DOL Practice Pointer: Are You Audit Ready?[1]

by

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I see the bad moon arising.
I see trouble on the way.
I see earthquakes and lightnin'.
I see bad times today.

--John Fogerty

INTRODUCTION

To paraphrase the famous song, it appears that PERM audits, like a bad moon, are on the rise. A document released recently by the Department of Labor (DOL) in response to a FOIA request reveal various PERM elements that may trigger an audit, including the following: positions requiring education that is less than a bachelor's degree, PERM applications filed by some public schools, positions requiring a bachelor's degree and no experience, cases resubmitted after a denial or withdrawn after audit, and cases in which employers had a layoff.[2] Apart from these and other known triggers, DOL appears to be issuing random audits with greater frequency.

Although some audits target one particular piece of information, all audits require the same set of basic compliance documents. In addition, recent random audits ask for the following additional items: (1) resumes for all U.S. workers who applied for the job opportunity, a recruitment report, and documentation of contact with applicants; (2) declarations from the employer and the foreign worker that the employer did not receive payments of any kind from the foreign worker or third party for any activity relating to the PERM application; and (3) where the employer used an employee referral program, documentation that employees were directly notified of the job opportunity through the program. In addition, PERM adjudicators will often focus on one particular issue until that issue is resolved by BALCA.

It is possible to "see trouble on the way," and overcome it, but practitioners should be aware that DOL frequently denies cases after audit when evidence was inadvertently omitted from an audit response, and when there are internal inconsistencies between the job description as it appears on

[1] **Errata**: This practice pointer, originally published on AILA InfoNet on April 28, 2014 was republished on May 13, 2014 to provide clarification on several points and to correct a statement which indicated that the PERM file be made available for public inspection. Under 20 CFR §656.10 (f), copies of PERM applications and all supporting documents must be retained by the employer for five years from the date of filing, but employers are not required to make the file available for public inspection.

[2] *See* "DOL OFLC Audit Plan," *published on* AILA InfoNet at Doc. No. 14020361 (*posted* 2/3/14).

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the ETA 9089 and the job description as it appears on the prevailing wage determination and in recruitment documentation. The purpose of this practice advisory is to help practitioners avoid such problems and be as “audit-ready” as possible as of the date of filing.

DEALING WITH STANDARD AUDIT REQUESTS

DOL regulations require an employer to retain the PERM application form and all supporting documents for five years following the filing of the application.[3] These are essentially the same documents that form the “standard” boilerplate section of every audit request. Therefore, a best practice is to prepare a “compliance” or “audit” file at the time of filing, in duplicate, containing a copy of the PERM application and all supporting documentation. One “compliance” or “audit file” is sent to the employer to facilitate compliance with the retention regulation, and the second is retained by the attorney in the event of an audit. To ensure that the compliance file contains all necessary documentation, many practitioners find that the use of a checklist during the preparation of the PERM application and in the assembly of the compliance file is extremely useful. Using such a checklist also helps practitioners spot and resolve inconsistencies between the way the job is described in various PERM-related documents.

As discussed above, most random audits appear to request the same additional items. Each request is discussed below with tips as to how to prepare and present this information.

Resumes and Recruitment Report

DOL regulations require the preparation of a recruitment report “describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections.”[4]Audits now typically require much more recruitment information, including submission of the resumes and applications for all U.S. workers who apply for the job. Thus, if the employer required a job application in addition to a resume, these must be retained and presented at audit. In addition, audits typically request a detailed recruitment report with the following information:

- **The date(s) the employer contacted or attempted to contact the applicant(s).** This clearly only applies to applicants who appeared to meet the basic job requirements on paper and were contacted for an interview by the employer. Note that as with the traditional labor certification process, it continues to be crucial for an employer to contact U.S. applicants in a timely fashion.
- **The date(s) and methods the employer used to interview the applicant(s).**
- **For applicants who were not interviewed, the reasons for not interviewing them.** Presumably, the reasons for not interviewing most applicants will be that the applicants were not qualified based on their resumes. In other cases, applicants may have declined an interview or not responded to the employer when contacted. The employer must be prepared with evidence of such situations.
- **Specific lawful job-related reasons that interviewed applicants were rejected, and how the applicants were informed of such rejection.** There is no regulatory or BALCA

[3] 20 CFR §656.10 (f).
[4] 20 CFR §656.17 (g).

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authority requiring notification of rejected applicants, or even notification of applicants who are qualified, willing, and available, although clearly, if applicants are qualified, willing, and available, the labor certification process is over as the labor market test has shown that qualified U.S. workers exist. If the employer keeps documentation regarding contact with workers who were rejected as unqualified, this could be submitted as part of the audit documentation, but in our view, is not necessary.

- **Copies of documentation of contact with applicants, including telephone logs, dated e-mails and/or copies of letters to applicants with signed certified mail receipt cards.**

The above information may be included in the required recruitment report, which may be in a narrative format or a detailed chart, signed by the employer or the official who was responsible for reviewing resumes and interviewing applicants. Note that such a signature on the recruitment report is a regulatory requirement and a case may be denied after audit if the recruitment report is not duly signed.[5] Also note that, while a signed recruitment report must be part of the documentation kept at the time of filing, there is no regulatory requirement that the recruitment report be dated. Therefore, as long as the initial recruitment report contains the basic information required in regulations, it should be permissible to add supplementary information, or prepare a supplementary report in the event of an audit that may require more information about the recruitment process than might have been anticipated at the time of filing.

Declarations from the Employer and the Employee that the Employee Did Not Pay for Any Part of the PERM Process

Audits now require additional sworn assurances from both the employer and the employee that the employee paid no fees whatsoever with respect to the PERM application, including attorney's fees, recruitment costs, and administrative fees. This includes payment of fees by a third party for the employer's benefit, despite the fact that the payment may have been made to a party other than the employer. The audits mention the Department of State as one of these parties, leading to questions as to whether DOL is attempting to expand its prohibition on payment of attorney's fees beyond the PERM process. Nevertheless, the regulatory prohibition applies to the PERM process only, so the reference to the Department of State in audit notices appears to be inapplicable in this context. For purposes of this request, dated statements made under penalty of perjury by the employer and the employee should suffice.

Recruitment Documentation

Employee Referral Program

As mentioned above, if an Employee Referral Program (ERP) is used as a form of recruitment, audits now routinely require documentation to show that current employees are notified that the PERM job opportunity is subject to the ERP. This request is a source of controversy in PERM practice. The regulation allowing an existing ERP to be used as a form of recruitment simply does not require a direct link between the particular job opportunity and the ERP.[6] For many years, DOL simply accepted what was required under the regulations, that is, "dated copies of

[5] *See* 20 CFR §656.17(g).
[6] *See* 20 CFR 656.17(e)(4)(ii)(G).

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employer notices or memoranda advertising the program and specifying the incentives offered."[7] However, at a 2010 stakeholder teleconference, DOL announced that it would require more documentation from employers who use ERPs as a form of recruitment, and thereafter on August 3, 2010, DOL issued instructions as to the use of ERPs in PERM FAQ 11, which provides:

> *In addition to establishing the existence of a referral program, employers must document that its employees were aware of the vacancy for which certification is being sought through means such as a posting on the employer's internal web site. The Notice of Filing provided to satisfy § 656.10(d) shall not be sufficient for this purpose.*[8]

Several BALCA cases support the additional twist on the ability to use an ERP, imposed by the DOL in FAQ 11. In *Matter of Sanmina-Sci Corporation*, BALCA articulated the following three-part test for determining whether an employer's ERP will be sufficient as a form of recruitment:

- The ERP must offer incentives to employees for the referral of candidates;
- The ERP must have been in effect during the PERM recruitment period (although it need not be dated within the recruitment period); and
- Employees must have been on notice of the job opening and aware that it was eligible for the ERP.[9]

Employers who use an ERP as a form of recruitment and have evidence satisfying the three-part test articulated in *Sanmina* should not have trouble satisfying the standard audit request. In addition, while FAQ 11 indicates that the Notice of Filing in and of itself is not sufficient to fulfill the third part of the test, practitioners have successfully used Notices of Filing that bear the additional statement: "This Job Opportunity is Eligible for Our Employee Referral Program," and a reference to the location of information relating to the program.

Print Advertisements

It is crucial to ensure that the tear sheets contain the names of the newspaper and date(s) of placement. If the tear sheets do not contain the name and/or date of publication, alternative documentation should be provided, such as an invoice from the newspaper showing the dates, a statement from the publisher, or correspondence demonstrating the dates and name of the publication.

Job Orders

Proof of job order publication and production of text has proved to be problematic in many circumstances. In an en banc case, *Matter of a Cut Above Ceramic Tile,* BALCA held that under the plain language of 20 CFR §656.17(e)(2)(i), the dates of placement on the ETA 9089, in and of themselves, constitute sufficient acceptable evidence of the placement of the job order.[10] *A*

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[7] *Id*.
[8] http://www.foreignlaborcert.doleta.gov/pdf/PERM_Faqs_Round_11_08032010.pdf.
[9] 2010-PER-00697 (Jan. 19. 2011).
[10] 2010-PER-00224 (Mar. 8, 2012).

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Cut Above therefore, gives the employer the choice of limiting the evidence of job order compliance to referring the Certifying Officer to Section I, items c.6 and c.7 of Form 9089, or, alternatively, providing the Certifying Officer with compliant print-outs of job order placement dates and/or the text appearing on the SWA website.

Job orders are a frequent source of post-audit denials, as SWA websites often force an employer to make choices that do not appear in ads, such as "drug testing required." Great care should be taken in reviewing all default and drop down menus on such websites, as well as the final print out of the Job order.

On-Campus Recruiting and Posting at a Campus Placement Office

Until recently, little has been said regarding the documentation needed at the audit stage to demonstrate acceptable on-campus recruitment. However, BALCA addressed both on-site recruiting and notification to a campus placement officer in *Matter of Micron Technology, Inc.*[11]

In *Micron,* the employer offered printouts from its own website indicating the campuses it would visit and the dates, but did not produce copies of the announcement posted through the universities. Citing the plain wording of 20 CFR §656.17(e)(1)(ii)(D), which states that on-campus recruiting "can be documented by providing copies of the notification issued or posted by the college's or university's placement office naming the employer and the date it conducted interviews for employment in the occupation," BALCA found that the word "can" did not preclude the employer from submitting other types of documentation to establish on-site campus recruitment.

The *Micron* decision also held that the employer's posting directly on the college's career center job site was adequate documentation. The posting was limited to providing the "descriptive job title," the name of the employer, and the means to contact the employer. Citing the guidance in the 2004 preamble to the Federal Regulations,[12] BALCA determined that the posting was adequate to satisfy 20 CFR §656.17(e)(1)(G).

PREPARING FOR OTHER REQUESTS FOUND IN DOL AUDITS

Layoffs

DOL is likely to issue an audit if the employer has had a layoff in the PERM occupation or a related occupation in the area of intended employment within the previous six months. An employer that has experienced a layoff must "notify and consider" for the PERM position, all potentially qualified workers who were laid off.[13] In such cases, the employer is asked to supply an affidavit attesting to the following:

- A brief explanation of the layoff and the relevant dates;
- A list of the occupations involved in the layoff;

[11] 2011-PER-02193 (Jan. 30, 2014).
[12] 69 Fed. Reg. 77,326 (Dec. 27, 2004).
[13] 20 CFR §656.17(k)(1).

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- Resumes of all laid-off workers (not simply the ones the employer deemed to be in the PERM or related occupation);
- The steps undertaken to notify and consider any potentially qualified U.S. workers who were laid-off;
- Names, job titles, places of employment, and divisions/departments of laid-off workers who were notified and considered for the job opportunity;
- The results of any notification and consideration of laid-off employees; and
- The reasons for rejection of any potentially-qualified U.S. worker.

In addition to the affidavit, the employer must provide DOL copies of notifications provided to laid-off workers.

On February 21, 2014, DOL issued an FAQ addressing what type of notification and consideration it would deem acceptable and what actions would not meet the regulatory requirement.[14] Therefore, it is crucial to understand how DOL defines these terms in preparing for an audit.

First, the FAQ makes it clear that a related occupation is any occupation in which workers perform a majority of the essential duties involved in the PERM occupation. Next, the FAQ states that an acceptable way of complying with the regulation is to contact potentially qualified workers who were laid off and invite them to apply for the specific job opportunity. The FAQ indicates the optimal time to do this is at time of posting the job order and newspaper advertisements, however, this is not covered in the regulation, and therefore it should not be deemed mandatory. Moreover, if the layoff occurred sometime after recruitment, this will not be possible. If a lay off occurs sometime after recruitment but before filing, the employer should reach out to potentially qualified workers at that time. Presumably, if the job opportunity is described and offered at that time, the employer would still be in compliance with the "notify and consider" provisions.

Finally, the FAQ explains that the "notify and consider" requirement is not satisfied by merely informing laid off workers they may be qualified for other job opportunities with the employer in the future. Likewise, it is insufficient to require them to monitor the employer's website or other locations for future job postings. Rather, potentially qualified laid-off workers must be apprised of the specific job opportunity in the PERM application.

An employer that has had a layoff should maintain in its audit file documentation of how it determined there were potentially qualified workers in the same or related occupations, how it notified those workers of the PERM job opportunity, and the process of consideration of those workers for the opportunity. This same information should be included in the employer's recruitment report. Keep in mind that DOL is currently requesting a list of occupations involved in the layoff, and will likely make its own determination as to which occupations are "related" to the PERM occupation. An employer should interpret generously "related occupation" when assessing which laid-off workers may be qualified.

[14] "DOL FAQ on Notification and Consideration of Laid Off U.S. Workers for PERM Applications," *published on* AILA InfoNet at Doc. No. 14022460 (*posted* 2/24/14).

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At a point in time relatively close to the filing of the PERM application, such as during the 30 day quiet period, it is a best practice to remind the employer it will be required to disclose on the PERM form any relevant layoffs. If there has been a layoff, discuss with the employer its impact. This will allow the employer time to reach out to any potentially qualified employees, notify them of the job opportunity, and consider their applications. This will also allow the practitioner time to assist the employer in gathering the documents listed above in the event of an audit.

Foreign Language Requirement

Although some PERM applications containing a language requirement will receive an audit, a clear nexus between the job duties on the ETA 9089 and the foreign language requirement may help prevent an audit. The easiest way to accomplish this is by clearly describing how the language is used in H.11 (Job Duties) and include the same wording in K.9.1 (Employment History). A foreign language requirement for translators, interpreters, and foreign language teachers is considered inherent to the occupation and should generally not be audited. For other occupations, 20 CFR §656.17(h)(2)(ii) states that business necessity of a foreign language may be justified if the employer can establish a need to communicate with a large majority of its customers, contractors, or employees in the foreign language.

If an audit requires proof of language documentation, it is best to provide electronic communications or printed materials reflecting actual use of the language in the day-to-day duties of the job. Examples of documentation include promotional literature, communications with the employer's foreign office, communications with customers within or outside of the U.S., and employee communications and/or invoices. A detailed statement from the employer should accompany this documentation.

Business Necessity Documentation

It is a long-held tenet of labor certification practice that an employer must be able to justify any job duties or requirements other than those normal to the occupation with evidence of business necessity.[15] Clearly, this evidence must exist at the time of filing a PERM for a position that contains such duties or requirements.

However, the "business necessity" language has been eliminated from the first audit page template, and DOL has indicated that any such request will be specific and will highlight exactly those items for which documentation is required. Foreign language, unless inherent to the occupation, can often provoke an audit for business necessity. So documentation of the valid requirement for a foreign language should always make up part of the audit file. But, in other, perhaps less predictable, business necessity situations, should the practitioner expend a lot of energy gathering documentation for a potential request up front, and maintain this in the audit file, or wait for the request from DOL? "Business necessity" audit requests at present seem to be relatively rare, though at any moment, this could become a new analyst "trend," as we have witnessed many times in the past. At this time, practitioners may want to discuss with the

[15] *See* Preamble to Final PERM Regulation, 69 Fed. Reg. 77326, 77351 (Dec. 27, 2004).

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employer of the general types of documentation that could be requested to ensure they are available and to preserve them if needed. Expending the time to prepare documentation in advance and placing it in the audit file, seems to be overkill, unless the employer has an unlimited budget and a lot of time to compile documentation.

Evidence of the Beneficiary's Qualifications

Until a few years ago, DOL did not heavily involve itself in verifying the foreign national's qualifications for the job, other than comparing the number of years of experience listed in Section K to the requirements in Section H. This function was generally left to the good judgment of USCIS at the I-140 stage. That has changed. DOL is auditing, and in many cases, denying without audit, cases where each and every qualification for the job does not appear somewhere on the ETA 9089. This includes special skills, coursework, certificates, board certification, licenses, a second degree, and so on. In drafting the PERM form, it is now crucial to ensure that a Certifying Officer will be able to discern, just from reviewing Section K, that the beneficiary possessed every skill and qualification articulated in Section H prior to assuming the PERM position. In addition, because requests for reconsideration and sometimes audits often now involve providing such proof, it is a best practice to keep it together with the audit file. Indeed, as a general matter, the practitioner should always collect documentary evidence of all of the foreign national's qualifications prior to submitting the prevailing wage request, since, whatever happens in the labor certification context, such evidence will absolutely be needed at the I-140 stage.

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