien to the extent that if the employer succeeds in its application then the alien also succeeds by receiving labor certification. It would be the rare exception to find the alien and the employer represented by different attorneys.***

But BALCA, in *Rojas*, held that the attorney represented the employer rather than the foreign worker in the conduct of the interviews. The employer was present at the location of the interviews to observe the applicants and to decide, after conferring with his attorney, whether to conduct follow-up interviews. Therefore, the attorney only represented the employer and 20 CFR §656.20(b)(3) was inapplicable to this case. *Rojas*, can thus best be described as an exception to the generally accepted rule that the attorney for the employer will also be treated as the attorney for the foreign worker. Of course, Rojas was decided before the amendment to the rule in 2008.

In a later decision, *Chicken George*, 2003 BALCA LEXIS 72, the attorney for the employer and the foreign worker was the one who issued letter for the interview to one of the U.S. applicants who applied for the job. The letter was written on the letterhead of the law firm. Since the employer's attorney assented that he was the attorney for both the employer and the alien, BALCA held that 20 CFR §656.20(b)(3)(i) and (ii) had been violated.

Finally, in *Matter of Scan*, 97-INA-247 (BALCA 1998), the labor certification was

denied because it appeared that the applicant was to have been screened by the attorney rather than by the employer. There, the Certifying Officer concluded:

> ***The initial assessment of the applicant's qualifications constitutes attorney involvement and is prohibited by the Regulations. It is clearly adverse to the interests of U.S. workers for the alien's attorney to have any involvement in the recruitment process. The rebuttal provides no satisfactory assurance that the attorney did not initially assess the applicants' qualifications in this case despite the fact that the employer actually interviewed the workers and made the 'hiring decision.' We cannot say that U.S. workers were not prejudiced by the attorney's actions in this case.***

Although it is unclear from the fact that the attorney claimed to only be the employer's attorney, BALCA appeared to have broadly held that the attorney violated 20 CFR §656.20(b)(3)(i) because he had engaged in the "filtering process" which is part of the personnel procedures that the employer follows when the employer hires staff personnel.

Thus, under the predecessor provision, 20 CFR §656.20(b)(3), with the sole exception of *Rojas*, BALCA has held that an attorney interfering in the recruitment process, either by interviewing or initially screening applicants, violated the regulation. Of course, the regulation does carve out an exception where if the attorney is the person who normally interviews job applicants outside the labor certification process, this provision will not be implicated.

I have provided this history to demonstrate that the DOL has recognized dual representation in the labor certification process. If the employer is engaging in dual representation, then there will be no downside in answering the question as "Yes" to Question D.2 in the revised ETA 9089.

2. How to Answer the Question on Familial Relationships?

The revised ETA 9089 asks the following two questions:

> ***A.16. Is the employer a closely held corporation, partnership, or sole***

> ***proprietorship in which the foreign worker has an ownership interest?***
>
> ***Yes***
>
> ***No***
>
> ***A.17. Is there a familial relationship between the foreign worker and the owners, stockholders, partners, corporate officers, and/or incorporators?***
>
> ***Yes***
>
> ***No***

In the current ETA 9089, Question C.9 asks:

> ***Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, corporate officers, incorporators, or partners, and the alien?***

The question needed to be answered "Yes" only if the employer was a closely held corporation, partnership or sole proprietorship and the foreign worker either had an ownership interest or there is a familial relationship between the owners, stockholders, corporate officers, incorporators, or partners, and the foreign worker. The language in C.9 was consistent with the language in 20 CFR 656.17(l), which provides:

> ***If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation…….***

The new ETA 9089 now separates out this question into two questions

removing any ambiguity regarding whether the corporation has to be closely held for both parts in the same C9 question of the current form.

Question A.16 asks:

> ***Is the employer a closely held corporation, partnership, or sole proprietorship in which the foreign worker has an ownership interest?***

Question A.17 asks:

> ***Is there a familial relationship between the foreign worker and the owners, stockholders, corporate officers, incorporators, or partners?***

The DOL has taken the position that if the foreign worker either has an ownership interest or there is a close family relationship the recruitment that the employer is required to conduct to test the US labor market will be suspect. If the foreign national has an ownership interest or familial relationship BALCA has set forth a "totality of circumstances" test under *Matter of Modular Container, 1989-INA-228 (Jul. 16, 1991) (en banc) to determine whether there is a bona fide job offer to US workers*. *Modular Container Systems* considers whether the foreign national:

> *a)* ***Is in a position to control or influence hiring decisions regarding the job for which LC is ought;***
> ***b) Is related to the corporate directors, officers or employees;***
> ***c) Was an incorporator or founder of the company;***
> ***d) Has an ownership interest in the company;***
> ***e) Is involved in the management of the company;***
> ***f) Is on the board of directors;***
> ***g) Is one of a small number of employees;***
> ***h) Has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; or***
> ***i) Is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue without the foreign national.***

In the current version of the form the question had to only needed to be responded to in the affirmative if the employer is a closely held corporation. The new question A.16 regarding whether the foreign worker has an ownership interest need only be answered "Yes" if the employer is a closely held corporation. This makes sense since even if the foreign worker held shares in a large publicly traded corporation it would be hard to imagine how the recruitment would be tainted.

Question A.17, however, is no longer conditioned by whether there is a closely held corporation, and this is clearly not consistent with 20 CFR 656.17(l). So, let's say the foreign worker is a second cousin or grandnephew to a corporate officer in Walmart which has over a million employees, the answer now has to be "Yes". For a publicly traded company, how is one supposed to know whether there is "a familial relationship between the foreign worker and the . . . stockholders"?

In DOL's FAQ, a "familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, cousins of all degrees, aunts, uncles, grandparents and grandchildren are included. It also includes relationships established through marriage, such as in-laws and step-families. The term 'marriage' will be interpreted to include same-sex marriages that are valid in the jurisdiction where the marriage was celebrated."

If the employer is not a closely held corporation and there is a familial relationship, one view is to assume that the intention of the DOL was to only expect an answer to the question in the affirmative if the employer is a closely held corporation. On the other hand, if the intention of the DOL was to ask the question without regard to whether the employer is a closely held corporation, the practitioner must require the foreign worker to ascertain whether there is any familial relationship foreign worker and the owners, stockholders, corporate officers, incorporators, or partners. This would be the more prudent approach until we get further clarification from the OFLC. The foreign worker can endeavor in good faith to find out whether any relative as defined in the DOL FAQ owns stock in the company that is filing the labor certification. If so, A.17 must be marked as Yes. In the supplemental information, Appendix C, it can be explained that notwithstanding the familial relationship the foreign worker under the totality of circumstances test in *Matter of Modular Containers*

had no influence on the recruitment process especially in the context of a large publicly held corporation.

There will be many instances when the foreign worker may not be able to identify every relative who owns stock in the company that is filing the ETA 9089 on their behalf. Even if the question A.17 is marked as "No" and it later comes to light that the question should have been "Yes" and the DOL denies the application, such a finding can be challenged as BALCA does not take too kindly to the DOL denying applications when the instructions are not clear. For instance, when the employer requires alternative experience and the foreign worker qualifies through that alternative experience, 20 CFR 656.17(h)(4), which adopted the holding in *Matter of Kellogg*, 1994-INA-465 (Feb. 8, 1998), provides that certification will be denied unless the application states that "any suitable combination of education, training, or experience is acceptable." In *Federal Ins. Co*., 2008-PER-37 (Feb. 20, 2009), BALCA reversed the denial on grounds of fundamental fairness and procedural due process where this language was not included as the ETA 9089 or its instructions gave no guidance where to put this language.

The new ETA 9089 now specifically instructs applicants about where and how to insert the *Kellogg* language, and how to respond to the question on the new form will probably be the subject of the next blog in this series.