**SHAPING THE FUTURE OF PERM — BALCA HIGHLIGHTS,**

**3Q 2017**

**BY RON WADA AND John C. Lemacks, II**

*This series of articles summarizes notable decisions of the Board of Alien Labor Certification Appeals (BALCA) issued during the preceding quarter. We identify the decisions according to subject area, include a brief summary and citations to related decisions, and offer commentary where appropriate. The decisions reported in these articles will also be reported in context in regularly scheduled updates to Chapter 44, Labor Certification, in the treatise* Immigration Law and Procedure*.[[1]](#footnote-1)*

BALCA issued only a handful of notable decisions during the third quarter of 2017. This is in marked contrast to its torrid pace over the past four years, which was still not sufficient to prevent a steadily increasing backlog of appeals that now stands at more than four years. Therefore, we lead off with a brief overview of the most significant trend at BALCA over the past year in which BALCA has articulated new standards for how employers conduct their applicant review process. Summaries of the handful of noteworthy decisions from 3Q2017 follow:

* 2017 BALCA Standards for an Employer’s PERM Applicant Review Process
* Noteworthy BALCA Decisions Issued During 3Q2017:
  + The CO Waives Alternate Grounds for Denial That Are Not Specifically Cited
  + Denial of Request for Extension to Respond to an Audit Request is Reviewed Under Abuse of Discretion Standard
  + Drafting Problems – Travel and Relocation

**2017 BALCA STANDARDS FOR AN EMPLOYER’S PERM APPLICANT REVIEW PROCESS**

For the first eight years or so of the PERM program, DOL had tacitly accepted an employer’s disqualification of applicants to a PERM job opportunity if the applicants did not meet the employer’s objectively stated job requirements. The employer is required to state the minimum job requirements and to prepare a business necessity justification for each job requirement that exceeds the “normal” requirements for the occupation. In the absence of additional clarification from DOL, employers made the reasonable presumption that if the applicant did not have the required education, or the required years of experience, or any of the skills specified by the employer as being required to do the job, the employer could properly disqualify that applicant; the employer would have to also explain why the specific the job requirements could not be met during a reasonable period of on-the-job training. Conceptually, this all made sense. But as with all aspects of the PERM process, the devil is in the details, and what we’ve learned over the past year is that DOL’s view of who should be interviewed and who is qualified for a given position may differ substantially from an employer’s view.

The following observations and practice tips have been consolidated from previously published articles in this series in order to present a more coherent picture of the scope and content of the standards that BALCA has articulated over the past year that impact how an employer conducts the applicant review process for PERM.

It is important to note that the PERM regulations do not provide specific standards under which U.S. applicants can be properly rejected, instructing only that employers provide a recruitment report describing the recruitment steps taken and results achieved, categorizing any U.S. workers rejected by the lawful job-related reasons for rejection, and demonstrating that the employer made a good-faith effort to recruit qualified U.S. workers. The absence of guidance on this point meant that employers have had to guess at the acceptable standard for disqualifying applicants, using “good faith effort” and prior experience with the labor certification process as guides.

The Certifying Officer began denying PERM applications filed in 2013 and later after reviewing audit responses that included the requested recruitment reports and applicant resumes. In some cases finding technical fault with recruitment reports that contained inconsistencies or audit responses that failed to include all applicant resumes,[[2]](#footnote-2) or rejecting an employer’s reasons for rejection as being impermissible under the PERM rules.[[3]](#footnote-3) A third category of denials involved cases where applicants were disqualified not based on failure to meet one or more job requirements but rather based on the employer’s judgment that the applicant would be unable to perform one or more of the job duties specified on ETA Form 9089 based on review of the applicant’s resume alone.[[4]](#footnote-4)

The most far reaching of these recent decisions involve denials where the employer failed to interview an applicant who, in the Certifying Officer’s judgment, *might have been qualified* despite submitting a resume that showed that the applicant did not hold the required degree, or failed to include specific mention of one or more of the required job skills in their background.[[5]](#footnote-5) In other words, with only rare reversals by BALCA, the Certifying Officer is now substituting his judgment for the employer’s judgment about who should be interviewed for a particular position, akin to what the CO does in a supervised recruitment case.[[6]](#footnote-6)

The CO has created a set of surrogate tests regarding who should be interviewed and under what conditions, apparently based on an undefined “reasonable person” standard, and BALCA has generally affirmed. The basic idea that has been repeated in multiple decisions is that if an applicant has many years of experience in the generic occupation (e.g., as a software engineer), it doesn’t matter if their experience does not encompass the specific subject matter of the job being offered, the applicant should at least have been interviewed to verify their lack of qualification before being disqualified.

The fuzzy contours of BALCA’s position appear to be as follows:

* Whenever an applicant has something resembling the required education or degree and more years of experience in an occupation than are required in ETA Form 9089 Section H, BALCA will find that the employer should have at least interviewed the applicant and provided more detailed information on why the applicant was rejected.[[7]](#footnote-7)
* Even where an applicant does not possess the required degree, if the applicant has direct experience performing the job duties described for the PERM position, the applicant should be interviewed.[[8]](#footnote-8)

In addition, specific factors present in the ETA Form 9089 will *enhance* an employer’s duty to interview applicants and provide more specific justifications as to why an applicant who meets the basic profile was disqualified:

* No experience required[[9]](#footnote-9)
* No special skills required[[10]](#footnote-10)
* Subjective special skill requirements[[11]](#footnote-11)
* Experience in an alternate occupation is acceptable[[12]](#footnote-12)
* Kellogg language included[[13]](#footnote-13)

In addition, while BALCA acknowledges that an inability to perform the job duties specified in Section H.11 of ETA Form 9089 can be leveraged to serve as a basis for disqualification, BALCA has also clarified that specific conditions can render this reasoning insufficient when disqualifying an applicant without an interview to verify such inability:

* Where the job duties require a specific skill but the skill is not listed among the special skill requirements provided at H.14 of ETA Form 9089, an applicant whose resume does not list that specific skill may not be disqualified without an interview;
* If the applicant possesses related experience and there is a reasonable possibility that the skills can be learned in a reasonable period of on-the-job training, the employer still has a duty to inquire. As a minimum, this means a duty to interview the applicant to verify their qualifications vis-à-vis the job requirements, and provide a thorough explanation of the basis for disqualification.

Finally, BALCA will not accept the following justifications for disqualifying a U.S. applicant:

* Applicant was overqualified[[14]](#footnote-14)
* Applicant really wanted another position[[15]](#footnote-15)
* Applicant demanded higher pay[[16]](#footnote-16)
* Applicant submitted a poorly written resume[[17]](#footnote-17)

Disqualification must be based on an explicit determination (presumably based on an in-person interview) that the applicant was unable to perform the duties of the position and could not gain the required background or skills during a reasonable period of on the job training.

In sum, it has become abundantly clear in BALCA decisions issued over the past year that old rules of thumb regarding what applicants an employer may safely disqualify without interview no longer apply. In essence, it appears that anyone who comes within shouting distance should be interviewed, particularly where the job requirements are minimal in terms of experience and special skills, or where the Kellogg language is included.[[18]](#footnote-18)

***Practice Tip #1:*** Disqualification of an applicant can no longer be based on a simple review of the four corners of the applicant’s resume. The relevant test is, would a reasonable person acting in good faith perform at least a phone screen with a candidate if it appears that they may qualify, but may not have all the requirements listedon the resume? If an applicant has many years of experience in the related field but their resume is missing some of the required skills, it behooves the employer to at least conduct a phone screen of the candidate and if the interview reveals that the applicant could not perform the job duties even with a reasonable period of on-the-job training, document the reasons for rejection in specific detail.

***Practice Tip #2:*** The duty to inquire (a.k.a. the duty to interview) is enhanced when (a) no experience is required,[[19]](#footnote-19) (b) no special skills are required,[[20]](#footnote-20) (c) experience in alternate occupations is acceptable,[[21]](#footnote-21) or (d) the Kellogg language is used.[[22]](#footnote-22) Moreover, in each of these situations, an inability to perform the job duties given in Section H.11 cannot be cited as a basis for rejecting applicants. As a minimum, these factors enhance an employer’s duty to interview a broad range of applicants to verify their qualifications vis-à-vis the job requirements, and provide a thorough explanation of the basis for disqualification.

***Practice Tip #3:*** Neither “overqualified” nor “excessive salary demanded” are acceptable bases for disqualifying an otherwise qualified U.S. applicant; the unwillingness/unavailability of a qualified applicant must be scrupulously documented in the recruitment documentation.[[23]](#footnote-23)

***Practice Tip #4:*** When drafting job duties and job requirements for a PERM application, the best practice should be to assume that the recruitment will produce an applicant with related education and many years of experience, not necessarily all of it relevant to the position. A crucial question to ask when drafting is whether the job specification is robust enough (e.g., whether the required skills are substantial enough that they could not be gained through a reasonable period of on the job training) to serve as justifiable grounds for disqualification. Subjective terms should be avoided when drafting job requirements.

Finally, BALCA has reversed denial in at least one case where the employer provided a thorough and convincing argument that the applicant’s experience was not relevant or appropriate to the job being offered, and that decision is worth careful review.[[24]](#footnote-24)

**NOTEWORTHY BALCA DECISIONS ISSUED DURING 3Q2017**

**THE CO WAIVES ALTERNATE GROUNDS FOR DENIAL**

**THAT ARE NOT SPECIFICALLY CITED**

*Matter of Systime Computer Corp.[[25]](#footnote-25) –* denial of certification reversed for a Computer Software Engineer, Applications. The employer indicated the job opportunity required a BS degree and 24 months of experience on the Form 9089. It also listed a myriad of alternate ways a person could qualify for the job opportunity – e.g., “a combination of degrees, diplomas, and experience equivalent to a Bachelor’s degree and 24 months of experience.” The CO relied on 20 CFR §§ 656.10(c)8, 656.10(c)(9), and 656.24(b)(2) to justify denial alleging the employer did not include the alternate requirements in any of the recruitment. BALCA reversed and held “to prevail upon review a CO must accurately and with specificity identify the provision(s) of Part 656 with which the employer has not complied, and explain why that non-compliance justifies denial of the application by reference to one or more of the bases listed in § 656.24(b).” BALCA reminded the CO that it must rely on the correct provision of law when denying an employer’s labor certification application. The CO cited 20 CFR §§ 656.10(c)(8) and (c) (9) as grounds for denial which require an employer to attest that the job opportunity “has been clearly open to any U.S. worker” and that any “U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons”, respectively. The CO also cited 20 CFR § 656.24(b)(2) which deals with college or university teachers as a ground for denial. In the instant case, there were no applicants and the job opportunity was not for a college or university teacher. Therefore, BALCA dismissed the CO’s reliance on 20 CFR § 656.10(c)(9) and § 656.24(b)(2) as valid reasons for denial. The panel then noted that “the relevant inquiry under 656.10(c)(8) is whether the employer’s job search website advertisements and job order ‘so misinformed, or so failed to inform, potential applicants about the job opportunity that the recruitment did not support the Employer’s attestation that the job opportunity was clearly open to any U.S. worker’.”

*Matter of Infoexperts[[26]](#footnote-26)* – denial of certification reversed for a Network and Computer Systems Administrator. The CO listed several grounds to support the denial – all of which were reversed. Two grounds were based on the recruitment report, one was based on the job order, and one was based on the prevailing wage request. Regarding the recruitment report, the CO denied the application because the employer failed “to provide the results achieved, the number of hires, and the number of U.S. workers rejected, categorized by the lawful job-related reasons for such rejections.” In its request for reconsideration, the employer provided supplemental evidence indicating the that none of the applicants possessed the required degree or experience and the CO did not challenge the documentation submitted by the employer on reconsideration. Regarding the job order, the CO erroneously cited 20 CFR § 656.17(f)(6) and denied the application because the State Workforce Agency contained a “*veterans only*” requirement. And since 20 CFR § 656.17(f)(6) applies only to advertisements in newspapers of general circulation or professional journals - and not job orders – the panel held “*the stated ground for denial does not support denial of certification in this case*.” Lastly, the CO relied on 20 CFR §§ 656.40-41 and denied the application on the ground that the prevailing wage determination request included a travel requirement which was not included on the ETA Form 9089. Citing IBM Corp., 2011-PER-02838 (Jan. 13, 2014), BALCA found that the CO erroneously “*relied on regulatory provisions that do not provide content requirements*.”

*Matter of Hyun-Soo Lee, MD, P.A.,[[27]](#footnote-27)* – denial of certification was reversed for a Medical Assistant position. The audit requested proof that the employer’s Notice of Filing was posted for ten (10) consecutive business days and if one or more of the consecutive business days was a weekend or holiday, evidence showing it was open on such days. In response to the audit, the employer provided a signed sworn statement indicating the Notice of Filing was posted for 10-consecutive business days; specifically, from July 1, 2010 to July 14, 2010. The employer failed to provide proof that it was open during any weekends and/or holidays with their response as requested in the audit. The CO denied the application asserting that July 5, 2010 was a Federal Holiday (Independence Day Observed), and since the employer did not provide evidence to show they were open on any weekends or holidays during the required posting period, concluded that the Notice of Filing was posted for only nine (9) consecutive business days citing 20 CFR § 656.10(d)(1)(ii) as the basis for denial. BALCA reversed the denial because the legal reason cited by the CO, i.e., 20 CFR § 656.10(d)(1)(ii), does not require the employer to maintain or submit proof that they were open on any weekends or holidays during the required posting period.

***Comment:*** These cases illustrate that BALCA will review a decision based solely on the specific regulation(s) cited by the CO when deciding whether to affirm or reverse a labor certification denial. Other possible grounds for denial, if not specifically cited by the CO, will not be considered. For example, in *Hyun-Soo Lee*, BALCA indicated that the CO could have relied on a different section of law – i.e., 20 CFR § 656.20(b), which provides in part that “[a] substantial failure by the employer to provide required documentation will result in that application being denied…” to support their decision but did not. Therefore, the CO waived reliance on 20 CFR § 656.20(b) as a basis for denial, noting that “*To do otherwise risks confusion on the part of employers and the legal practitioners assisting them, and can result in judicial inefficiencies upon appellate review.*”

**DENIAL OF REQUEST FOR EXTENSION TO RESPOND TO AN AUDIT REQUEST IS REVIEWED UNDER ABUSE OF DISCRETION STANDARD**

*Matter of Mama Mias LLC[[28]](#footnote-28)* – denial reversed and remanded for a Chef position. The CO issued an audit on December 8, 2011 requiring a response by January 9, 2012. The employer requested an extension of time to submit the audit response which was received by the CO on January 10, 2012. The employer cited an inability to retrieve the Form 9089 from the ETA website as the reason for the extension. The CO rejected the request for extension on the grounds that the employer had not justified the need for an extension but never alleged that the extension request was untimely. The CO denied the application on April 9, 2012 citing a substantial failure to provide information. 20 CFR § 656.20(b). Employers may request an extension of time for submitting a response to an audit as prescribed in 20 CFR § 656.20(c). In its decision to reverse denial and remand, BALCA made it clear that “*the Board reviews the CO’s decision to deny an extension of time for an abuse of discretion.”* Here, the employer appeared to have timely requested an extension even though it was not received by the CO until after the audit response was due. Moreover, the employer provided a plausible reason for the extension –i.e., the inability to retrieve the 9089 from the ETA website which was not specifically rebutted by the CO. Since the CO never justified why the extension request was denied, BALCA remanded for further processing.

**DRAFTING PROBLEMS - TRAVEL AND RELOCATION**

*Matter of Opensoft, Inc.[[29]](#footnote-29)* - certification for a Software Developer, Applications (Java Developer) was denied after audit. The employer included travel language in Section H.11 of the ETA 9089 – specifically, “*[m]ust be willing to travel, perform feasibility studies, and interact with clients for different long term and short term projects*.” The employer’s recruitment included newspaper and website ads for multiple job opportunities at different levels.[[30]](#footnote-30) The ad for the Java Developer opportunities included the phrase, “Trav. & relo. may be reqd.” The CO denied certification on the grounds that the newspaper ad contained a relocation requirement that was not listed on the ETA 9089 and thus violated 20 CFR §§ 656.17(f)(6) and (7) as the ads contained “job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089.” On reconsideration, the employer cited Microsoft Corp., 2011-PER-00324 (Feb. 29, 2012)[[31]](#footnote-31) asserting the plain language of the ads indicated there were multiple job opportunities – some of which required relocation and some that did not. BALCA affirmed the denial finding the phrase, “Trav. & relo. may be reqd” in the advertisements created a chilling effect on potential U.S. applicants.

*Matter of Proficient Business Systems, Inc.[[32]](#footnote-32)* – multiple denials reversed where the employer did not disclose in its ads or applications that workers might have to relocate. The employer did however indicate the job location encompassed “unanticipated locations throughout the U.S.” in both its advertisements and applications. BALCA reversed the denials relying on Infosys Ltd, 2016-PER-00074.[[33]](#footnote-33) In Infosys, BALCA dealt with a similar issue and concluded that it was reasonable to assume that relocation was possible because the employer indicated the job location was in Plano, Texas and various unanticipated locations throughout the U.S.

***Comment:*** *Opensoft* should remind employers the importance of clarity and word choice and risk of misinterpretation when drafting advertisements, particularly where a single ad is intended to cover multiple positions.[[34]](#footnote-34) BALCA distinguished its decision in *Microsoft Corp.,* which involved similar but not identical facts, because the employer had not made it clear that the relocation requirement did not apply to all job opportunities. In Microsoft, the advertisements included the words “and/or” and were written in a passive voice making it clearer to readers that not all requirements applied to all job opportunities. To avoid confusion, employers should make it clear which requirements apply to which opportunities, especially for a travel or relocation requirement.[[35]](#footnote-35)

**INDEX OF BALCA DECISIONS**

* Matter of Academic Partnerships, LLC, 2016 BALCA LEXIS 917 (BALCA Dec. 7, 2016);
* Matter of American Airlines, 2016 BALCA LEXIS 510 (August 5, 2016);
* Matter of Cardinal Health, 2016 BALCA LEXIS 585 (BALCA Sept 13, 2016)
* Matter of Clearstructure Financial Technology LLC, 2017 BALCA LEXIS 402 (March 10, 2017)

Matter of Encore NG Services Inc., 2016 BALCA LEXIS 918 (BALCA Dec. 7, 2016);

* Matter of Global Teachers Research and Resources, Inc., 2017 BALCA LEXIS 583 (Apr. 5, 2017)

Matter of Google, Inc., 2016 BALCA LEXIS 881 (BALCA Nov. 30, 2016);

Matter of Guardian Pharmacy, LLC, 2017 BALCA LEXIS 681 (Apr. 26, 2017).

* Matter of HSBC Bank USA, N.A.*,* 2016 BALCA LEXIS 751 (BALCA Oct. 28, 2016).

Matter of Hyun-Soo Lee, MD. P.A., 2017 BALCA LEXIS 1274 (July 18, 2017).

Matter of Infoexperts, 2017 BALCA LEXIS 1398 (Aug. 25, 2017).

* Matter of Infosys LTD, 2016 BALCA LEXIS 270 (May 12, 2016).
* Matter of Kim Howard Corporation, 2016 BALCA LEXIS 909 (BALCA Dec. 6, 2016).
* Matter of Kohn Pedersen Fox Associates PC, 2016 BALCA LEXIS 878 (BALCA Nov. 25, 2016)
* Matter of Lodestar Consulting LLC, 2016 BALCA LEXIS 931 (BALCA Dec. 13, 2016);
* Matter of M5 Networks, 2016 BALCA LEXIS 841 (BALCA Nov. 16, 2016);

Matter of Mama Mias LLC, 2017 BALCA LEXIS 1401 (Aug. 25, 2017).

Matter of Micron Technology, Inc., 2016 BALCA LEXIS 506 (August 1, 2016);

Matter of Microsoft Corp., 2012 BALCA LEXIS 371 (Feb. 29, 2012).

* Matter of Netapp, Inc., 2017 BALCA LEXIS 104 (Jan. 25, 2017).
* Matter of Opensoft, Inc., 2017 BALCA LEXIS 1408 (Aug. 22, 2017).
* Matter of Proficient Business Systems, Inc., 2017 BALCA LEXIS 1320 (July 28, 2017).
* Matter of Robert Bosch, 2016 BALCA LEXIS 568 (August 25, 2016).

Matter of SolarCity, 2017 BALCA LEXIS 132 (Feb. 1, 2017);

* Matter of Systime Computer Corp., 2017 BALCA LEXIS 1263 (July 18, 2017).
* Matter of Techorbits Inc., 2016 BALCA LEXIS 927 (BALCA Dec. 9, 2016);
* Matter of Transamerica Life Insurance Co., 2017 BALCA LEXIS 258 (Feb. 22, 2017).

Matter of Unisoft International, Inc., 2016 BALCA LEXIS 982 (BALCA Dec. 29,2016);

Matter of Xerox Business Services, LLC, 2017 BALCA LEXIS 116 (Jan. 27, 2017).

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The previous articles in this series are:

Ron Wada and John C. Lemacks, II, *Shaping the Future of PERM–2Q 2017*, 22 Bender’s Immigr. Bull 933 (Aug. 15, 2017), covering: ● DOL Section K FAQ Not a Valid Basis for Denial; ● Motion to Expedite Based on Humanitarian Need Accepted by BALCA; ● Rejection of Applicants Based on Subjective Job Requirements Fatal; ● Late Attempts to Contact Job Applicants Indicates Bad Faith; ● Contradictory NOF Requirements Under Supervised Recruitment; ● Kellogg Language + SVP Rules = Duty to Interview.

Ron Wada, *Shaping the Future of PERM–1Q 2017*, 22 Bender’s Immigr. Bull 649 (May 15, 2017), covering: ● Improper Rejection of U.S. Applicants (continued from 4Q2016); ● New Decisions Endorsing Use of Broad Degree Equivalency Language; ● Instructions to Laid-Off Employees to Apply for Alternative Positions Does not Satisfy the PERM “Notify and Consider” Requirement; ● New decisions following *Matter of SmartZip Analytics* and *Matter of Tek Services*.

Ron Wada and Tu Cam Castillo, *Shaping the Future of PERM–4Q 2016*, 22 Bender’s Immigr. Bull 205 (Feb. 15, 2017), covering: ● Improper Rejection of U.S. Applicants; ● H.14 Special Requirements Need Not Be Quantified; ● *Kellogg* Language OK as Degree-Equivalency Language; ● CO Not Permitted to Change Grounds for Denial on Reconsideration.

Ron Wada and Mailine Wong, *Shaping the Future of PERM–3Q 2016*, 21 Bender’s Immigr. Bull 1397 (Nov. 15, 2016), covering: ● Standards for Disqualification of U.S. Workers; ● Standards for Recruitment Report Content; ● Strict Standards Apply to Both Applicants and the Certifying Officer; ● Broad Degree Equivalency Language Ruled Acceptable in Multiple Cases.

Ron Wada and Tu Cam Castillo, *Shaping the Future of PERM–2Q 2016*, 21 Bender’s Immigr. Bull 999 (Sept. 1, 2016), covering: ● Invalid Grounds for Denial – Notable Post-*Symantec* Decisions; ● Home Office Opportunities; ● Travel Requirements vs Relocation; ● Broad Degree Equivalency Language Ruled Acceptable.

Ron Wada, *Shaping the Future of PERM–1Q 2016*, 21 Bender’s Immigr. Bull 543 (May. 15, 2016), covering: ● Post-*Symantec,* BALCA Addresses the Remaining Test for Recruitment Inconsistencies Under 20 C.F.R. § 656.10(c)(8); ● Conflict Between Form 9089 and Form 9089 *Instructions* for Alternative Job Requirements; ● CO’s Vaguely Stated Audit Questions Make Proper Response Impossible; ● No Presumption of Delivery of Certified Form 9089.

Ron Wada, *Shaping the Future of PERM–4Q 2015*, 21 Bender’s Immigr. Bull 277 (Mar. 1, 2016), covering: ● Documenting a U.S. Applicant’s Withdrawal of their Job Application Submitted in Response to PERM Recruitment; ● Grounds for Disqualification of PERM Job Applicants; ● Misinterpretation of Alternative Job Requirements Due to Inadequate ETA Form 9089; ● The Notice of Filing Does Not Have to List Every Job Requirement; ● Prevailing Wage Determinations Based on “All Other” SOC codes; ● *Practice Alert: Section K Denials*.

Ron Wada and Ron Matten, *Shaping the Future of PERM–3Q 2015*, 20 Bender’s Immigr. Bull 1309 (Dec. 1, 2015), covering: ● Content CO reliance on an invalid ground of denial – will BALCA reverse, remand or deny based on an alternate ground? ● Insufficient CO Guidance during supervised recruitment is grounds for remand; ● Passive Matches from SWA Posting are not considered job applicants; ● Proper evidence of recruitment for employer website ad and third party website ad; ● Evidence of recruitment where there is a mismatch between the content and the caption; ● Choice of Newspaper of General Circulation for required print ads; ● Validity period for a continuous employee referral program; ● How to specify degree requirements and alien qualifications on ETA Form 9089; ● Employer provided wage survey may rely on median wage if mean wage is not available.

Ron Wada and Mailine Wong, *Shaping the Future of PERM–2Q 2015*, 20 Bender’s Immigr. Bull 897 (Aug. 15, 2015), covering: ● Grounds for Disqualification of PERM Job Applicants; ● Documentation of SWA Posting; ● Prevailing Wage Determinations Based on “All Other” SOC codes.

Ron Wada & Steve H. Kim, *Shaping the Future of PERM–1Q 2015*, 20 Bender’s Immigr. Bull 631 (June 15, 2015), covering: ● Implied Travel OK If Inherent in the Job; ● Home Office Benefit Must Be Advertised; ● Post-*Symantec* Clarifications; ● Recruitment Report Content; ● Recruitment Documentation.

Ron Wada, Steve H. Kim & Claire Hamano, *Shaping the Future of PERM–4Q 2014*, 20 Bender’s Immigr. Bull 225 (Mar. 1, 2015), covering: ● Implied Travel and Travel versus Where Applicants Will Likely Have to Reside; ● Lawful Job Related Reason for Rejecting A U.S. Applicant – the Duty to Inquire; ● On-site Housing Benefit Must be Advertised; ● The No Modification Rule 20 C.F.R. §656.11(b).

Ron Wada, Claire Hamano & Steve H. Kim, *Shaping the Future of PERM–3Q 2014*, 19 Bender’s Immigr. Bull 1325 (Dec. 1, 2014), covering: ● Content Requirements for PERM Recruitment Advertisements, SWA Job Orders and Notices of Filing; ●Prevailing Wage Determinations Based on “All Other” SOC Code; ●Use of Sworn Affidavits in lieu of Dated Copies of Recruitment Ads; ●Failure to Follow Clear Regulatory Requirements is Not Harmless Error; ●Incomplete Applications are Subject to Denial.

Jody Blaski Swartz & Ron Wada, *Shaping the Future of PERM–2Q 2014*, 19 Bender’s Immigr. Bull 889 (Aug. 15, 2014), covering: ● Sponsored Employee’s Qualifying Experience gained with the Sponsoring Employer; ●Infeasibility to Train Exception; Position Not Substantially Comparable Exception; ●Substantial Equivalence update; ●Continuing Split in Authority on Content Requirements for PERM Recruitment Advertisements; ●Modifying the Application after Submission.

Ron Wada & Jody Blaski Swartz, *Shaping the Future of PERM–1Q 2014*, 19 Bender’s Immigr. Bull 493 (May 15, 2014), covering: ● Split in Authority on Content Requirements for PERM recruitment advertisements; ● Sponsored employee’s experience documented on the ETA Form 9089; ● New DOL FAQ on PERM Notify & Consider Requirements.

Ron Wada & Jody Blaski Swartz, *Shaping the Future of PERM–4Q 2013*, 19 Bender’s Immigr. Bull 195 (February 15, 2014), covering: ● Rejection of U.S. Applicants; ● Definition of “trade or professional organization”; ● A significant settlement agreement between DOL and a major U.S. employer involving the PERM “notify and consider” requirements in the wake of a layoff

Ron Wada & Jody Blaski Swartz, *Shaping the Future of PERM–3Q 2013*, 18 Bender’s Immigr. Bull 1351 (December 1, 2013), covering: ● SWA job order content; ● Home Office; ● Sponsored employee’s experience documented on the ETA Form 9089; ● Closely Held Corporations; ● Due Process: Notice of denial reason; ● Substantial Equivalence update; ● Notice of Filing Content.

Ron Wada & Jody Blaski, *Shaping the Future of PERM–2Q 2013*, 18 Bender’s Immigr. Bull. 943 (August 15, 2013), covering: ● ‘‘Harmless Error’’ & ‘‘Fundamental Fairness”; ● ‘‘Substantial Failure’’ to respond to Audit; ● Layoff in Area of Intended Employment; ● Wage Variance; ● SWA Job Order Audit Requirement; ● Recruitment Report Content and Form.

Ron Wada & Jody Blaski, *Shaping the Future of PERM–1Q 2013*, 18 Bender’s Immigr. Bull. 557 (May 15, 2013), covering: ● Interpretation of Travel Language; ● Substantial Equivalence; ● Limitations of Form ETA 9089; ● Newspaper of General Circulation; ● Supervised Recruitment Issues; ● Presumption of Delivery of DOL Mailings: ● Sponsorship Verification.

1. Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure. Immigration Law and Procedure is a twenty-one-volume ‘‘bible’’ of immigration law that has been cited in over 400 federal court decisions from across the district courts, through the courts of appeals, and including the Supreme Court. [↑](#footnote-ref-1)
2. *See, e.g.,* Matter of American Airlines, 2016 BALCA LEXIS 510 (August 5, 2016); Matter of Robert Bosch, 2016 BALCA LEXIS 568 (August 25, 2016). [↑](#footnote-ref-2)
3. *See, e.g.,* Matter of Micron Technology, Inc., 2016 BALCA LEXIS 506 (August 1, 2016); Matter of Encore NG Services Inc., 2016 BALCA LEXIS 918 (BALCA Dec. 7, 2016); Matter of SolarCity, 2017 BALCA LEXIS 132 (Feb. 1, 2017); Matter of Guardian Pharmacy, LLC, 2017 BALCA LEXIS 681 (Apr. 26, 2017). [↑](#footnote-ref-3)
4. *See, e.g.,* Matter of Lodestar Consulting LLC, 2016 BALCA LEXIS 931 (BALCA Dec. 13, 2016); Matter of Academic Partnerships, LLC, 2016 BALCA LEXIS 917 (BALCA Dec. 7, 2016); Matter of Transamerica Life Insurance Co., 2017 BALCA LEXIS 258 (Feb. 22, 2017). [↑](#footnote-ref-4)
5. *See, e.g.,* Matter of M5 Networks, 2016 BALCA LEXIS 841 (BALCA Nov. 16, 2016); Matter of Xerox Business Services, LLC, 2017 BALCA LEXIS 116 (Jan. 27, 2017); Matter of Netapp, Inc., 2017 BALCA LEXIS 104 (Jan. 25, 2017). [↑](#footnote-ref-5)
6. An employer cannot merely assert that it knows who is qualified and who is not, but must bear the burden of demonstrating that none of the applicants was qualified or available for the position. This includes the determination of who can be disqualified without an interview. Matter of HSBC Bank USA, N.A.*,* 2016 BALCA LEXIS 751 (BALCA Oct. 28, 2016). [↑](#footnote-ref-6)
7. *See, e.g.,* Matter of M5 Networks, 2016 BALCA LEXIS 841 (BALCA Nov. 16, 2016) (The CO stated that *“where a U.S. applicant’s resume indicated that he/she meets the broad range of experience, education and training required for the job, the employer has a duty to make a further inquiry, by interview or other means, into whether the applicant meets all of the requirements.”* The BALCA panel agreed, noting that *“the Employer has a duty to investigate an applicant further, even if they do not have the exact experience required.”*); *see also* Matter of Unisoft International, Inc., 2016 BALCA LEXIS 982 (BALCA Dec. 29,2016); Matter of Google, Inc., 2016 BALCA LEXIS 881 (BALCA Nov. 30, 2016); Matter of Xerox Business Services, LLC, 2017 BALCA LEXIS 116 (Jan. 27, 2017). [↑](#footnote-ref-7)
8. Matter of Cardinal Health, 2016 BALCA LEXIS 585 (BALCA Sept 13, 2016) (“[w]here the record reflects an applicant has performed the very type of work that is described in Form 9089, eliminating such a qualified applicant because his or her degree is not in a specified field appears to run counter to the purpose of [the regulations].”) [↑](#footnote-ref-8)
9. Matter of Netapp, Inc., 2017 BALCA LEXIS 104 (Jan. 25, 2017). [↑](#footnote-ref-9)
10. *Id.* [↑](#footnote-ref-10)
11. Matter of Guardian Pharmacy, LLC, 2017 BALCA LEXIS 681 (Apr. 26, 2017) (*“employers face a heightened burden when they reject otherwise qualified U.S. applicants for failing to meet subjective requirements… The requirement at issue in this case (“strong verbal and written communication skills”) is subjective in nature; the Employer therefore had an obligation to support its contention that five U.S. applicants (each of whom was board certified in the United States and had at least seven years’ experience working in a pharmacy) did not meet this requirement with “objective, detailed facts.”*); Matter of Micron Technology, Inc., 2016 BALCA LEXIS 506 (August 1, 2016) (Employer listed eleven “subjective” criteria (e.g., thorough understanding of physical vapor deposition, strong grasp of current semiconductor fabrication process techniques, good judgement, etc.) that a “successful candidate” would possess, then disqualified applicants who could not demonstrate having coursework that met the criteria). [↑](#footnote-ref-11)
12. Matter of Transamerica Life Insurance Co., 2017 BALCA LEXIS 258 (Feb. 22, 2017). [↑](#footnote-ref-12)
13. *Id.* BALCA has cited the presence of the Kellogg language as justification for denying a PERM application where the employer failed to interview an applicant who had many years of experience in the occupation but whose resume did not list one or more of the job requirements. In Matter of Global Teachers Research and Resources, Inc., 2017 BALCA LEXIS 583 (Apr. 5, 2017), BALCA noted the presence of the Kellogg language and suggested the use of an SVP equivalence test as a way of determining whether an applicant should have been interviewed. [↑](#footnote-ref-13)
14. Matter of Kohn Pedersen Fox Associates PC, 2016 BALCA LEXIS 878 (BALCA Nov. 25, 2016) (*“[t]he Board has long held that an employer may not reject a U.S. applicant based on a belief that the applicant is overqualified for the position,”* (citing *Bronx Medical and Dental Clinic*) and that *“Board panels have also held an Employer may reject a qualified U.S. applicant as unwilling to accept the wages offered* ***only*** *after the position has been offered to the applicant at the salary listed, and there is documentation of the offer and applicant’s refusal to accept the position at the offered wages.”*) [↑](#footnote-ref-14)
15. Matter of Academic Partnerships, LLC, 2016 BALCA LEXIS 917 (BALCA Dec. 7, 2016). [↑](#footnote-ref-15)
16. Matter of Techorbits Inc., 2016 BALCA LEXIS 927 (BALCA Dec. 9, 2016); Matter of Kim Howard Corporation, 2016 BALCA LEXIS 909 (BALCA Dec. 6, 2016). [↑](#footnote-ref-16)
17. Matter of SolarCity, 2017 BALCA LEXIS 132 (Feb. 1, 2017). [↑](#footnote-ref-17)
18. Interestingly, a legal basis for the CO to intervene in an employer’s applicant review process that has NOT been invoked by either the CO or BALCA can be found in the regulation at 20 CFR 656.24(b)(2)(i), which states that:

    “*[t]he Certifying Officer must consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. . . a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training*.” (emphasis added)

    This language would permit the CO to shift the inquiry away from what is required to do the specific job that is the subject of the PERM application, and toward what is required to perform “*the duties involved in the occupation*,” which presumably would be more generic in nature. The potential shift from specific job opportunity to generic occupation would have the effect of swallowing the rest of the PERM labor certification process and render it meaningless, which may be why neither the CO nor BALCA have elected to use it. [↑](#footnote-ref-18)
19. *See, e.g.,* Matter of Netapp, Inc., 2017 BALCA LEXIS 104 (Jan. 25, 2017) (certification denied for position of Software Developer, Systems Software, requiring a Master’s degree in Computer Science, Engineering or a related technical field, no training or experience, and special skills. The employer had rejected without interview four applicants who met the Master’s degree requirement and had substantial work experience but did not list all of the required skills on their resumes. BALCA concluded that “*because each of the four U.S. applicants possessed the requisite educational background and experience, the Employer had a duty to interview these applicants”*) [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
21. Matter of Transamerica Life Insurance Co., 2017 BALCA LEXIS 258 (Feb. 22, 2017); Matter of Academic Partnerships, LLC, 2016 BALCA LEXIS 917 (BALCA Dec. 7, 2016). [↑](#footnote-ref-21)
22. *See* Matter of Transamerica Life Insurance Co., 2017 BALCA LEXIS 258 (Feb. 22, 2017); Matter of Global Teachers Research and Resources, Inc. 2017 BALCA LEXIS 583 (Apr. 5, 2017). [↑](#footnote-ref-22)
23. This can be done, for example, by having an applicant acknowledge in writing that they have withdrawn their application. [↑](#footnote-ref-23)
24. *See* Matter of Clearstructure Financial Technology LLC, 2017 BALCA LEXIS 402 (March 10, 2017) (position for a Marketing Analyst required a Bachelor’s Degree in Marketing or a related field + one year of experience in the job offered, no special skills required. Certification was denied by the Certifying Officer who found that a U.S. applicant with a Master’s Degree in Finance + 5 yrs of experience in unrelated jobs was improperly rejected without interview, stating that the applicant “*should have been contacted in order to investigate Applicant’s qualifications and determine if he could ‘acquire the skills necessary to perform the job duties during a reasonable period of on the job training.*’” BALCA reversed, finding that the applicant’s degree was in Financial Risk Management was not a related field to Marketing, and that his work experience did not overlap with the specific duties of the job being offered. BALCA stated, “*An employer may incorporate the job duties as job requirements when it indicates on the ETA Form 9089 that it is requiring experience in the job offered . . . [t]he Employer outlined the position’s specific job requirements in both its application and advertisements,*” and “*the Applicant’s resume does not raise a reasonable possibility that he met the Employer’s experience requirements, and therefore the Employer was not required to make further inquiry into the Applicant’s qualifications.*”) [↑](#footnote-ref-24)
25. Matter of Systime Computer Corp., 2017 BALCA LEXIS 1263 (July 18, 2017). [↑](#footnote-ref-25)
26. Matter of Infoexperts, 2017 BALCA LEXIS 1398 (Aug. 25, 2017). [↑](#footnote-ref-26)
27. Matter of Hyun-Soo Lee, MD. P.A., 2017 BALCA LEXIS 1274 (July 18, 2017). [↑](#footnote-ref-27)
28. Matter of Mama Mias LLC, 2017 BALCA LEXIS 1401 (Aug. 25, 2017). [↑](#footnote-ref-28)
29. Matter of Opensoft, Inc., 2017 BALCA LEXIS 1408 (Aug. 22, 2017). [↑](#footnote-ref-29)
30. The ads covered multiple job opportunities, QA Analysts and Java Developers - both of which had multiple levels - entry level to senior level. [↑](#footnote-ref-30)
31. Matter of Microsoft Corp., 2012 BALCA LEXIS 371 (Feb. 29, 2012). [↑](#footnote-ref-31)
32. Matter of Proficient Business Systems, Inc., 2017 BALCA LEXIS 1320 (July 28, 2017). [↑](#footnote-ref-32)
33. Matter of Infosys LTD, 2016 BALCA LEXIS 270 (May 12, 2016). [↑](#footnote-ref-33)
34. Employers often draft job advertisements for multiple job opportunities at multiple levels and abbreviate the contents to save on advertising costs. This can sometimes result in a muddled ad leaving the reader uncertain as to what the job opportunity requirements truly are. [↑](#footnote-ref-34)
35. This notion should be followed when advertising all off-site work requirements and/or benefits such as having to perform work at a client site, travel and telecommuting. [↑](#footnote-ref-35)