CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

THE APPLICATION FOR PREVAILING WAGE DETERMINATION AND THE APPLICATION FOR PERMANENT LABOR CERTIFICATION – SIBLINGS OR TWINS?

Posted on March 25, 2024 by Cyrus Mehta

By Cyrus D. Mehta and Kaitlyn Box*

The process for an employer to sponsor a noncitizen employee for permanent labor certification is long and complicated. The first step in the process for filing Form ETA 9089, Application for Permanent Labor Certification, also known as PERM, is to file Form ETA 9141, Request for Prevailing Wage Determination. It takes about 6 months for the National Prevailing Wage Center to issue the prevailing wage determination. It is only after the prevailing wage is determined, and recruitment is conducted, that the employer can file Form 9089, which takes 9 months to a year before a labor certification is issued.

The filing of Form 9089 sets the priority date, which determines where the noncitizen is in the queue under the Employment-Based Second (EB-2) or Employment-Based Third (EB-3) Preference. The filing of the Form 9089 can also provide the legal basis for filing an H-1B extension beyond the six year limit if it is filed one year before the sixth year under section 106(c) of the

American Competitiveness in the 21st Century Act.

As the Form 9141 is imperative in ensuring that the Form 9089 can be filed as soon as possible, the National Prevailing Wage Center has begun to issue Requests for Information (RFI) after the Form 9141 is filed to request a prevailing wage determination, which have the potential to further delay the overall labor certification process.

In the Form 9141, the position and the requirements have to be provided in

detail so that the National Prevailing Wage Center (NPWC) can issue an appropriate prevailing wage determination. For instance, if the position requires travel, this too needs to be specified on Form 9141. Since June 1, 2023, Form 9141 links to the new Form 9089, automatically populating certain fields on the PERM application form. Some of the information on Form 9141, such as the description of the offered position and its requirements, remain only on Form 9141.

Practitioners have been receiving a Request for Information (RFI) after filing Form 9141 requesting the employer to answer the travel requirement question with more specificity. This could add further delays to the issuance of a prevailing wage determination, which is taking about six months, which in turn would lead to delays towards filing Form 9089. Question F.d.3 on Form 9141 asks, "Will travel bs required in order to perform the job duties?" If the response is "Yes" to this question, then the employer is required under Question F.d.3. to "provide geographic location and frequency of travel"

If the position requires travel, Question F.d.3. should be answered as specifically as possible. If the position requires travel about once a month domestically to meet clients, the employer must specify under F.d.3 that the position requires travel once a month with the US to meet with clients. If such details are not provided in Form 9141, and instead, the answer is "occasional travel required" then the NPWC will issue an RFI asking for specific details as set forth in the following example we have received on behalf of a client:

> *Item F.d.3a states, "Frequent travel required. " Please clarify if the occupation will require any national or international travel, and the frequency of that travel. Your response should also confirm that the NPWC has permission to correct your Form ETA-9141 with the information you provide in your response.*

The employer is given the choice to respond directly to the RFI in the FLAG system or via e mail. The employer must respond within 7 days. The employer is also given the choice to withdraw and apply again too.

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. Even with roving

employees, the employer will tend to answer “Yes” to F.d.3, which asks “Will travel be required in order to perform the job duties?” Then, under F.d.3.a. where the employer is asked to “provide geographic location and frequency of travel” the employer tends to answer consistent with the Barbara Farmer Memo as follows: “Must be willing to relocate and work anywhere in the US.”

Recently, the NPWC has been issuing an RFI on this response too stating:

> *Item F.d.3 states "Yes", and Item F.d.3a states the applicant "Must be willing to relocate and work anywhere in the U.S. "*
>
> *Please clarify the frequency of that travel.*

However, this response does not relate to travel because the frequency of travel is now known. The position, rather than requiring travel, requires the employee to be willing to relocate and work anywhere.

At the AILA 2024 Spring Conference in Washington DC on March 22, 2024, Lindsey Baldwin, Director, National Prevailing Wage Center, clarified that the DOL is more interested in knowing about travel in the Form 9141 than unanticipated job locations under the Barbara Farmer memo. She also said that the information in the Form 9141 does not have to match everything that is in the Form 9089, and suggested that the Form 9141 and Form 9089 may be siblings but they are not twins!

Given that the information in the Form 9141 links to the Form 9089, what if the employer answers “No” to Question F.d.3 regrading travel for a position that only requires the ability to work at unanticipated locations under the Barbara Farmer Memo? How will the ability to work at unanticipated worksites get captured in the Form 9089? Answering “No” may avoid an RFI regarding travel. However, the information in the Form 9089 must also match with the information provided in the advertisements, which requires that the job applicant be willing to relocate and work anywhere in the US.

One way of ensuring that the need to relocate to unanticipated worksites gets into Form 9089 is to answer “Yes” to Fb.1. in Form 9089 – Will work be performed in geographic areas other than the one identified in Section F as above? Then answer F.c. – Other Definable Geographic Area(s) – by stating “Various worksites such as the Company Headquarter and other unanticipated locations in the US.” This further demonstrates that Form 9141 and Form 9089

are siblings and not twins.

In order to answer the RFI and also answer F.d.3.a on Form 9141 to avoid a future RFI another suggested response from the employer may include answering positively to the travel question after consulting with the employer regarding the anticipated frequency of relocation. One example is as follows:

> *Must be willing to relocate and work anywhere in the US. Travel in the context of relocation may be required at least once or twice a year based on clients' needs.*

Ms. Baldwin did however emphasize that when responding to the RFI regarding travel, the employer must specify:

- *Whether travel is local or international*
- *How frequent is the travel? – once or twice a year or more (do not indicate "occasional travel" as that is subjective)*
- *What is the nature of the travel? Is it for meetings or is it for the performance of the duties of the position?*

If the employer does not answer the RFI with such specificity, the Form 9141 issuance will get further delayed.

The labor certification process has been both exacting and maddeningly complex. The recent trend of RFIs being issued in the context of travel to determine the prevailing wage have added even more complexity as well as confusion to the process. The authors only provide suggested responses to RFIs and how to complete the travel section in Form 9141 and related sections in Form 9089. They do not provide any assurances that DOL will agree with these suggested responses.

***Kaitlyn Box is a Senior Associate at Cyrus D. Mehta & Partners PLLC.**

.