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KELLOGG HAS REARED ITS UGLY HEAD IN THE NEW LABOR CERTIFICATION FORM: HOW DO WE DEAL WITH ALTERNATE REQUIREMENTS?

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Our most recent blog in this series discusses the new Application for Permanent Employment Certification, Form ETA 9089 ("ETA 9089") and corresponding Application for Prevailing Wage Determination, Form ETA 9141 ("ETA 9141") promulgated by the Department of Labor (DOL), and, specifically, how issues concerning dual representation and familial relationships can be dealt with on the new form. In this blog, we discuss how to handle alternate requirements in the new ETA 9089.

The Office of Foreign Labor Certification (OFLC) of the DOL has now delayed the implementation of the new ETA 9089 until June 1, 2023. The new form was originally scheduled to go into effect on May 16, 2023. OFLC will continue accepting the older version of form ETA 9089 until June 1, 2023. Significantly, the new ETA 9141 will link to the new ETA 9089, automatically populating certain fields on the PERM application form. Watermarked versions of both new forms are available on the DOL website. This functionality of the new form has introduced uncertainty for practitioners, who must now ensure that information, specifically that pertaining to alternative requirements, is listed on the ETA 9141 in such a way that it will be correctly incorporated into the ETA 9089 as well.

The new ETA 9089 has undergone formatting changes, as well. The new form appears to change the way employers must list alternative requirements and specifically incorporate the *Kellogg* "magic language". The controlling guidance on alternative requirements comes from the Board of Alien Labor Certification

Appeals (BALCA)'s decision in *Matter of Francis Kellogg*, 94-INA-465 (Feb. 2, 1998). As discussed in a prior blog, *Kellogg* held that employers should indicate that they 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 there is no appropriate place on the ETA 9089 to include the *Kellogg* language, so an employer's failure to do so should not be a basis for denial of the PERM application.

As the holding of *Federal Insurance* suggests, the old ETA 9089 was not well formatted to incorporate the *Kellogg* language. Box H.6 of the old ETA 9089 asks "Is experience in the job offered required for the job?". Box H.10 then asks "Is experience in the alternate occupation acceptable?" If the employer answered both H.6 and H.10, it would likely trigger the requirement to state the *Kellogg* language. Many employers chose to avoid stating the *Kellogg* language on the form by answering "no" to question H.6. Instead, one could respond "yes" to box H.10., which asked "Is experience in an alternate occupation acceptable?" This approach resulted in the alternate requirement listed in H.10 becoming the primary requirement. Because Box H.6 was answered "no", there was only one requirement in H.10 rather than a primary and alternate requirement. However, this approach became irrelevant after *Federal Insurance* was decided on February 20, 2009, although employers still attempted to only have a primary requirement just in case the DOL revived the *Kellogg* language.

Take the example of a Systems Engineer with the following job duties and requirements:

> *Conduct project execution in a global delivery model using various methodologies like Agile to deliver projects in enterprise applications*

> *space. Utilize Oracle Peoplesoft HCM, SCM and CRM, SaaS, and cloud based software like Salesforce. Conduct architecture, analysis, design, development, customization, and maintenance of applications using PeopleSoft, Salesforce Cloud, Data analytics tools like Tableau, PL/SQL, SQL, Oracle, HP Quality Centre, Rally, ServiceNow along with testing, application packaging, release co-ordination, security administration and product management from ideation to delivery of the product.*
>
> ***Reqs:** Master's degree (or equiv) in CompApps, CompSci, Engg (Comp/Mech/Electronic), or related field, plus 3 years of experience in position involving similar duties/technical capabilities.*

In this case study, the employer instead of requiring 3 years of experience in the exact duties of the position as offered above has asked for "3 years of experience in a position(s) involving similar duties/technical capabilities."

The employer will address this in H.10 rather than H.6. in the existing ETA 9089 by answering "no" to H.6 and "yes" to H.10 – Is experience in an alternate occupation acceptable? Then, by indicating the number of months of experience requirement in the alternate occupations in H.10A and by referring to H.14 in H.10B that the employer will accept "3 years of experience in a position(s) involving similar duties/technical capabilities." Even before *Federal Insurance*, by checking only H.10 rather than both H.6 and H.10, the employer could avoid the *Kellogg* language. However, if an employer chose to answer both H.6 and H.10 from February 20, 2009, the Kellogg language would not trigger because of *Federal Insurance*.

The new Form ETA 9089, however, appears to rectify the problem identified in *Federal Insurance* by specifically referencing the *Kellogg* language. This change could create confusion for employers who are not accustomed to including this language in recruitment or the ETA 9089 itself.

Box G.4. of the new ETA 9089 asks "Is the foreign worker currently working for the employer submitting this application?" An employer who answers "yes" to this question must then indicate in Box G.4.a. "whether the foreign worker only qualifies for the job opportunity by virtue of the employer's alternative requirements identified in Section F of the ETA 9141 identified in Question E.1". If the answer to this question is "yes" as well, Box G.4.b. asks the employer to "select the applicable statement describing the employer's willingness to accept

any suitable combination of education, experience, or training", mirroring the *Kellogg* "magic language". The two possible responses to this question are "I accept" or "I do not accept".

Once the Kellogg magic language is included in the ETA 9089, it will be harder for employers to justify the lawful rejection of US workers. In *Matter of Goldman Sachs & Co.,* 2011-PER-01064 (June. 8, 2012), the employer, indicated on the ETA Form 9089 that it would accept for the position of Financial Analyst, "any suitable combination of education, training and experience," which was the required *Kellogg* magic language. During supervised recruitment, the employer submitted an expert opinion to the DOL detailing why thirty-five U.S. worker applicants had each been rejected without interview. As examples, BALCA highlighted one applicant who was rejected despite his "substantial academic business credentials" and because he did not possess "narrowly focused" experience necessary for the position and another applicant who the employer described as having "a long and varied career in accounting and financial reporting" but lacking in certain specific experience. The Certifying Officer (CO) denied the labor certification finding that the employer rejected U.S. workers for other than job related reasons. The CO specifically emphasized that the employer had indicated its willingness to accept "any suitable combination of education, training or experience" and had not taken the time to explore and evaluate the suitability of the applicants' education, training or experience. The DOL cited 20 C.F.R. § 656.24(a)(2)(b) and stated that "where there is a reasonable possibility the applicant may meet the job requirements, it is incumbent on the employer to further investigate the U.S. applicant's qualifications." In its request for reconsideration, the employer argued, *inter alia*, that it has no duty to interview candidates who fail to show on their resumes that they satisfy the major job requirements.

BALCA held that the CO did not question the employer's business necessity for its job requirements, but instead questioned the fact that the employer rejected without interview applicants who appeared facially qualified for the position and did not address how they were unqualified even possessing a *combination* of education, training and experience. BALCA upheld the CO's denial and cited *Blessed Sacrament School*, 96-INA-52, slip op. at 3 (Oct. 29, 1997) which held that where the applicant's resume shows a broad range of experience, education and training that raises a reasonable possibility that the applicant is qualified even if the resume does not expressly state that he or she

meets all the requirements, an employer bears the burden of further investigating the applicant's credentials. Thus, since the employer was required to evaluate US worker applicants under the *Kellogg* standard – will accept any suitable combination of education, experience and training – the employer's rejection of US worker applicants based on only a review of their resumes were not considered to be lawful rejections.

Although the employer has to evaluate candidates who apply for the position under the Kellogg language, this language need not appear in the advertisements as confirmed in the following DOL Round 10 FAQs:

> *Does the advertisement have to contain the so-called "Kellogg" language where the application requires it to be used on the application?*
>
> *Where the "Kellogg" language is required by regulation to appear on the application, it is not required to appear in the advertisements used to notify potential applications of the employment opportunity. However, the placement of the language on the application is simply a mechanism to reflect compliance with a substantive, underlying requirement of the program. Therefore, if during an audit or at another point in the review of the application it becomes apparent that one or more U.S. workers with a suitable combination of education, training or experience were rejected, the application will be denied, whether or not the Kellogg language appears in the application.*

Still, the fact that the employer has to evaluate resumes in light of any combination of education, training or experience imposed by *Kellogg* in the new ETA 9089 may make it harder for employers to win labor certifications especially in industries where there have been many layoffs in recent times.

It remains to be seen whether the employer can avoid the *Kellogg* language like under the old form by making the alternative requirement the primary requirement. Under the revised forms, what is indicated in ETA 9141 will be linked to the ETA 9089. The question is whether under the new system the employer will be able to skip F.c. in ETA 9141, which asks details about the Alternative Job Requirements and instead complete only F.b. in ETA 9141, which asks details about the Minimum Job Requirements but would actually include information about the alternative job requirements. By skipping F.c. in ETA 9141 (alternative requirements) and completing F.b. (minimum requirements)

in ETA 9141, can the employer argue in Appendix C – Supplemental Information that the alternate has become the primary requirement and thus avoid using the *Kellogg* language?

It is unclear how well the approach of making the alternate requirement the primary will work in light of the "*Kellogg* language" question on the new ETA 9089. There is a chance that failure to accept the *Kellogg* question on Box G.4.b. of the new ETA 9089 when alternative sets of qualifications will be accepted, even if F.c. in ETA 9141 was left blank, could result in an audit or denial of the PERM application.

In *Agma Systems LLC*, 2009-PER-132 (Aug. 6, 2009), BALCA held that an employer was not required to include the *Kellogg* language where it has two sets of alternative requirements that are substantially equivalent. In *Agma*, the requirements in question were a Master's Degree in Computer Science or Engineering and three years of experience in Computer Software Developing and/or Consulting -- and a Bachelor's Degree in Computer Science or Engineering and five years of experience in Computer Software Developing and/or Consulting. Because these two sets of requirements were essentially the same and neither was the "primary", BALCA reasoned that the *Kellogg* language need not be invoked because *Kellogg* expressly recognizes this type of equivalent requirements as acceptable. When requirements are substantially equivalent, BALCA's holding in *Agma* lends support for the strategy of making the alternative requirement the primary requirement, thereby obviating the need to use the *Kellogg* language even in the revised ETA 9089.

The *Kellogg* language has returned with a vengeance in the new ETA 9089, and it remains to be seen whether employers and their attorneys will be able to avoid it if the alternate requirement can still become the single primary requirement. Employers need to deal with *Kellogg* with the respect that it deserves in order to avoid a denial.

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