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HOW THE DEFINITION OF THE WORD TBEGINУ COULD AFFECT YOUR PERM APPLICATION

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by
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Of the many complicated rules surrounding the Department of Labor's ("DOL") Permanent Electronic Review Management ("PERM") process, one rule, and more fittingly, the DOL's hypertechnical interpretation of that rule, continues to be the basis for many unexpected PERM denials. This rule can be found in 20 C.F.R. §656.40(c). In pertinent part, that regulation states:

> To use a SWA PWD , employers must file their applications or begin the recruitment required by §§ 656.17(d)[1] or 656.21[2] within the validity period specified by the SWA .

As a background, the DOL has promulgated complex regulations at 20 CFR 656 setting forth the criteria for employers to successfully file labor certification applications under PERM. In summary, an employer must conduct specific recruitment steps, and they must be completed within 180 days of filing the PERM application. Obtaining a labor certification is generally the first step before an employer can sponsor a foreign national worker for a green card.[3].The employer must attest that it recruited the position with its actual minimum requirements, at the prevailing wage, and was unable to find a qualified US worker.

Hence, one of the key issues is the employer's reliance on a Prevailing Wage Determination ("PWD"), which is issued by the State Workforce Agency. 20 CFR § 656.40(c) governs the validity of a PWD when an employer files a PERM application. The DOL requires that either the *earliest* recruitment *or* the date

the PERM application was filed must be within the validity period of the PWD. Accordingly, an employer who commenced recruitment on March 8, 2009 and continued its recruitment efforts every month until June 8, 2009, then obtained a PWD with a validity period from April 8, 2009 to July 7, 2009, and filed the PERM application on July 31, 2009, well within the 180 day period from the first recruitment, will still be issued a denial notification. As authority for the denial, the DOL will cite 20 C.F.R. §656.40(c) and state that because the employer did not begin the *earliest* recruitment nor file the application during the PWD validity period, the application is denied. But nowhere in the regulation does it state that the employer must begin the *earliest* recruitment within the PWD validity period in order to file the PERM application after the PWD has expired. Challenges to the DOL on this particular issue are few and there is no reported decision on this to date. Most employers will opt to conduct new recruitment and to re-file the PERM. Re-filing presents a greater assurance of success in comparison to filing a Motion to Reopen and Reconsider the denial. Such a motion will most likely remain pending for years only to be denied. This article will discuss the reasons why the DOL's interpretation of this particular part of 20 C.F.R. §656.40(c) is flawed in the hope of assisting those employers and their attorneys who wish to challenge the denial. Some employers may still need to challenge the denial if the foreign worker's H-1B status has reached the maximum term of six years in order to seek H-1B extension under § 106(a) of the American Competitiveness in the 21st Century Act ("AC 21").

At the outset, by requiring that the employer's earliest recruitment begin within the PWD validity period in order for the employer to file the PERM application after the PWD has expired, the DOL wrongly imposes a requirement that cannot be found in the PERM regulation. This interpretation of the regulation is overly narrow and contrary to the plain meaning of the regulation. Essentially, the DOL is inventing a new regulation without going through the notice and comment procedures of the Administrative Procedures Act ("APA")[4].

In fact, the regulation at 20 C.F.R. §656.40(c) requires only that the employer *"begin the recruitment"* within the PWD validity period. Under a plain reading of the regulation, in the above-described scenario, the employer did indeed *begin* the recruitment within the PWD validity period. Although the employer's earliest recruitment began on March 8, 2009, before the start of PWD validity period, the employer's recruitment efforts continued throughout most of the PWD validity period. Basically, the employer *began* recruitment efforts while the

PWD was still valid. Or, to put it another way, the employer's recruitments had begun prior to the PWD's expiration.

When interpreting a statute, rule or regulation, it is necessary to first look to the plain meaning of the language itself. *See INS v. Phinpathya,* 464 U.S. 183 (1984); *Barroso v. Gonzales,* 429 F.3d 1195 (9th Cir. 2005). If the language is unambiguous, then that plain meaning ought to be applied. If the language *is* ambiguous then deference to the appropriate agency's own interpretation is warranted. *See Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (holding that courts must defer to an agency's permissible construction of a statute it administers where Congress has not directly spoken on the question at issue). The regulation at 20 C.F.R. §656.40(c) is very clear and unambiguous. Plainly, to *"begin recruitment within the validity period"* means that the employer must have conducted some type of valid recruitment while the PWD was still valid. For the DOL to impose an extremely hypertechnical definition of the word *"begin"* goes against the plain meaning of the regulation and against the Employment and Training Administration's ("ETA") intent when promulgating the regulation. If the intent were to have the employer *begin the* ***earliest*** *recruitment* within the PWD's validity period, then the regulation would have clearly stated this. A review of other sections of the PERM regulations makes it very clear that the ETA had the ability to issue very specific directions in its regulations.

To highlight the intent behind the regulation, note that § 212(a)(5) of the Immigration and Nationality Act ("INA") requires that the hiring of a foreign worker will not adversely affect the wages and working conditions of U.S. workers working in the occupation in the area of intended employment. To comply with the statute, the DOL regulations require that the wages offered to a foreign worker must be the prevailing wage rate for the occupational classification in the area of employment. It is therefore clear that the goal of 20 C.F.R. §656.40(c) is to ensure that an employer conducts the recruitment or files the labor certification while the prevailing wage is still current so as to prevent a scenario where an employer utilizes an old prevailing wage that no longer corresponds with the occupational classification.

In fact, in a notice of proposed rulemaking for the PERM regulations[5], the ETA sought to explain the need for specific PWD validity periods and stated:

2. Validity Period of PWD

> We are proposing that the SWA must specify the validity period of PWD on the PWD form, which in no event shall be less than 90 days or more than 1 year from the determination date entered on the PWDR. Employers filing LCA's under the H-1B program must file their labor condition application within the validity period. **Since employers filing applications for permanent labor certification can begin the required recruitment steps required under the regulations 180 days before filing their applications, they must initiate at least one of the recruitment steps required for a professional or nonprofessional occupation within the validity period of the PWD to rely on the determination issued by the SWA.**

Clearly, the ETA never contemplated a requirement that the *earliest* recruitment be conducted within the PWD validity period. On the contrary, from the above notice of proposed rulemaking, the ETA's obvious goal was to have the employer conduct at least one form of recruitment (any recruitment, not the *earliest* recruitment) within the PWD validity period in order to continue to rely on the PWD after its expiration. The final rule contains no substantive changes to this proposed rule.

Considering the ETA's intent, the DOL's extremely narrow interpretation of 20 C.F.R. §656.40(c) is baffling. Under the DOL's current interpretation it would be perfectly permissible for an employer to obtain a PWD with the minimum 90-day validity period, begin the first recruitment on the 90th day of that validity period, and file the labor certification 179 days later, just before the maximum 180-day recruitment period expires. All other requirements being met, because that employer technically "*began the **earliest** recruitment*" within the PWD's validity period, the labor certification will be certified despite the fact that the PWD was 179 days old on the date the labor certification was filed and was possibly completely irrelevant even while the employer conducted recruitment.

On the other hand, an employer who began the first recruitment just before obtaining the PWD, and continued to run several other forms of recruitment within the PWD's validity period, thereby ensuring that the PWD still corresponded to the occupational classification, and who filed the labor certification soon after the PWD has expired, will have the labor certification denied due to an excessively hypertechnical interpretation of 20 C.F.R. §656.40(c) which is actually contrary to the intent behind the regulation.

The DOL might argue that requiring the employer to conduct its *earliest* recruitment within the PWD validity period prevents the employer from deterring qualified U.S. workers by offering them a low wage. However, this argument will fail because 20 C.F.R. §656.40(c) allows the employer who began recruitment well prior to obtaining the PWD, to simply file the labor certification within the PWD's validity period. Thus, the employer could possibly have deterred several US workers from the position prior to obtaining the PWD, filed the labor certification within the PWD validity period and received certification provided there was no audit. Clearly, there is a lack of justification for the erroneously narrow construction of 20 C.F.R. §656.40(c). Moreover, an employer must attest at the time of filing the PERM, regardless of when the recruitment was conducted or whether the PWD is still valid, that it lawfully rejected US worker applicants when it offered the job at the prevailing wage.

In *Matter of Redheads Bistro & Bar*, 2008-PER-00216 (1/5/09), the Board of Alien Labor Certification Appeals ("BALCA"), in affirming the denial of a labor certification where the PWD expired in December 2005 and the employer commenced recruitment in February 2006, stated:

> …he Employer's application was clearly not in conformity with the regulatory requirement to conduct the recruitment or file the application within the validity period of the SWA prevailing wage determination…Even if the Employer's error was unintentional, however, its application included a **substantive violation of the regulation**. Moreover, the prevailing wage determination had expired months before the Employer began its recruitment in support of the PERM application or filed the application. Under such circumstances, we find that the CO properly denied certification and that equitable relief from the error is not warranted.

It is very significant to note that, in affirming the denial, BALCA never stated that the employer ought to have begun the ***earliest*** recruitment with the PWD validity period. It would have been very easy to affirm the denial on this clear basis, if the regulations allowed for it. On the contrary, BALCA's statements reaffirm that under a plain reading of 20 C.F.R. §656.40(c), the employer must merely *conduct recruitment* within the PWD validity period. Moreover, BALCA held that the fact that the employer's PWD had expired *months* prior to the commencement of recruitment or the filing of the labor certification was too

substantive an error to overlook. Thus, it can be inferred that had the employer's error not been so grievous, perhaps had the employer commenced recruitment closer to the PWD validity period, that BALCA would have agreed with the employer that its recruitment efforts "...met the spirit if not the substance of the recruitment requirements...."

The regulation at 20 C.F.R. §656.40(c), the ETA's intent behind it and BALCA's interpretation of the regulation are all very clear. It is erroneous for the DOL to impose a new, unintended and hypertechnical interpretation of the regulation onto employers who, in good faith, fully comply with the regulation and who, in so doing, achieve the goal that the ETA sought to achieve in setting forth the regulation. Going forward, one can only hope that a well-crafted Motion to Reopen and Reconsider a denial based on this particular issue will bring forth an even more definitive statement from BALCA very soon.

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[1] Note that the DOL has acknowledged its typographical error in referencing §656.17(d). The required pre-filing recruitment is covered in §656.17***(e).***

[2]Section 656.21 covers Supervised Recruitment.

[3] A labor certification is required before an immigrant visa may be issued to an alien for whom classification is sought under INA §203(b)(2) as an alien who is a

member of the professions holding an

advanced degree or under §203(b)(3) as a Skilled Worker, Professional or Other worker.

[4] *See* 5 U.S.C. § 553(b).

[5] Employment and Training Administration, Proposed Rule, Implementation of New System, *Labor Certification Process for the Permanent Employment of Aliens in the United States* , 20 CFR Part 656, 67 Fed. Reg. 30466, 30478 (May 6, 2002).