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TOP 20 TIPS FOR PREPARING APPROVABLE PERM APPLICATIONS

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TOP 20 TIPS FOR PREPARING APPROVABLE PERM APPLICATIONS

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The Program Electronic Review Management (PERM) labor certification application process is a complex and highly regulated procedure that requires complete familiarity with the applicable U.S. Department of Labor (DOL) regulations and knowledge of the nuances in obtaining certification of a PERM application. This article provides some tips for navigating through the PERM process. Of course, the most important tip is the one which, if followed, would have prevented the most recent PERM denial!

Based on the authors' knowledge of the PERM regulations, reading of the Board of Alien Labor Certification Appeals (BALCA) decisions, and understanding of the PERM FAQs, with the following is a list of 20 tips that are important and have broad applicability. Of course, there are other tips that could vie for the top 20, but these are the ones that made the authors' list.

These tips are important for both novices and experienced practitioners. For novices, these tips will help practitioners wend their way through the complicated PERM labor certification process. For the experienced, these tips will confirm what is already being done correctly and possibly serve as reminder about some things forgotten.

TIP #1—Alternative Requirements Must be Substantially Equivalent.

20 Code of Federal Regulations (CFR) §656.17(h)(4)(i) states that alternative experience requirements must be substantially equivalent to the primary requirements. When the employer specifies alternative experience requirements, the question is which requirement is the “primary”

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requirement and which is the alternative requirement. Without going into a discussion about primary and alternative requirements, keep in mind that primary and alternative experience requirements must be substantially equivalent.

Matter of Globalnet Management L.C., 209-PER-00110 (BALCA Aug. 6, 2009) illustrates the issues involved with ensuring that primary and alternative requirements are substantially equivalent. The employer specified a primary requirement of a bachelor's degree plus two years of experience and the alternative requirement of 14 years of experience (using the H-1B regulation equivalency of "three years for every missing year of education"). BALCA determined that the 3-to-1 equivalency formula from the U.S. Citizenship and Immigration Service's (USCIS) H-1B regulation was inapplicable in a PERM context; therefore, requiring 14 years experience was not substantially equivalent to a bachelor's degree plus two years experience. Although reference to specific vocational preparation (SVP) has lost much of its usefulness, it is obvious that a bachelor's degree and two years experience would have an SVP equivalency of four years as opposed to a 14-year SVP for the alternative requirement, which is a 10-year difference!

The case becomes more complicated when the primary requirement is a master of science (M.S.) degree and the alternative requirement is a bachelor's (B.S.) degree plus five years experience. The SVP of an M.S. degree is four and the SVP of a B.S. degree, plus five years experience is seven. DOL may not consider these to be "substantially equivalent." In this instance, employers should be prepared to defend their requirements as substantially equivalent, even if the requirements do not have parallel SVPs.

TIP #2—The Foreign National Must Meet the Stated Job Requirements Before He or She Starts Working for the Sponsoring Employer

This tip contains a number of facets:

- a. Be sure the foreign national meets the stated educational requirements. For example, if the requirement is a bachelor's degree, does the applicant's foreign bachelor degree meet that requirement? This issue arises when the applicant has a foreign bachelor's degree based on a three-year program. Even if the foreign degree may not be equivalent to a four-year bachelor's program, this can be explained in Section H.14 to make the three-year degree acceptable.
- b. Watch out for EDGE evaluations. Although USCIS uses these evaluations in the H-1B context, it may also use EDGE evaluations in an I-140 context. Again, using the appropriate language in H.14 will assist in ensuring approval at the I-140 stage.
- c. Be sure the foreign national meets the required years of experience.

In *Matter of Continental System USA Inc.*, 2009-PER-00376 (BALCA Mar. 2, 2010), DOL denied the PERM application because the employer required 24 months experience but the employee had only 20 months experience at the time he was hired. BALCA affirmed DOL's denial and re-

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