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SUPERVISED RECRUITMENTS IN TOUGH ECONOMIC TIMES - PRACTICAL TIPS FOR COMPLIANCE

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by
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When the Program Electronic Review Management (PERM) system regulations[1] were introduced, it was proposed that PERM adjudications could take place very quickly. Indeed, within the first few years of the effective date of the regulations, users, including the authors, reported same-day and next-day approvals of PERM applications filed, and a high percentage approved within 30-60 days. It appeared the DOL had fixed its broken labor certification adjudication system. Yet, as time marched on, more audits were initiated, and problems with DOL staffing[2] has resulted in a 10-month backlog for cases under regular review, 2 years for audited cases, and even longer for cases under appeal.[3] To make matters worse, in June of 2009, DOL announced plans to roll out a large-scale Supervised Recruitment Initiative from the Atlanta National Processing Center by October 1, 2009.[4] As national unemployment rates continue to rise and companies reduce their workforces at alarming rates, it is time to review in detail the DOL regulations outlining Supervised Recruitment requirements and prepare for additional delays in PERM processing.

Requirements Under Supervised Recruitment

"Supervised Recruitment is one of many tools the uses to safeguard the integrity of the permanent labor certification process and protect job opportunities for American workers," said Solicitor of Labor Gregory F. Jacob.[5] "The department takes seriously its statutory responsibility to ensure that

American workers have access to jobs they are qualified and willing to do."[6]

The Supervised Recruitment process is authorized under federal regulations at 20 C.F.R. § 656.21, which outline the requirements and time deadlines for this process. The process is very similar to the recruitment ordered during the adjudication of a "Traditional" Labor Certification Application filed prior to the implementation of the PERM regulations. In addition to the regulations, the DOL has published "Frequently Asked Questions" about Supervised Recruitment to clarify procedural and timing issues.[7]

Following is the general timeline and requirements outlined in the regulations:

1. Supervised Recruitment Notice is Issued to Employer – Employer has 30 Days to Provide Draft Recruitment for Review by the Certifying Officer (CO)When a PERM application is placed under Supervised Recruitment, the CO will notify the employer with the required recruitment to be conducted. Generally, the recruitment ordered is an advertisement to run in a newspaper of general circulation or in a professional, trade or ethnic journal; however, the CO may order additional recruitment either in the initial Notice, or in a subsequent Notice.[8] The notice will stipulate recruitment activity required, and it should provide guidelines. The employer must submit a draft of the proposed recruitment to the CO for review within 30 days.

Practice Tip: The 30-day time deadline is actually 30 calendar days, which does not leave much time to prepare the draft recruitment. The attorney of record in the case should receive the Notice ordering Supervised Recruitment, so it will be critical to engage the employer as quickly as possible, to obtain appropriate approval for the draft before sending it to the DOL. Note that the advertisement will have to incorporate additional features that may not have been part of the pre-filing advertising. 20 C.F.R. 656.21(b)(2) lists criteria for what must be included in a supervised recruitment advertisement, which differ from the contents in a pre-filing advertisement under 20 C.F.R. 656.17(f). The latter requires the advertisement to " a description of the vacancy specific enough to apprise U.S. workers of the job opportunity for which certification is sought."[9] On the other hand, an advertisement under Supervised Recruitment must describe the job opportunity, summarize the minimum requirements, and most importantly, offer training if the job opportunity is the type for which

employers need to provide training.[10] Finally, it is important to accurately include the DOL address and P.O. Box number specified in the recruiting instructions. Unlike a pre-filing recruitment, which must identify the employer, a supervised recruitment advertisement does not require employer identification, and instead, requires the advertisement to direct resumes to a specific DOL address. Finally, the CO will set a new prevailing wage for the job. While the wage need not be indicated in the recruitment, care should be taken to ensure that the employer would still have the ability to pay at the time of filing the I-140 petition.

2. CO Reviews the Draft Recruitment and Responds with Either a "Assessment Correction Letter **or** Recruitment Instructions.If the CO wishes to make any changes to the draft recruitment, it will notify the employer accordingly. If the recruitment is approved, the CO will issue a Recruitment Instructions letter specifying where the recruitment should be placed, when, and for how long. The regulations state that if ad is to run in a newspaper of general circulation, it must run for three consecutive days, one of which must be Sunday. If the ad is to run in a professional, trade or ethnic journal, it must run in the next available published edition.[11]

Practice Tip: During the traditional labor certification era, the SWA often questioned certain job requirements and required a showing of business necessity prior to approving the draft. It is unclear whether the CO in the supervised recruitment era will do likewise, and may not, if the justifications for these requirements were already sent in if the case was audited prior to the supervised recruitment. But be prepared to justify excessive job requirements before the CO approves the draft. Finally, note that the employer would still not be able to make any changes on the PERM form during supervised recruitment.

3. Employer Places Recruitment According to Instructions – Timing for Recruitment Specified by DOLWhen instructed to recruitment by the CO, the Employer should place the specified recruitment. The employer will have to start the advertising within 15 days, although they can run beyond 15 days. As noted, Draft ads must[12]:
    1. Direct applicants to send resumes or applications for the job opportunity to the CO for referral to the employer;

2. Include an identification number and an address designated by the CO;
3. Describe the job opportunity;
4. Not contain a wage rate lower than the prevailing wage rate[13];
5. Summarize the employer's minimum job requirements, which cannot exceed any of the requirements entered on the application form;
6. Offer training if the job opportunity is the type for which employers normally provide training; and
7. Offer wages, terms and conditions of employment no less favorable than those offered to the alien.

Practice Tip: Again, time is of the essence. The CO should specifically list where and when the recruitment should be placed. It is likely that the CO may specifically require that the advertisement be placed in a newspaper of general circulation, which must run for 3 days including a Sunday, or in a professional, ethnic or trade publication.[14] Care must be taken to run the three consecutive advertisements, within the stipulated period, so that they can also run on a Sunday. Current ad costs and schedules for newspapers and trade/professional journals should be obtained at the time the draft recruitment is sent to the CO for review, so that the employer will be ready to place recruitment as soon as the Recruitment Instructions are received.

4. CO Forwards All Resumes and Applications Received in Response to the Recruitment to the Attorney/Agent of Record, or to the Employer – Normally Within 30 Days of RecruitmentNormally within the 30 day period following recruitment, the CO will forward all resumes and applications received in response to the Employer's recruitment efforts. The Employer must consider all U.S. applicants for the job and carefully document all contact with applicants. It is recommended that employers complete detailed analysis of resumes and then keep records of all contact with applicants, including phone calls to arrange for phone or office interviews, any additional documentation provided by the applicant. If the applicant is rejected, the employer must carefully document the lawful reasons for the rejection.

Practice Tip: In addition to following PERM regulations regarding the

preparation of the recruitment report,[15] it is prudent to clearly document all contact with the applicants, including phone logs, return-receipt notices for written correspondence and emails, as well as detailed notes for the disqualification of applicants.[16] It is further noted that the attorney will be the first to receive the resumes, and he or she must be mindful of DOL's announcement on August 29, 2008 specifically prohibiting the attorney from making any assessments of the resume before the employer does.[17] While, according to the August 29, 2008 guidance, there is nothing prohibiting attorneys from receiving resumes, attorneys may not conduct any preliminary screening of resumes before an employer does, other than the routine and ministerial organization of resumes.[18] Also, attorneys cannot withhold any resumes that they may receive from U.S. applicants.

5. CO Issues a Recruitment Report Letter to the Employer – Employer Has 30 Days to Respond with a Detailed Recruitment ReportGenerally, 30-60 days after the Recruitment has been placed, the CO will send the Recruitment Report Letter, requesting a detailed recruitment report within 30 days. The Employer must provide the following information and evidence as part of the Recruitment Report:
    1. Evidence of Recruitment – tear sheets from the publications in which the recruitment ran, proof of publication, or dated copies of web pages, if applicable;
    2. Number of U.S. workers who responded to the recruitment;
    3. Names, addresses, and resumes of those who applied for the job;
    4. Number of workers interviewed;
    5. Job title of the person who conducted interviews; and
    6. Detail regarding lawful reasons as to why each applicant was rejected for the position.

Practice Tip: In addition to the employer's recruitment report, the attorney of record should prepare not only the required steps taken to ensure compliance with DOL regulations and the CO's instructions, but also a brief or letter outlining the legal reasons for each applicant's disqualification. If the labor certification contains alternative requirements requiring the *Kellogg* standard in evaluating job applications – i.e. agreeing to consider applicants possessing any

suitable combination of education, training or experience,[19] the recruitment report must also establish that the applicants did not possess any suitable combination of education, training or experience. Also important is to contact applicants soon after the resumes have been received; otherwise the DOL may conclude that the employer did not recruit in good faith.[20]

Upon submission of the Recruitment Report to the DOL, the CO will either make a decision in the case or, possibly, order additional recruitment. If the Employer requires an extension of time to respond to either the initial Notice, the Recruitment Instructions, or the Recruitment Report Letter, it may request an extension "for good cause," and it is within the CO's discretion to grant the extension.[21] Therefore, if an extension is needed, it is recommended that the reason for the extension be clearly and concisely explained and documented and that a specific time frame be requested.

Can Supervised Recruitment be Avoided

PERM is an audit-based system. Applications are submitted electronically and recruitment activities, although reported, are not documented. The only opportunities the DOL has to review the evidence of required recruitment are through the audit process, or via Supervised Recruitment. Sometimes, DOL will audit the case first, before requiring additional recruitment. However, as was stated above, the DOL has stated its goal to place many more cases under Supervised Recruitment until the unemployment levels drop significantly, so it is unlikely such Notices can be avoided. Based on DOL's public comments, it appears that Supervised Recruitment decisions will be based more on statistical analysis of a given job market and the stated job opportunity, rather than any "audit triggers" which may sometimes be avoided via skillful preparation of the ETA 9089.

Rising unemployment rates and publicized layoffs in certain industries and geographic locations contribute to the DOL's planned initiative to protect the integrity of the PERM program and certify cases only after the employer can prove that there are no qualified U.S. workers for this position. Expect DOL to target companies with publicized layoffs or reductions in force for Supervised Recruitment, as well as employers in certain industries, such as high-tech/computer industries, automotive-related industries, and financial/banking industries. The DOL has specifically admitted to targeting cases filed for

Financial Analyst positions in the New York City area after lay-offs in the financial industry were widely publicized.[22]

The best course of action for employers is to follow the PERM regulations very carefully when recruiting initially, and to be vigilant in keeping interview logs and notes regarding applicants for the position and the legal reasons for disqualification. Although Supervised Recruitment may not be avoidable, having all required recruitment evidence and organized documentation for responses to requests will prepare the employer for additional recruitment activities. Furthermore, a discussion between the attorney and the employer regarding the possibility of additional recruitment and what to expect will prepare the employer to mobilize for responding to each Notice and Letter from DOL within 30 days.

Conclusion

In June of 2009, after announcing its plan to roll-out a Supervised Recruitment initiative, DOL stated that approximately 200 pending PERM applications had been marked for Supervised Recruitment. Of those cases the following statistics were noted:

25% were withdrawn by the employer after Supervised Recruitment was ordered[23];

45% were denied;

11% had been certified; and

20% remained pending.[24]

It is necessary to consider the possibility for Supervised Recruitment before filing the PERM application. Although the employer may withdraw the application if additional recruitment is ordered, withdrawal, and particularly a pattern of withdrawals, upon the receipt of Supervised Recruitment, can have serious repercussions on the employer.[25] And if the employer files a new application, the future application will also likely be subject to supervised recruitment.[26] Although Supervised Recruitment may be issued randomly, as many Audit Notices are, market conditions will likely trigger Supervised Recruitment for certain cases, so it is prudent to check with the local State Workforce Agency (SWA) in the geographic location for the position to get

statistics on labor market conditions prior to filing.

PERM Regulations outlining requirements for Supervised Recruitment are very similar to the recruitment requirements in place prior to the implementation of the PERM system. The most significant difference to a good-faith employer who has filed a PERM application is that the employer should have already spent thousands of dollars in advertising costs and resources recruiting for the position and determined before filing that no qualified U.S. applicants were available for the position. Under Supervised Recruitment, that employer will have the additional financial burden of placing new recruitment and reviewing all applicants the Certifying Officer stipulates. While supervised recruitment was also occasionally required if an employer filed a Reduction in Recruitment application,[27] the purpose then was to cure a defect that precluded RIR approval. Under PERM, the pre-filing recruitment may have been perfect, but what was fine previously, may no longer be the case and the CO orders supervised recruitment as a way to adjust the facts of the case to a changed reality.[28]

So, even though the employer has attested to the fact that no qualified applicants applied for the job, it will now have to recruit for the position again and consider all applicants the CO forwards for review. The DOL stated that its decision to increase the amount of cases tagged for Supervised Recruitment has to do with the significant change in labor market conditions pre-and post-filing.[29] One could argue that market conditions would not likely be so different if it wasn't taking 10 months to 2 years for cases to be adjudicated. When this was raised by AILA at the DOL Stakeholders Meeting in February of 2009, the DOL declined to comment.[30]

The DOL estimates that Supervised Recruitment will add at least 180 days to processing, in the "cleanest" of cases.[31] Based on current processing times and statistics for PERM Audits, it is probable that Supervised Recruitment will add at least one year to case processing times. Preparation is critical at every stage, and documentation of Supervised Recruitment activities and applicant review must comply with the regulations and CO instructions within the very tight regulated timeframes. Attorney assistance is strongly recommended to guide employers and ensure compliance.

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[1] *See* Final PERM Regulation, 69 Fed. Reg. 77325 (Dec. 27, 2004).

[2] *See* "Liaison Questions Submitted by AILA and Notes from February 3, 2009 Stakeholders Meeting," AILA InfoNet Doc. No. 09021165 (Posted 02/11/2009), noting that the DOL commented that there were very few federal employees and that because of contract disputes, staffing was low, which contributed to slower processing. The new contract workers were trained for much of the latter part of 2008, and at the time of the meeting in February of 2009, the DOL commented that there were still too few federal workers to review the work done by the contract staff. So, delays are expected to continue until staffing increases.

[3] Current DOL Published Processing times as of September 30, 2009, *available at* http://icert.doleta.gov/index.cfm.

[4] *See* "Highlights from the DOL Open Forum at Annual Conference 2009," AILA InfoNet Doc. No. 09061965 (posted June 19, 2009).

[5] *See* ETA News Release from the Department of Labor, "U.S. Department of Labor initiated supervised recruitment of permanent labor certification applications filed by immigration law firm," issued July 8, 2008 (Release No. 08-955-NAT).

[6] *Id*.

[7] *See* PERM Frequently Asked Questions About Supervised Recruitment, at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm.

[8] *See* 20 C.F.R. § 656.21(d).

[9] *See* 20 C.F.R. § 656.17(f)(3).

[10] See 20 C.F.R. § 656.21(2)(i)-(vii).

[11] *See* 20 C.F.R. § 656.21(b).

[12] For specific requirements pertaining to ads running under Supervised Recruitment, *see generally* 20 C.F.R. § 656.21(b)(2)(i) – (vii).

[13] It is important to note here that listing a wage in the recruitment is not required under regulations.

[14] *See* 20 C.F.R. § 656.21(b).

[15] *See* 20 C.F.R. § 656.17 for requirements for documenting PERM recruitment activities.

[16] One author received numerous audit notices in September 2009 requesting phone logs and detailed logs regarding contact with applicants. It is likely the DOL will start requiring evidence of such contact in all audited and supervised cases. If the employer sent a letter, the audit notice is requesting green return receipts of certified mail.

[17] *See* Restatement of PERM Program Guidance Bulletin on the Clarification of Scope of Consideration Rule in 20 C.F.R. § 656.10(b)(2) (Aug. 29, 2008), *available at* http://www.foreignlaborcert.doleta.gov/pdf/PERM_Guidance_Final_082908.pdf, and *available at* AILA InfoNet at Doc. No. 08082940 (posted Aug. 29, 2008).

[18] For a comprehensive overview on the role of the lawyer, *see* Endelman & Mehta, *Walking The High Wire Without A Net – The Lawyer's Role In The Labor Certification Process*, 14 Bender's Immigration Bulletin 168, February 1, 2009.

[19] *See Francis Kellogg*, 94-INA-465 (BALCA 1998), which has been codified at 20 C.F.R. § 656.17(h)(4).

[20] Readers would profit from reading recent BALCA decisions on good faith

recruitment. *See, e.g. Matter of Big Apple Compactor Co., Inc. d/b/a Big Apple Fire Sprinkler Co.,* 2008 INA 00009 (Mar. 3, 2009)(rejection of an applicant solely on the resume not listing recent experience, when it was not clear if applicant qualified, was not lawful rejection); *Matter of Technivate Inc*., 2008 INA 00065 (Aug. 27, 2008) (employer's efforts to contact applicant was not in good faith when employer sent e mail to inoperable address which was returned).

[21] *See* 20 C.F.R. § 656.21(g).

[22] *See supra* note 3.

[23] In the AILA notes from the February 2009 DOL Stakeholders Meeting, it was noted that DOL provided statistics on withdrawals after Supervised Recruitment had been ordered. The statistics were that over 50% of these cases were withdrawn, which the department noted was suspect and was a likely factor in its decision to increase such orders, in addition to market conditions and economic downturns.

[24] *See supra* note 5. The authors point out that the percentages are approximate and current add up to more than 100%.

[25] *See supra* note 8.

[26] For a good overview of supervised recruitment, *see* Romy Kapoor et al, *Post-Filing PERM Processing And Strategies*, Immigration & Nationality Law Handbook, 2009-10 (AILA).

[27] *See* DOL's General Administrative Letter No. I-97, *Measures for Increasing Efficiency in the Permanent Labor Certification Process*,