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CHANGES IN WORK FROM HOME POLICIES AFTER LABOR CERTIFICATION HAS BEEN FILED

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As a response to the COVID-19 pandemic, employers implemented telecommuting policies, and work-from-home became the norm for much of the workforce. Three years later, many of those employees are dusting off their lunchboxes and ironing their work suits as their employers call them back to the office. While the turning back of these policies may be met with groans from employees who grew comfortable in their home offices, for foreign nationals in the process of being sponsored for permanent employment, the change could mean something much worse than a mere change of work scenery. For instance, if the employer indicated in its test of the labor market that the position allows telecommuting and then later requires all employees to report to the office, could the labor certification be deemed invalid?

The PERM labor certification process is typically begun by submitting the Department of Labor (DOL) Form ETA 9141, Application for Prevailing Wage Determination (PWD). Some key "Job Offer Information" that ETA 9141 asks for in Section F is the job title (F.a.1), job duties (F.a.2), the minimum degree (F.b.1) and experience requirements (F.b.4), and whether the employer requires any special skills or other requirements (F.b.5). In F.b.5, the employer clearly must list any tools, software, or programs that the employee is required to know for the position, but the employer should also use this field to list other key information about the job, such as that telecommuting is permitted. The ETA 9141 also requires the employer to provide the full address of the place of employment (F.e). Based on the regulations' definitions of employment and employer, the "place of employment" has been interpreted to mean a physical office or location in the U.S. Specifically, 20 CFR § 656.3 defines employer as a

"person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States . . . . An employer must possess a valid Federal Employment Identification Number (FEIN).". In the case of "roving employees", the 1994 Barbara Farmer Memo states that the employer's main or headquarters (HQ) office should be indicated as the worksite when a job opportunity will require a beneficiary to work in various locations throughout the U.S. that cannot be anticipated. Note, the information from the ETA 9141 automatically gets included in the ETA 9089, the DOL form used to electronically submit the labor certification, since the revised ETA 9089 took effect on June 1, 2023. Under the old ETA 9089, the employer had to repeat the information from the ETA 9141 in the relevant boxes. Many of the approved labor certifications are under the old ETA 9089.

Once the ETA 9141 is certified by the DOL, employers can move onto the second stage of the PERM process which is to conduct a series of mandatory and optional recruitment steps to confirm that there are not sufficient U.S. workers who are "able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work", i.e., the labor market test. 20 CFR § 656.1(a)(1). The employer's advertisements must indicate all of the "Job Offer Information" that was listed in the ETA 9141, or in the old form it was the ETA 9089 and box H.14 was answered. The recruitment steps must be conducted in the area of intended employment that was listed in Section F.e. If an employer intends for an employee to work solely at a designated worksite, such as a company office or its HQ, then the ETA 9141 need only list one worksite location and the employer need only conduct recruitment in that area of intended employment. If the employer will permit the employee to perform work remotely from their home, then the ETA 9141 still need only list the employer's main or HQ office as the worksite, but F.b.5 on the ETA 9141, and in turn each of the ads used in recruitment, should indicate that the employer will permit telecommuting from anywhere in the U.S.

Turning back to the question we posed at the outset – what should happen to a labor certification that indicated "telecommuting permitted" but where the employer later decides that all employees must report to the office five days a week? Arguably, the labor certification should not be deemed invalid in such a

scenario because the labor market test was conducted in the area of intended employment, i.e., the company's main office or HQ, which is where the foreign worker will need to report to. Additionally, by issuing the labor certification, the DOL determined that there are not sufficient U.S. workers who are able, willing, qualified and available at the time of application for a visa and admission into the U.S. and at the place where the alien is to perform the work. Indeed, the employer, by indicating that telecommuting would be allowed, cast a wider net and potentially made the position "available" to more U.S. workers "at the place where the alien is to perform the work" since the U.S. applicant not need be physically present in the employer's area of intended employment listed in the ETA 9141, Section F.e or in the old ETA 9089. Therefore, the labor certification should not be invalid as the employer properly made the two attestations required by it.

But what if the issue was flipped and now the employer wishes to allow telecommuting even though the ETA 9141 and subsequent recruitment did not indicate that telecommuting would be permissible? Here, the employer's attestation that there are not sufficient U.S. workers who are able, willing, qualified and available at the time of application for a visa and admission into the U.S. and at the place where the foreign worker is to perform the work may be called into question. By failing to indicate in its ads that workers could telecommute from anywhere in the U.S., the employer arguably made the position more restrictive as qualified U.S. applicants may have not applied to the position due to the location of the employer's office or HQ, though they would have applied if telecommuting was allowed. Still, we would argue that the employer's telecommuting change after the labor certification should not invalidate the labor certification. The Barbara Farmer Memo made clear that the employer's main or HQ office should be indicated as the worksite when a job opportunity will require a beneficiary to work in various locations throughout the U.S. that cannot be anticipated. That HQ worksite in turn determines the course of the labor market test and where it is to be conducted. The labor certification should not be later deemed invalid just because the employer changes its mind as to whether or not telecommuting is allowed as the labor market test is still valid since it was conducted in the area of intended employment.

If the labor certification is approved but the I-140 petition still needs to be filed, it would behoove the employer to provide a justification in the support letter to

the I-140 that the labor certification is still valid despite a change in work from home policy. Alternatively, the employer is only obligated to offer the position in accordance with the terms of the labor certification upon the grant of permanent residence. See *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009). Thus, even if the work from home policies have currently changed, but the employer still wishes to offer the job in accordance with the labor certification, then there is no need for any further justification. Assuming that the employer does not intend to offer the position per the labor certification upon the grant of permanent residence, obtaining an I-140 approval after full disclosure has been made would be the ideal situation. If the I-140 petition is already approved, the employer could again go with the assumption that the underlying labor certification is valid despite the change in work from home policy and perhaps explain in the letter in support the I-485 or in the I-485J supplement, whichever is applicable. When there is doubt regarding the validity of the labor certification due to changes in work from home policies, and the I-140 is already approved, the employer can file a new labor certification and upon approval of the labor certification, file an I-140 petition and recapture the earlier priority date under 8 CFR § 204.5(e)(1).

Given the extraordinary time it takes to obtain labor certifications, starting again when there is a change in a work from home policy can be very burdensome especially when the foreign worker is running out of H-1B time. Our blog provides a legal basis for keeping the labor certification in intact when there is a change in work from home policies, and making full disclosure when submitting the subsequent I-140 petition and I-485 application.

(This blog is for informational purposes and should not be relied upon as substitute for legal advice)

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