

Practice Advisory: Listing Alternative PERM Job Requirements on Form 9141

On June 21, 2012, DOL issued a [new FAQ regarding prevailing wage determination requests](#) when the employer has alternative job requirements.¹ The FAQ states that if an employer intends to accept and list alternative job requirements on the labor certification application, ETA Form 9089, the employer must also list the alternative job requirements on the prevailing wage application, ETA Form 9141. Specifically, the employer should list its alternative job requirements in either the Special Requirements block (D.b.5) or the Job Duties block (D.a.6) of the ETA Form 9141. We bring this FAQ to your attention for a couple of reasons. First, because DOL has always determined the prevailing wage based on the primary requirements, without consideration of alternative requirements, many practitioners may presume that there is no reason to list the alternative requirements on the ETA 9141. Second, previous DOL guidance advised that alternative requirements do not need to be included on the prevailing wage request form. This new FAQ affirms that the NPWC will continue to base the prevailing wage determination only on the primary job requirements listed by the employer, and will not consider the alternative requirements.

DOL's stated rationale for requiring employers to list both the primary and the alternative requirements in the ETA 9141 is that a line of BALCA decisions affirms the agency's ability to require the same information on the job opportunity on both forms. However, the underlying principle in wage determinations is that when the employer leaves out a key job requirement on the ETA 9141 that could impact the prevailing wage, the prevailing wage determination is likely to be too low. For example, in [Florida Restaurant Group](#)², the 9089 form required two years of experience but the employer did not list this experience requirement on the prevailing wage request. BALCA held that certification was properly denied because the amount of experience strongly influences the wage determination. The inclusion of alternative requirements, on the other hand, does not influence the PWD. Another case that DOL may have considered in requiring alternative requirements to be included on the 9141 is [Take Solutions, Inc.](#)³, in which BALCA found that where the employer had received two different PWDs based on its primary and alternative minimum requirements, the employer is required to use the higher of the two PWDs. However, *Take Solutions* presumes that the employer submitted and received two different PWDs; the new FAQ only mandates that the alternative requirements be stated on the PWD request, the PWD will continue to be issued based only on the primary requirements.

What should members do going forward? Obviously, practitioners should include alternative requirements on the ETA 9141, as directed in the FAQ. More importantly, what should members do if they have received a PWD that was requested prior to June 21, and that PWD does not include alternate requirements which are (or will be) stated on the ETA 9089? DOL process changes should not be applied retroactively, so if a PWD was requested prior to publication of the June 21 FAQ, members should be able to use that PWD in support of a PERM filing that

¹ DOL Updates FAQs on Prevailing Wage Program. AILA Doc. No. 12062154.
<http://www.aila.org/content/default.aspx?docid=40236>.

² *Florida Restaurant Group*, 2009-PER-00014 (Aug. 25, 2009). AILA Doc. No. 09102064.
<http://www.aila.org/content/default.aspx?docid=30343>.

³ *Take Solutions, Inc.*, 2010-PER-00907 (Apr. 28, 2011). AILA Doc. No. 11042966.
<http://www.aila.org/content/default.aspx?docid=35254>.

includes alternative requirements. In theory, practitioners should not receive PERM denials in cases where the ETA 9089 includes alternative requirements but the underlying PWD that was requested prior to publication of the FAQ does not. However, should DOL deny a PERM application based on a retroactive application of this FAQ, practitioners may want to consider requesting reconsideration and/or review. Some arguments that can be raised:

- The omission of the alternative requirements does not impact the determination of the prevailing wage, so there is no substantive impact of the omission, and the denial is one of form over substance.
- The PWD request was drafted in reliance on prior agency guidance, which advised that the PWD would be issued solely on the basis of the primary requirements, so there was no reason to include the alternative requirements on the PWD request. Prior agency guidance that supports omission of the alternative requirements from the PWD form:
 - [DOL Prevailing Wage FAQ issued on August 1, 2005](#)⁴

2. Question: When requesting a prevailing wage determination from the SWA should the employer include, if applicable, alternative experience requirements? For example, if the employer requires a Master's Degree plus 2 years experience but will accept a Bachelor's Degree plus 5 years experience, as an alternative, should the employer include both on the prevailing wage request?

Answer: No, the employer should not separately include "alternative education and experience requirements" when requesting a prevailing wage determination from the SWA. Employer requests for prevailing wage determinations must describe the actual education and experience requirements the worker must possess to be considered for the job opportunity.

NOTE: The education and experience stated on the prevailing wage request for PERM applications must match the minimum education and experience stated on the ETA form 9089 (Item H4, H4a, H4b, H6 and H6a). The employer is reminded that alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which employment is sought

- [DOL FAQ issued March 2010](#)⁵

Question: I want to include alternative job requirements on the ETA Form 9141. Is there a section on the 9141 where I can list alternative job requirements?

*Answer: No. Prevailing Wage Determinations will be made based on the initial requirements submitted on the 9141. **Alternative requirements will not be considered for prevailing wage purposes.** (Emphasis added)*

⁴ New FAQ from DOL on Prevailing Wage. AILA Doc. No. 05081067.
<http://www.aila.org/content/default.aspx?docid=40631>.

⁵ DOL Issues Updated Prevailing Wage FAQs. AILA Doc. No. 10032662.
<http://www.aila.org/content/default.aspx?docid=31632>.

These same arguments could also be raised in responding to an audit, as an affirmative defense that the submitted PWD is acceptable, even if it omits alternate requirements that are on the ETA 9089.

AILA Liaison has reached out to DOL to ask if they concur that PWDs that did not include alternate requirements, but were requested prior to issuance of the FAQ will still be acceptable for PERM filings that include both primary and alternative requirements. We will provide updated guidance should DOL provide clarification on this point. Should members receive a denial of a PERM application because the PWD did not include the alternative requirements stated on the PERM application, please notify AILA through reports@aila.org, using the subject line "PERM denial based on PWD." Please include a copy of the denial decision, including the case number, with the report.