

The Effect of DOL FAQs and BALCA Decisions on the PERM Process*

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The PERM regulations are clearly the most important material to review while handling a PERM case.¹ Constant reference to the regulations are critical prior to beginning a PERM case and while working on the case. It is also a best practice to review and constantly reference the U.S. Department of Labor's (DOL) posted FAQs and Board of Alien Labor Certification Appeals (BALCA) decisions to make appropriate decisions on a case. This article will identify important FAQs and recent BALCA decisions that are critical to be aware of when formulating and executing a PERM case strategy.

LEGAL WEIGHT OF FAQs

BALCA has held as far back as their very first post-PERM denial, *HealthAmerica*², that while the FAQ postings and responses issued by DOL act as helpful guidance on, and clarification of, the PERM regulations, they do not have the force of law. In essence, they are instructive and persuasive, but not binding. As the recent cases below demonstrate, BALCA is not afraid to overturn the denial of an application where the certifying officer (CO) relied on an FAQ response in its decision, or even reference them on their own in overturning the CO's denial.

- *University of Texas at Brownville*, 2010-PER-00887 (BALCA July 20, 2011), *published on* AILA InfoNet at Doc. No. 11072168 (*posted* July 21, 2011). Case remanded. For case filed under 20 CFR Section 656.18 (special university professor procedures), requirement of an ad

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¹ 20 CFR §656.

² 2006-PER-1 (BALCA Jul. 18, 2006)(en banc).

in a national professional journal can be satisfied by ad in online version of professional journal, despite FAQ saying otherwise.

- *Matter of Target Point Media, LLC*, 2010-PER-01637 (BALCA Feb. 27, 2012), *published on* AILA InfoNet at Doc. No. 12022849 (*posted* Feb. 28, 2012). Denial reversed. ETA-9089 showed job title as Business Development Specialist; ad showed Business Development VP. BALCA held there was a logical nexus between the ad and the position on the ETA-9089. BALCA referred to DOL's posted FAQs and noted that it's a difficult burden for employer to establish why the different titles do not violate the regulations but employer did so in this case.

SOME RECENTLY PUBLISHED FAQs OF WHICH PRACTITIONERS SHOULD BE AWARE

There is no substitute for reading the regulations, but every PERM practitioner should become intimately familiar with the FAQs published by DOL. The FAQs can be found on AILA InfoNet, as well as on the DOL website at www.foreignlaborcert.doleta.gov/faqsanswers.cfm. Additionally, the AILA DOL Liaison Committee has compiled a list of online research tools and information sources for DOL, including DOL items posted on InfoNet, as well as DOL resources on prevailing wage determinations, labor condition applications, nonimmigrant categories, and more.³

The following are key FAQs that have been published over the past two years:

Primary and Alternative Requirements Must Be Stated on the Prevailing Wage Request

An FAQ published June 21, 2012, states the ETA-9141 must include both the primary and alternative requirements. DOL also updated prevailing wage FAQs addressing the following topics: occupation-specific issues, documentation of an affiliated or related nonprofit entity, and the issuance of hourly wages.⁴

Electronic Ad Placements for Teachers

In this FAQ, DOL confirmed that employers may use an electronic or web-based national professional journal to satisfy regulations requiring the use of a "national professional journal" for advertisements for college or university teachers. The advertisement must be posted for at least 30 calendar days on the journal's website, and documentation of the ad placement must include evidence of the start and end dates of the placement, as well as the electronic ad's text.⁵

³ See "DOL Online Research Tools and Information Sources," *published on* AILA InfoNet at Doc. No. 12121342 (*posted* Dec. 13, 2012).

⁴ See "DOL Updates FAQs on Prevailing Wage Program," (Jun. 21, 2012), *published on* AILA InfoNet at Doc. No. 12062154 (*posted* Jun. 21, 2012). See also, practice advisory by the AILA-DOL Liaison Committee regarding how to list alternative PERM job requirements on Form 9141, based on the Jun. 21, 2012, DOL FAQ, *published on* AILA InfoNet at Doc. No. 12072645 (*posted* July 26, 2012).

⁵ See "DOL Revised PERM FAQ on Special Recruitment for College and University Teachers," (Sept. 28, 2011) *published on* AILA InfoNet at Doc. No. 11090164 (*posted* Sep. 01, 2011).

PERM Placement of Job Orders

DOL updated FAQs regarding the placement of Job Orders and addressed the following questions: whether an employer's name is required to appear in the Job Order; whether the employer must receive all of the resumes; and how long must a Job Order be posted in order to comply with the regulations.⁶

DOL Updates FAQs on PERM & Fractional Years on Form 9089

The DOL advises in this FAQ that where the acceptable number of years is not a whole number, the employer should round to the nearest whole number, e.g., a value of 6 months would become 1 year and a value of 15 months will become 1 year, enter the whole number in Section H, Item 8-C, and then use Section H, Item 14 to provide the actual number of years and months.⁷

Job Requirements Not Considered Normal for Occupation

This November 7, 2011 FAQ reminds practitioners that where an employer indicates on the prevailing wage request form (ETA Form 9141) that the job contains requirements beyond those considered normal for the occupation, the employer must still accurately outline its requirements on ETA Form 9089 Questions H.12 or H.13.⁸

Withdrawing Application in Supervised Recruitment

This FAQ addressed the consequences of withdrawing an application in Supervised Recruitment:

"While OFLC/ANPC may grant an employer's request to withdraw an application undergoing supervised recruitment and the employer then files a new application meeting all regulatory requirements, the future application for the same foreign worker as in the withdrawn application will be subject to supervised recruitment pursuant to 20 CFR 656.21. Additionally, where the OFLC/ANPC determines it appropriate, all other applications filed by the employer for *any* foreign worker or job opportunity may also be subject to supervised recruitment.

An employer that wishes to file a future application for the same foreign worker as in an application withdrawn while undergoing supervised recruitment must do so by completing the ETA Form 9089, except Section I, Recruitment Information, which will be completed after submission at the instruction of the OFLC/ANPC. The employer must file the above referenced application by mail to the Atlanta National Processing Center.

Repeated requests to withdraw different applications undergoing supervised recruitment will be carefully reviewed and may evidence a pattern or practice of the employer's failure to comply

⁶ See "DOL Updates FAQs on PERM Placement of Job Orders," (Jun. 11, 2012) *published on AILA InfoNet at Doc. No. 12061150 (posted June 11, 2012).*

⁷ See "DOL Updates FAQs on PERM & Fractional Years on Form 9089," (May 29, 2012), *published on AILA InfoNet at Doc. No. 12052951 (posted May 29, 2012).*

⁸ See "OFLC Updates PERM FAQ on Job Requirements Considered Not Normal to the Occupation" (Nov. 7, 2011), *published on AILA InfoNet at Doc. No. 11110864 (posted Nov. 08, 2011).*

with the supervised recruitment process, and may subject the employer to debarment from the permanent labor certification program for a reasonable period of no more than three years pursuant to 20 CFR 656.31(f)(1)(v)."⁹

Third Party Filing Software

DOL advises filers who utilize third-party software to upload PERM certification applications in the Office of Foreign Labor Certification (OFLC) Case Management System that DOL cannot warrant that data submitted via such tools is accurate, even though DOL has no policy barring the use of such software.¹⁰

GAME-CHANGING PERM BALCA DECISIONS

BALCA was busy in 2012, with decisions related to a variety of critical issues in PERM processing. Here are some highlights:

Experience Requirement on SWA Job Order

Matter of Cognizant Technology Solutions US Corp, 2011-PER-01697 (BALCA Nov. 29, 2012), published on AILA InfoNet at Doc. No. 12120345 (posted Dec. 03, 2012). Denial reversed. Employer entered Masters plus 12 months into New Jersey Job Bank job order. Employer provided evidence that the SWA computer system automatically converted 12 months to "Mid Career (2–15 years)." CO argued Employer could have entered 12 months into a text field, but provided no evidence of same. BALCA held that denying certification where a deficient form prevents Employer from complying with the regulations offends fundamental due process.

Recruitment for "Roving" Positions

Matter of Infosys Technologies, Inc., 2012-PER-00417 (BALCA Nov. 16, 2012), published on AILA InfoNet at Doc. No. 12111950 (posted Nov. 19, 2012). Denial reversed. Advertisement showed worksite as San Francisco with multiple long term assignments within the region, but 9089 showed worksite as Fremont, which was employer's headquarters location. Employer provided copious evidence, some of which was accepted under judicial notice on appeal, that both cities are in the same metropolitan statistical area.

⁹ See "DOL Updates FAQs on PERM Supervised Recruitment" (May 14, 2012), published on AILA InfoNet at Doc. 12051446 (posted May 14, 2012).

¹⁰ See "DOL Updates FAQs on PERM & Use of Third-Party Software" (May 29, 2012), published on AILA InfoNet at Doc. No. 12052950 (posted May 29, 2012).

Employee Referral Programs

Matter of Bottomline Technologies, 2011-PER-02325 (BALCA Oct. 18, 2012), *published on* AILA InfoNet at Doc. No. 12102240 (*posted* Oct. 22, 2012). Denial reversed. BALCA applied the three-part test from *Matter of Sanmina-Sci Corp.*, 2010-PER-00697 (BALCA Jan. 19, 2011), and found that although the employee referral evidence was poorly presented, (1) the CO had conceded that there were incentives; (2) the combination of the Employer's signed attestation as to the dates of the program on the 9089, the human resources managers's statement in the recruitment report, and the documentation that the referral program was part and parcel of the company handbook evidenced that the program was in effect during the relevant period; and (3) the website ads and the posted notice of filing show that employer's employees were on notice of the job opening.

Travel Requirements in Ads

Matter of M-I LLC, 2011-PER-01256 (BALCA Aug. 23, 2012), *published on* AILA InfoNet at Doc. No. 12082642 (*posted* Aug. 26, 2012). Denial affirmed. ETA-9089 indicated that the position required international travel 35% to 45% of the time but this was not in the ads or the PWD. BALCA held the ads did not comply with the requirement of 656.17(f)(4) to apprise applicants of any travel requirements and thus failed to sufficiently indicate the geographic area of employment.

CO Impermissibly Substituted Judgment for The Employer

Matter of JP Morgan Chase & Co., 2011-PER-01000 (BALCA July 16, 2012), *published on* AILA InfoNet at Doc. No. 12071746 (*posted* Jul. 17, 2012). Denial vacated. Where the employer explained why the job requirements were a business necessity and why on-the-job training was not feasible, and the CO did not contend the requirements were unduly restrictive, the employer may reject job applicants whose resumes do not demonstrate that the applicant meets the minimum requirements without interview.

Most Appropriate Newspaper

Matter of Intercontinental Enterprises, Inc., 2011-PER-02756 (BALCA July 30, 2012), *published on* AILA InfoNet at Doc. No. 12073142 (*posted* Jul. 31, 2012). Denial affirmed. *The Washington Examiner* was not the newspaper in the Washington, D.C. area most appropriate to the professional position of Senior Food Technologist and the workers likely to apply for the job opportunity, or most likely to bring responses from able, willing, qualified, and available U.S. workers.

Sunday Ads in Rural Areas

Matter of Michigan Technological University, 2011-PER-00790 (BALCA May 21, 2012), *published on* AILA InfoNet at Doc. No. 12052246 (*posted* May 22, 2012). Denial affirmed.

Where employer is in rural area without Sunday newspaper, choice of paper is dependent on widest circulation WITHIN area of intended employment (normal commuting distance).

Familial Relationship Between Foreign National and Employer

Matter of MMB Stucco, LLC, 2011-PER-00715 (BALCA May 7, 2012), *published on* AILA InfoNet Doc. No. 12050851 (*posted* May 08, 2012). Denial reversed. Alien was brother of employer/owner. BALCA stated that a close family relationship alone is not dispositive. *Applied Modular Container Systems*¹¹ totality factors. Moreover, CO cannot raise new issue in transmittal letter without notice to employer.

"One of Three" Additional Recruitment Steps

Matter of Symrise Inc., 2012-PER-00558 (BALCA May 18, 2012), *published on* AILA InfoNet Doc. No. 12052140 (*posted* May 21, 2012). Denial vacated and remanded. Employer placed Sunday ads and local ad in *The Record*. Although an employer cannot place three ads in a newspaper of general circulation, where a given newspaper is *both* a newspaper of general circulation *and* a local paper employer can use separate ads in that paper as separate recruitment activities.

Naming Employer in Ads Placed By Private Employment Firms

Matter of World Agape Mission Church, 2010-PER-01117 (BALCA March 23, 2012), *published on* AILA InfoNet Doc. No. 12032642 (*posted* Mar. 26, 2012). Denial reversed. Advertising requirement set forth in 20 CFR §656.17(f), that employer must be named in ad, does not apply to ads placed by private employment firms, but that these ads must comply with the employer's duty to recruit in good faith and must make the job opportunity clearly open to U.S. workers. Thus, failure to include name of employer in ad placed by recruiter was not fatal to case. If recruiter ad had to show employer name, applicants could unfairly bypass the recruiter.

HOW TO PROCEED WHEN A FAQ OR BALCA DECISION IS ISSUED POST RECRUITMENT OR POST FILING

Because FAQs and BALCA decisions are published on an ongoing basis, it is important to continue to check for updates throughout case processing and even after filing the PERM. Where an FAQ or new BALCA decision has ramifications for your case, whether positive or negative, it is important to analyze whether there are procedural changes to be made. For example, the employer may need to conduct an additional recruitment activity, or revise evidence in the regulatory file addressing a particular issue. There may be a new argument that could be made on a denied case; the AILA DOL Liaison Committee may be able to work with DOL to establish a special processing queue for cases positively affected. A new FAQ or BALCA decision could also mean that you need to go back to the employer with the bad news that a PERM case will have to start over. In any event, it is better to analyze and synthesize new FAQs and BALCA decisions as they are published, rather than waiting for the result on a given case many months, or years, down the road.

¹¹ 89-INA-228 (BALCA July 16, 1991).