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ALTHOUGH SECTION H.10-B HAS DISAPPEARED IN THE NEW ETA 9089, WILL ITS GHOST CONTINUE TO HAUNT US?

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The new ETA 9089 form has gone into effect and DOL stopped using the old version of the form on the evening of May 31, 2023. The new form does not have Box H.10-B. In our previous blog, we discussed the rise in PERM labor certification denials related to question H.10-B between October 2022 and March 2023. Does that mean that the problem has gone away? Not entirely, since the new ETA 9089 links to the Form ETA 9141 - the application for a prevailing wage determination - which asks an analogous question to H.10-B regarding the occupation required if employment experience is required. If the employer did not respond appropriately to the analogous question in ETA 9141 that now links to the new ETA 9089, will the DOL still deny labor certification?

This blog is part of a series, see here and here, that address some of the numerous questions and issues raised by these new forms.

As background, Box H.10-B of the previous version of the ETA 9089 asked employers to "identity the job title of the acceptable alternate occupation" if experience in an alternate occupation is acceptable. The DOL had promulgated little guidance on this question, so immigration lawyers completed this question in a variety of ways, including describing the experience such as "2 years of experience in engineering management emphasizing cloud-based product development" and then referring to section H.14., which lists the requirements of the offered position, rather than attempting to list specific job titles. This is because foreign national workers often had a number of job titles in their prior experience, which may not have reflected the job offered in the

labor certification. For instance, with respect to the position of Engineering Manager, the foreign worker may have had similar experience in prior engineering management positions, but may have held titles that had little direct connection to the duties, such as Associate or Specialist. Hence, it was more appropriate to describe the experience gained rather than the titles in the prior positions, as this approach would define the employer's job requirements with greater clarity. Historically, the DOL had accepted PERM applications that responded to question H.10-B in this way. Since the spate of denials from October 2022, the Office of Foreign Labor Certification (OFLC) communicated the following guidance to the American Immigration Lawyers Association (AILA) in November 2022 in response denials on this issue: "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.

The denials concerning question H.10-B centered on the idea that question H.10-B is not properly completed if the employer fails to list specific job titles. The DOL therefore took the position that the entire PERM application is rendered incomplete if this question is not completed properly. The DOL cited to 20 CFR § 656.17(a), which states that incomplete applications will be denied, as the authority for the denials.

The DOL responded to reports of increasing PERM denials concerning question H.10-B, and posted a notice that read as follows as its website on April 14, 2023:

> *OFLC has stopped issuing denials for this issue for pending applications and will not deny for this reason for any application submitted on or before May 30, 2023, by which point OFLC expects to be accepting the updated version of Form ETA-9089 in the Foreign Labor Application Gateway system. Further, OFLC will overturn denials based solely on this issue. OFLC will identify applications that were denied for this issue and for which reconsideration has not yet been requested; employers whose applications have been denied solely for this reason and have not yet requested consideration are encouraged not to submit a request for reconsideration. Where reconsideration has been requested, OFLC will*

> *prioritize processing for any pending reconsideration requests based on denials where this is the only denial issue.*

Although this notice has now been removed, it is reproduced as AILA Doc. No. 23041700. In our firm's experience, PERMs denied solely on a question H.10-B issue were certified rather quickly after a Requestion for Reconsideration ("RFR") was filed. Interestingly, though, while OFLC acknowledges that it has not adjudicated H.10-B issues in a consistent manner, it states that some of the denials were justified, stating:

> *...OFLC concluded that some employers have not consistently answered the question accurately by providing acceptable alternate job titles; rather, they include statements such as "see H.14 - Special Skills." The information provided in H.14 does not identify what alternate occupations are acceptable to meet the experience requirements for the job that is the subject of the PERM application. Instead, the application only lists a series of the special skills requirements and/or other alternative combinations of education and experience that the employer is willing to accept. As a result of employers providing insufficient information in either H.10-B. or H.14, OFLC has recently denied applications for being incomplete.*

OFLC evaluated these denials and determined that while they are appropriate, it has not been consistent about when it denies an application for this reason, which could confuse filers.

On April 24, 2023, the Board of Alien Labor Certification Appeals (BALCA) issued an important decision addressing H.10-B denials. In *Matter of Charter Communications, Inc*., 2020-PER-00171 (Apr. 24, 2023), BALCA held that an employer's failure to list specific occupation titles in box H.10.B. alone was not sufficient grounds for denial of a PERM application, also noting that the OFLC has dealt with this issue in an inconsistent manner in its adjudication of PERM applications. The employer in this case had inserted the following in box H.10-B: "Please see H-14." *Id*. The employer's response to section H.14 read as follows: "Bachelor's degree, or foreign equivalent, in Engineering, Computer Science, or related field. Must have 7 years of experience working with DSG/DAVIC set top boxes; and managing, maintaining, and configuring Linux

operating systems. Must have 5 years of experience supporting software applications for back office servers." *Id*. The Certifying Officer denied certification, and affirmed its denial after the employer filed a Request for Reconsideration ("RFR"), asserting that section H.10-B requires an occupation or job title. BALCA vacated the denial and remanded the PERM application for certification, reasoning that: "…the Employer persuasively argued why, in this matter, failing to include the job title of an acceptable alternative occupation was immaterial to the CO's review of the substance of the Form 9089. The Employer precisely detailed the skills needed to satisfy the requirement that "experience in an alternate occupation" was acceptable. Section H.10-B conveyed significantly more information than simply listing the job title of an acceptable alternate occupation." *Id*.

While box H.10-B has disappeared from the new ETA 9089, box F.b.4.b. of the new 9141 with respect to minimum job requirements still asks employers to "indicate the occupation required" if employment experience is required for the position. *See* AILA Doc No. 23050101. On the previous version of the ETA 9141, which included the same version of this question as the new 9141, employers often responded by indicating "see addendum" and listing the full requirements of the position rather than just the occupation, such as "2 years of experience in engineering management emphasizing cloud based product development", in the addendum. Because the new ETA 9141 will link to the ETA 9089 and certain fields will be populated automatically, uncertainty for practitioners remains, even though box H.10-B itself has disappeared, as the response to box F.b.4.b may not have been in compliance to the recent guidance provided by OFLC with respect to H.10-B. These ETA 9141s were prepared and submitted in 2022, even before the H.10-B denials, and do not contain the preferred language recommended by OFLC in November 2022. They will now link to the new ETA 9089. The employer will not have an opportunity in the new ETA 9089 to include any rehabilitative language as it did in response to H.10-B closely analogous to DOL's suggested "any occupation in which the required experience was gained" language. Will the DOL deny the ETA 9089 because the preferred language was not included in the previously approved ETA 9141?

Although only time will tell whether section H.10-B will haunt us despite its disappearance in the new form, employers who have not listed specific job titles in box F.b.4.b. of the 9141 should be able to take reassurance from

BALCA's decision in *Matter of Charter Communications*, which although it pertained to an H.10-B denial, seems to support the more general idea that an employer's failure to list specific job titles is not sufficient justification for denial of a PERM application. Employers should also be able to argue that 20 CFR § 656.17(a), the provision used to justify PERM denials based on box H.10-B, pertains only to an incomplete Form ETA 9089. If the DOL issues a denial based on an incomplete ETA 9141, there should be a strong legal basis to challenge the denial under 20 CFR § 656.17(a) in addition to the reasoning provided in *Matter of Charter Communications.* Another point in favor of challenging any denial is that the ETA 9141 with respect to alternative job requirements at box F.c.4.a asks for the number of months of alternate experience. It does not ask for the job title in the alternate occupation even if box F.b.4.b asks for the occupation required. It is hoped that DOL will not use the logic from its H.10-B denials to deny ETA 9089s in the new system because the occupation was not mentioned in response to box F.b.4.b. of the 9141. If it does, there will be ample basis to challenge the denial and forever exorcize H.10-B's ghost.

The DOL sees the new 9089 as the solution to all the ambiguities in the old ETA 9089. However, we all know that the new ETA 9089 is not the panacea to all the problems in the old form and continues to create additional ambiguities. We will need to remain vigilant and point these issues out as they play out including challenging potential denials to BALCA and even in federal court.

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