PERM Success Is In the Details

By Avalyn C. Langemeier[1]

Preparation of PERM labor certification cases requires careful attention to detail, especially during recruitment and drafting of the Form ETA 9089.[2] Employers and their attorneys are forced to follow regulations and DOL Frequently Asked Questions (FAQs) with little, if any, room for error. An application can be denied due to a typo, even if the typo is immaterial. Certifying Officers (COs) can improperly deny PERM labor certification applications based on alleged filing and document requirements that do not exist in the regulations or in FAQs. Furthermore, FAQs are issued without notice by the DOL.

The good news, however, is that the Board of Alien Labor Certification Appeals (BALCA) serves as a check on a CO's erroneous denials. The not so good news is that the application is still expected to be near perfect if not perfect at the time of filing. This article discusses recent BALCA decisions and provides practice pointers.

Favorable Decisions – BALCA Reversed Denials

- **Totality of Circumstances Showed Employer's Participation in a <u>Job Fair</u> in Accordance with 20 CFR 656.17(e)** – *Matter of HTC Global Services, Inc*., 2012-PER-02084 (BALCA Oct. 6, 2016), AILA Doc. No. 16101145

In *Matter of HTC Global Services*, the employer provided evidence related to recruitment at a job fair in its audit response. The evidence included email correspondence from an account executive with the job fair sponsoring company, including a receipt confirmation and a request for advertisement information; a credit card receipt for $599 from The Employment Guide dated October 29, 2010 that didn't specify the job fair; a flyer/brochure with the details of the job fair that did not include the employer's name; a sign up form with pricing for participating employers; and an advertising report reflecting 35 applicants sourced from the job fair.

The CO denied the application. After the employer filed a motion to reconsider, the CO upheld the denial on the basis that the employer had failed to provide adequate documentation that it

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[2] The PERM labor certification application is the first step in the three-step permanent residence process. The purpose of this first step is to determine through recruitment if (1) there are no sufficient U.S. workers who are able, willing, qualified and available for the offered position at a place where the alien will perform the position and (2) if employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* 20 CFR 656.1 and 20 CFR 656.2.

participated in a job fair in violation of 20 CFR 656.17(e)(1)(ii)(A) because the employer's ads, postings, photos and press coverage regarding the job fair did not name the employer as a participant in the job fair. The employer appealed.

BALCA reversed the denial finding that, based on the precise facts, the totality of evidence showed the employer's participation in the job fair. "While the regulation at 656.17(e)(1)(ii)(A) provides one method for documenting an employer's participation in a job fair, the employer can document its participation by other means if the alternative documentation is reasonably equivalent to the primary proof required by the regulation, and it adequately indicates the employer actually participated in recruitment at the job fair." Here, BALCA found "[t]he pieces of evidence are not merely generic recruitment tools, but rather, they document ongoing correspondences with the job fair sponsor company and demonstrate the Employer took the required steps to register for and participate in the job fair. Furthermore, the receipt confirmation received from the sponsor company clearly notes the Employer's name and states, 'For your records.'" The court also noted that the employer's recruitment report reflected 35 applicants from the job fair, which indicated the employer's participation in the job fair.

Practice Pointer: Under 20 CFR 656.17(e)(1)(ii)(A), an employer can conduct recruitment for the offered position at a job fair, "which can be documented by brochures advertising the fair and newspapers advertisements in which the employer is named as a participant in the job fair." An employer can provide alternate documentation, however, if it is "reasonably equivalent" and shows the employer's "actual" participation in the job fair. As a precaution, an employer should keep all correspondence and documentation showing its communications with the job fair organizers; take pictures showing its attendance at the job fair; obtain and retain any documentation with its name connected to the job fair, particularly if the employer was a sponsor of the fair; create a signup sheet for individuals/potential applicants who stop by the employer's table or meet with the employer at the job fair; and a list of the applicants from the job fair.

- **PERM Was Timely Filed Where Proof Was Provided that Federal Express Delivered the Filing Late** – *Matter of Town and Country Children's Montessori,* 2012-PER-03624 *(*BALCA Oct. 6, 2016), AILA Doc. No. 16101144

In *Matter of Town and Country Children's Montessori,* the employer had filed a PERM a labor certification application by mail on Thursday for Friday delivery, but Federal Express did not deliver the application until Monday. The CO denied the application saying the job order had expired on Saturday. The employer filed a motion for reconsideration/request for review.

BALCA rejected the employer's argument that the actual deadline for filing was Monday since the application deadline fell on a Saturday when the DOL was closed. However, BALCA did reverse the denial finding that while Federal Express had delivered the application late, sufficient evidence was shown that the employer had taken steps to file the application timely.

Practice Pointer: This is good news for the employer. Unlike the CO, BALCA considered the employer's evidence, rather than mere assertion, of its good faith attempt to file timely. Employers should make sure to document all steps taken to file applications timely, including retaining the Federal Express label and delivery instructions. Had the employer merely asserted that it filed the application without submitting supporting evidence then BALCA likely would have upheld the CO's denial.

- **Employer Had No Regulatory Obligation Under 20 CFR 656.17(f) to Include Its Name in the Job Search Website Advertisement** – *Matter of Kyyba Inc.*, 2012-PER-02841 (BALCA June 30, 2016), AILA Doc. No. 16070830.

In *Matter of Kyyba Inc.*, the employer responded to an audit with an affidavit of publication and a print-out summary of the advertisement that ran on the job search website; it was unclear if the employer's name was included in the ad. CO denied certification pursuant to 20 CFR 656.10 finding that the employer had failed to properly attest that the job opportunity was clearly open to U.S. workers because the job search website ad did not include the employer's name in accordance with 20 CFR 656.17(f).

In its request for reconsideration, the employer provided evidence for the first time that the job search website advertisement did in fact include the employer's name. The CO said it was barred from considering that evidence under 20 CFR 656.24(g)(2), which states that applications for reconsideration may include only documentation that the DOL received in response to an audit or that the employer did not have an opportunity to present previously to the CO but existed at the time of filing and was mentioned by the employer in compliance with the requirements of 656.10(f).[3]

On appeal, BALCA reversed the denial, finding that an employer has no regulatory obligation to include its name in the job search website ad. By its own terms, 20 CFR 656.17(f) only applies to advertisements placed in Sunday newspapers or professional journals. Therefore, it was irrelevant that BACLA could not determine from the evidence submitted during the audit if the employer's name was included in the job search website ad. Instead, the relevant inquiry is

[3] 20 CFR 656.10(f) states that copies of applications for permanent employment certification filed with the DOL and all supporting documentation must be retained by the employer for 5 years from the date of filing the application for permanent labor certification.

under 20 CFR 656.10(c)(8), whether the employer informed potential applicants of the job opportunity sought. Since the employer's compliance with 20 CFR 656.10(c)(8) was not at issue, the denial was reversed.

Practice Pointer: This case reminds practitioners of what evidence can be submitted with a request for consideration of a PERM labor certification application denial. This case also clarifies that the employer's name need not be included in the employer's job search website ad, although the content must still inform applicants of the job opportunity sought. It is nevertheless good practice to include the employer's name in the job search website ad and to provide that evidence in the audit response.

- **Ads Placed by Private Employment Firm That Included the Incorrect Salary Do Not Violate 20 CFR 656.17(f)(3)** – *Matter of Softpath System*, LLC, 2012-PER-03118 (BALCA June 9, 2016), AILA Doc. No. 16061307

In *Matter of Softpath System*, the employer used a private employment firm that listed the offered wage as $80,000 in the advertisements rather than $78,000 as listed on the ETA 9089. The CO denied the PERM pursuant to 20 CFR 656.17(f)(3) because the advertisement did not sufficiently apprise U.S. applicants of the job opportunity because it list a higher wage than what was listed on the ETA 9089.[4] The employer explained that the error was made by a private employment firm and that the "error was harmless because the higher wage 'should have yielded more [U.S.] applicants.'"

The only issue on appeal was whether the private employment firm's advertisement complied with the regulation at 20 CFR 656.17(f)(3). Citing prior decisions, BALCA found that 20 CFR 656.17(f)(3) only applies to advertisements placed in newspapers of general circulation or in professional journals. Accordingly, "a CO may not deny an application based on a petitioning employer's failure to comply with an unwritten requirement that has no basis in the clear text of the regulations." BALCA found that the CO's denial was not supported by the regulations because 20 CFR 656.17(f) does not apply to the content of advertisements placed by private employment firms.

Practice Pointer: One form of additional recruitment can be a private employment firm or a placement agency. *See* 20 CFR 656.17(e)(ii)(F). Where the employer chooses this form of

[4] 20 CFR 656.17(f)(3) states that advertisements placed in newspapers of general circulation or in professional journals before filing a PERM application must provide "a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought."

additional recruitment, the ads placed by the private employment firm or placement agency are not required to comply with 20 CFR 656.17(f)(3). Thus, it is good news that the employer will not be penalized for the errors of a third party vendor seeking to fill the offered position. That being said, employers should provide the content of the ad language to the third party vendor and review the ads after the ads have run to help avoid issues. By conducting a review of the ads, employers also can help ensure that the correct offered salary is listed as required in the Notice of Filing and not included in the other ads since inclusion of the salary is not required.

- **Totality of Circumstances Showed that <u>Brother</u> of Husband and Wife Owned Company Did Not Have Control or Influence Over the Employer's Business Operations** – *Matter of Palm Café Restaurant*, 2012-PER-01446 (BALCA June 7, 2016), AILA Doc. No. 16061303

In *Matter of Palm Café Restaurant,* the alien was the brother of one of the husband and wife owners. The CO denied the PERM labor certification application because the alien was possibly an integral part of the employer's business due to the alien's familial relationship with the owners. BALCA reversed the denial after considering the totality of the circumstances and applying the nine factors of *MMB Stucco*, 2011-PER-00715 (BALCA May 7, 2012), AILA Doc No. 12050851.

The nine *MMB Stucco* factors to determine whether a bona fide opportunity exists are whether the alien:

1. Is in the position to control or influence hiring decisions regarding the job for which labor certification is sought;
2. Is related to the corporate directors, officers, or employees;
3. Was an incorporator or founder of the company;
4. Has an ownership interest in the company;
5. Is involved in the management of the company;
6. Is on the board of directors;
7. Is one of a small number of employees;
8. Has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
9. 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 in operation with the alien.

Considering the above factors and the totality of the circumstances, BALCA found "Yes" to factor number 2 and "No" to factor numbers 1, 3, 4, 6, 7, and 8. BALCA found factor numbers 5 and 9 inapplicable because, although the Head Cook was in charge of several line cooks, there was no evidence that the Head Cook engages in management activities and the Head Cook was not involved in payroll activities.

Accordingly, BALCA held that a bona fide job opportunity exists under 20 CFR 655.17(l) where the alien had no control and influence over the employer's business operations, was independent of the employer, was not involved financially in the employer's business, and the CO did not object to the employer's recruitment efforts.

Practice Pointer: Question C.9 on Form ETA 9089 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 foreign worker and the owners, stockholders, partners, corporate officers, and incorporators?" (Italics added.) A familial relationship has been defined to be quite broad and 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." *See* FAQ FM1, AILA Doc. No. 14072854, posted July 28, 2014, and found at **http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#FM1**. According to the FAQ, the ultimate question is whether a job opportunity exists and there is no undue influence and control by the alien. Failure to disclose familial relationships or ownership interests when responding to Question C.9 is a material misrepresentation and may be grounds for denial, revocation or invalidation in accordance with the Department's regulations. *See* FAQ FM1, *supra.*

Therefore, in light of FAQ FM1 and *Matter of Palm Café Restaurant* , it would be good for the attorney to inquire at the outset of the case if (1) the employer is a closely held corporation, partnership or sole proprietorship in which the alien has an ownership interest and (2) if there is a *familial relationship* between the foreign worker and the owners, stockholders, partners, corporate officers, and incorporators with the definition of "familial relationship" also being provided. This inquiry could be done verbally and through written employer and employee questionnaires. If the response is yes to either of these questions, apply the *MMB Stucco* factors and totality of circumstances test before beginning the case. If the application is filed, be sure to mark yes to Question C.9 on the ETA 9089 on this issue.

- **Due Process Violated where Advertising Requirement Imposed for <u>Job Relocation</u> Without Notice to the Employer** – *Matter of Infosys Ltd,* 2016-PER-00074 (BALCA May 12, 2016), AILA Doc. No. 16051733

In *Matter of Infosys Ltd,* the employer had listed the worksite on the ETA 9089 as "Plano, Texas, and various unanticipated locations throughout the U.S." The CO issued an audit asking if there was a telecommuting benefit. The employer responded, "No". The CO also asked if there would be worksites other than the employer's headquarters or the worksites listed on the ETA, and if there would be multiple worksites. The employer responded, " Yes".

In a second audit, the CO asked additional questions to which the employer responded:

1. Is there a relocation requirement? The employer responded, "Yes".
2. Is the employee permitted and/or expected to perform the duties of the job opportunity listed on the ETA Form 9089 from a location other than that listed in Section H? The employer responded, "No," "because the worksite will be either headquarters or various unanticipated locations in throughout the U.S. as reflected in Section of the ETA Form 9089 and in all advertisements."
3. If yes, will the employee be required to relocate to multiple worksites and/or will the employer pay or reimburse all travel expenses? The employer responded, "Yes".

The CO denied the PERM labor certification application saying that the ETA 9089 failed to identify that the employee may relocate to different worksites and that the employer's recruitment must reflect the relocation requirement in order to fully apprise U.S. applicants of the job opportunity sought. Specifically, the denial was based on the employer's failure to comply with 20 CFR 656.17(f)(3) – employer is obligated to provide a description of the vacancy specific enough to apprise U.S. applicant of the job opportunity; 20 CFR 656.17(f)(4) – advertisements must indicate the geographic area of employment with enough specificity to apprise the applicant of any travel requirements; and 20 CFR 656.17(i)(1) – job be described with the employer's actual minimum requirements.

The employer filed a request for reconsideration arguing, among other things, that

1. Relocation was inherent in employment in the IT industry;
2. The employer had filed hundreds of similar applications that were certified, but this one was denied and that the "denial reflected a 'newly created standard', which was previously unpublished and unknowable to the Employer, announced only in retrospect upon denial of its labor certification application…" ; and
3. Multiple unsuccessful efforts had been made by stakeholders seeking guidance and that OFLC had responded by saying that "any change in the policy will be made clear with notice

to stakeholders, such as an FAQ or a Federal Register notice that will provide additional guidance and clarification."

Matter of Infosys Ltd., supra, at pp. 4- 5.

The two issues on appeal were found in favor of the employer, and the denial was reversed. First, BALCA found that the possibility workers might be required to relocate was subsumed in the employer's description of the work location as "various unanticipated locations throughout the U.S.".

Second, BALCA found that the CO's requirement that the employer include a relocation requirement on the ETA 9089 and in the advertisements violated due process and fundamental fairness. BALCA opined, "If the application is wrong, the employer must start all over. The employer must get it right the first time." Conversely, the CO bears the burden "to ensure that employers have adequate guidance of what will be demanded of them." Since no such prior guidance was provided to the employer and the employer's ETA 9089 was consistent with its recruitment, due process and fundamental fairness were violated. *Id.*, at pp. 10 and 11.

Practice Pointer: Employers must carefully follow the regulations and FAQs in effect at the time the PERM is filed because "employers must get it right the first time". Employers will not be held to a standard that did not exist at the time of filing. Nevertheless, if an FAQ is followed for recruitment and/or filing, attorneys should include that FAQ in the audit file as a precaution should the guidance be changed post-PERM filing.

Unfavorable Decisions – BALCA Upheld Denials

- **Applicant Should Have Been Interviewed Where Applicant Had Relevant Experience in the Job Offered, but Lacked the Related Degree** – *Matter of Cardinal Health,* 2012-PER-03522 (BALCA Sept. 13, 2016), AILA Doc. No. 16091911

In *Matter of Cardinal Health,* the offered positon was classified as Computer Systems Analysts, OES 15-1051.00. The minimum education requirement was listed on the ETA 9089 as a Bachelor's degree in Accounting, MIS, or Computer Science and indicated that "24 months of IT audit experience was an acceptable alternative." Three of the applicants were rejected without interview by the employer for having Bachelor's degrees in fields other than Accounting, MIS, or Computer Science, although their resumes reflected they "had extensive experience doing the very same work that was described in the Form 9089." In this case, one of the applicants

had a Bachelor's degree in an unspecified field, an MBA, and over seven years of experience as a Senior IT auditor.

The CO denied the application after an audit. In its denial of the employer's request for reconsideration, the CO found again that the employer's failure to submit one of the resumes was a valid reason for denial. The CO also found that it appeared three of the applicants were unlawfully rejected because they appeared qualified based on education and experience and so they should at a minimum have been interviewed.

On appeal, BALCA focused on only one basis of the denial – whether qualified U.S. workers were rejected by the employer for unlawful reasons. BALCA affirmed the denial finding that the regulations require the CO consider a U.S. worker able and qualified if the applicant is able to perform the position based on education, training, experience, or a combination thereof in accordance with 20 CFR 656.24(b)(2)(i). "Where the record shows that an applicant has performed the very same work that was described in the Form 9089, eliminating such a qualified applicant because his or degree is not in a specified field appears to run counter to the purpose of this regulation."

Practice Pointer: The argument can be made that this case is limited to those situations where the position has an alternate requirement, such as where experience will be accepted in lieu of education. In such situations, the employer clearly should interview applicants if they appear to have the relevant experience in lieu of the education.

However, it can also be said that *even if* there is no alternate requirement and *even if* the applicant does not have the required degree in the required field, the applicant should at least be given an interview if it appears the applicant has the relevant experience, especially if it is in the job offered. Simply put, if the applicant has actually been performing the offered position, regardless of whether the applicant meets the employer's minimum or alternate requirements for the position, the applicant should be interviewed. Otherwise, the CO could say recruitment was not conducted in good faith.

- **BALCA Affirms Denial Where Employer Required 72 Months of Experience, but Section K of the ETA 9089 Showed Only 70 months of the Alien's Experience** – *Matter of Netflix*, 2012-PER-02315 (BALCA June 8, 2016), AILA Doc. No. 16061305

In *Matter of Netflix*, the filed PERM labor certification application, Form ETA 9089, listed the minimum experience requirement as 72 months of experience, but only indicated 70 months of the alien's experience in Section K. The CO denied the application after an audit stating that it appeared the employer's actual minimum requirement was only 70 months of experience since

Section K showed the alien had only 70 months of relevant experience.[5] The employer filed a request for reconsideration with the alien's additional experience letters showing the alien had 72 months of relevant experience and argued there was a typo on the ETA 9089 and that due process requires acceptance of the new evidence. The CO stood by its denial.

BALCA affirmed the denial saying that, contrary to the employer's argument, the issue is not whether the alien had the actual experience, but that the ETA showed the alien's wrong amount of experience. BALCA opined that the employer is essentially asking to amend Section K, which is not permitted under 20 CFR 656.11(b) and *O'Connor Hosp.*, 2011-PER-00076 (BALCA Mar. 5, 2012) which had reversed its original decision on reconsideration. BALCA affirmed the denial finding that employers cannot amend the ETA 9089 once it is filed.

Practice Pointer: This finding is particularly harsh given that the alien did in fact meet the listed experience requirement of 72 months although Section K did not reflect all of the alien's experience. What is also harsh is that in the earlier decision of *Matter of O'Connor Hospital,* 2011-PER-00076 (BALCA Jan. 24, 2012), AILA Doc. No. 12012562, the court had reversed a denial of the PERM application finding that the DOL can consider evidence of prior work experience even if the ETA 9089 had not listed all of the alien's prior work experience. Attorneys are reminded to check carefully the ETA 9089, particularly Sections K and H14, to see if the alien's relevant experience and qualifications (including certifications and training) are clearly reflected in the filed ETA 9089.

- **Employer Provided Statement, but No Phone Log Of When Applicants Contacted** – *Matter of Scenic Landscaping LLC*, 2012-PER-00989, (BALCA June 1, 2016), AILA Doc. No. 16060600

In *Matter of Scenic Landscaping LLC*, the CO issued an audit requesting the employer provide recruitment documentation, including "information that documents the employer contacted the applicant(s) by phone (telephone logs), email (dated copy of electronic submission) and/or by mail (copy of letter sent to applicant(s) along with a copy of certified mail/'signed' green return receipt card." The employer responded with a statement indicating it had contacted two applicants by phone. One applicant was contacted three times but never responded. The other applicant was contacted by phone and an interview was scheduled, but the applicant did not appear for the interview. A phone log was not submitted with the audit response. The CO denied the application.

[5] It is not clear if the employer had submitted evidence of its recruitment, including Notice of Filing, showing that the actual minimum experience requirement was 72 months of experience and that the applicants had been apprised of this minimum requirement.

Before affirming the denial, BALCA cited *SAP America Inc.*, 2010-PER-1250 (BALCA Apr. 18, 2013) (en banc) and stated that if a CO requests documentation that is not required to be retained by the regulations, then BALCA cannot summarily affirm the denial. Instead, BALCA must assess whether the CO's request was reasonable, such as readily available to the employer, and if the omission by the employer was material enough to constitute a substantial failure to provide required documentation. After making this assessment, BALCA found the CO's request reasonable because documentation evidencing contact with applicants should be retained by the employer and the employer's failure to provide the documentation demonstrating it contacted two applicants was a substantial failure to comply with the audit under 20 CFR 656.20(b).

Practice Pointer: In light of this case, attorneys should advise employers to keep records of its attempts to contact applicants, including telephone logs if the employer tries to contact applicants by phone and copies of emails that include the date the email was sent to the applicant(s). If applicants were attempted to be contacted by mail, then a copy of the letter sent to the applicant(s) along with a copy of the certified mail/'signed' green return receipt card should also be retained.

Conclusion

As shown by the recent BALCA decisions, the devil is in the details. Or, to be put another way, success is in the details. Employers cannot amend the ETA 9089 once it is filed. Employers and practitioners should follow the regulations carefully and follow FAQs that exist at the time of recruitment and preparation of the ETA 9089, with placement of the FAQ in the audit file. If DOL later changes the requirements without notice the employer would be able to rely on the regulations and FAQ in effect at the time of filing to show good faith recruitment.