

PRACTICE TIPS FOR THE BUSY IMMIGRATION LAWYER

Coping with PERM Audits

LONG-TIME IMMIGRATION LAW ATTORNEY Steve Clark's *Immigration Law Today's* column, Ask the Expert, offers practice tips to the busy immigration lawyer and answers to commonly asked questions. This issue's Q&A focuses on coping with PERM audits.

Members report increased PERM audits. What is the cause?

The U.S. Department of Labor (DOL) has played its cards close to the vest. When the PERM rule was published, DOL indicated that it would not reveal its plans for audits because to do so would undermine their effectiveness, and it would need to remain flexible to respond to changing trends and patterns (see 69 Fed. Reg. 77, 326, 77, 359 (Dec. 27, 2004)). Clearly, DOL had been focusing on process issues in an effort to iron out the bugs in a complex system rather than substantive issues in the first three years of PERM operation. It is natural, now that some of those issues have been put to rest, that DOL would take a closer look at substantive issues. Perhaps this delayed attention to substantive issues was accentuated by having senior managers retiring from the DOL headquarters as PERM began.

The abrupt shift of focus to audits and substantive issues in the past several months may well have been accelerated by the fact that the backlog elimination centers (BECs) are now closing and their personnel are available and familiar with the substantive issues. When DOL started to wind down the BECs, it transferred the federal employees at the BECs to the PERM program. Possibly, there will be jobs created at the PERM processing centers for the temporary BEC contract employees as well. The fact that these temporary workers have reviewed the employers' documentation in connection with traditional labor certification (TLC) and reduction in recruitment (RIR) appli-

cations gives them a possible edge, since PERM analysts have had relatively few audits that would have exposed them to the documentation underlying the attestations embedded in the Form ETA 9089.

Will the trend of increased audits continue?

DOL has not announced its intentions. Some members report that all their cases are being subjected to audits; others report that all their cases where the Specific Vocational Preparation (SVP) (guidelines for maximum education and experience requirements) has been exceeded are being audited. It is entirely possible that some attorneys have received extra scrutiny, or that DOL is currently focusing

on the SVP issue. But the beauty of the electronic system is that it enables DOL to detect processing patterns, adapt its criteria to these patterns, and respond to workload factors. Obviously, if all cases involving an SVP issue are audited—given the downgrading of SVP codes for numerous occupations—we will soon have the extensive backlogs that forced DOL to adopt the PERM program. No doubt, as backlogs increase, audit criteria will ease. DOL may want to look at a larger universe of cases precisely so that it can set criteria and provide a foundation for further guidance. Hope springs eternal!

How can one avoid audits?

Audits may be directed at trigger points in the application, such as excessive requirements or foreign language requirements. But numerous audits are conducted on a random basis. When the PERM rule was published, DOL indicated that it would not go on fishing expeditions but →

About Steve Clark

AILA Past President Steve Clark (1999–2000), of Flynn & Clark, P.C., has practiced business immigration in Cambridge, MA, for more than 30 years. As a long-time AILA member, Clark authored a monthly practice advisory on employment-based issues, which appeared in the *AILA Monthly Mailing* (a predecessor of *Immigration Law Today*) from 1989 to 1996. In addition, he has served as senior editor of AILA's annual conference handbook, the *Immigration and Nationality Law Handbook*, and editor-in-chief of AILA's monograph, *Representing Professionals Before the Department of Labor*. He also is a contributor to AILA's *David Stanton Manual on Labor Certification* (Third Ed. (2005)). Clark currently updates the chapter on labor certifications in the Matthew Bender treatise, *Immigration Law and Procedure*. He is a graduate of Yale College and Harvard University Law School, and he is listed in *Who's Who Legal*, *Best Lawyers in America*, and *Super Lawyers*.



would be relying primarily on targeted audits. Unfortunately, the heavy reliance on random audits (that ask for most all documentation) and the insistence on furnishing all such information (even if there is an attachment focusing on a specific issue) is at odds with this representation. So simply complying with SVP requirements will not eliminate audit requests.

What should one provide in response to an audit request?

The standard random audit letter requests a variety of documentation:

- ▶ Copy of the submitted ETA Form 9089, with original signatures in Section L, M, and N (Alien, Preparer, and Employer).
- ▶ Proof of business necessity as outlined by 20 CFR §656.17(h) if the answer to question H-12 is “no”, (i.e., the job requirements are not normal); the answers to H-13, H-15, or H-17 are “yes”, (i.e., the job requires a foreign language, a combination of occupations, or living on the employer’s premises); or the job duties and/or requirements are beyond those defined for the job by the SOC/O*NET code and occupation title provided by the state workforce agency (SWA). Business necessity documentation is not requested if the response is that the requirements are normal for the occupation.

▶ PRACTICE POINTER: DOL policy, as announced in the frequently asked questions (FAQs) section in PERM, is to deny cases where the employer states the requirements are normal even if business necessity documentation is offered (see PERM FAQ Set, Round 1 (March 3, 2005); all FAQs are located at www.foreignlaborcert.doleta.gov/). Further, the rule does not require business necessity documentation if the job duties are unusual, unless they involve a combination of occupations or the SVP is exceeded (see 20 CFR §656.17(h)(1), (3)).

- ▶ Documentation required for live-in household domestic service workers as outlined by §656.19(b) if H-18 indicates such an occupation and requirement are involved.

- ▶ Notice of filing as outlined in §656.10(d). This would include in-house postings, whether print or electronic.

▶ Recruitment documentation:

For basic process cases:

- Recruitment report signed by the employer describing steps taken and results achieved, number of hires, and, if applicable, number of U.S. workers rejected, summarized by lawful job-related reasons for such rejections. Résumés and applications are not requested, but the audit letter advises that they may be requested later.
- Copy of the prevailing wage determination (PWD) from the SWA, including the prevailing wage request if it is not included as part of the determination.
- Recruitment documentation outlined in §656.17(e), (i.e., two Sunday advertisements and documentation of three additional steps if the job is professional).

For college and university teachers using special recruitment:

- Statement of hiring authority detailing recruitment procedures undertaken, setting forth total number of applicants and specific, lawful job-related reasons why the alien is more qualified than each U.S. applicant.
- Final report of selection committee.
- Copy of advertisement and other recruitment sources, if any.
- Written statement as to alien’s qualifications.

Most, if not all, of this documentation would have been submitted with the ETA-750 form, at least in a TLC case. What makes the PERM audit different is that DOL is not required to tip its hand and tell you what its concerns are and how to overcome them, as it had to under the rules in effect prior to PERM. (See 20 CFR §656.25) DOL’s *Technical Assistance Guide* No. 656 (TAG) at 81–82 states that the certifying officer must state “every reason for the employer’s failure to meet the regulation requirements, specifics of the availability finding, and particulars of the adverse effect, thereby giving the employer the opportunity to rebut the findings.” For the notice of findings to provide a basis for denying a certifica-

tion, it must show specific facts that are relied upon in making the determination. Conclusory statements alone do not provide enough information for the applicant to prepare a rebuttal.” (See *Matter of Cotton L.A.*, 00-INA-313 (BALCA Sept. 25, 2001) [raising issue for first time in final decision rather than in NOF “deprives the Employer of due process”].) For that reason, it may be wise to err on the side of providing items not explicitly requested.

Where the audit letter requests documentation of a specific issue, is it necessary to submit the documentation requested in the general or random audit letter?

The targeted audit letters normally do require the employer to provide the documentation specifically requested as well as the documentation in the standard request. Frequently, the standard documentation will be needed to evaluate the documentation specifically requested. As with all documentation submitted, do not hand it over uncritically: check for defects that could trigger a denial. This is your last chance to avoid a mishap.

What should be done if the audit letter refers to an attachment, but only the standard two-page letter is enclosed in the envelope?

A number of audit letters have incorrectly referred to attachments. If you receive a letter referring to an attachment, but find none enclosed, e-mail DOL at the info mailbox to inquire whether DOL issued an attachment but forgot to enclose it. Members report a number of instances where DOL responded that no attachment was issued and the letter incorrectly referred to one. Depending on which processing center issued the audit request, the address will be either plc.atlanta@dol.gov or plc.chicago@dol.gov. Give the subject line a catchy heading such as “Audit attachment missing,” and include the employer name and case number so that your response can be triaged appropriately.

What steps should be taken if the employer’s representative is no longer employed by the employer?

This can present a problem because the au-

dit letter requests a copy of the “submitted” Form ETA 9089. The prudent practitioner will have the employer and employee sign the draft ETA 9089 prior to filing, but the file number on that copy will bear the letter prefix “T”, whereas the copy as submitted will bear the prefix “A” or “C”, depending on whether the case was submitted to the Atlanta or Chicago National Processing Center. It also is possible to have the new employer’s representative sign the submitted copy and provide a letter from the company explaining the transition. In the absence of guidance on this issue from DOL, we have provided both. Attorneys, too, are not always chained to their desks and may no longer be employed by the law firm at the time of the audit. Again, in the absence of DOL guidance, it is possible to provide the draft copy and the submitted copy signed by the newly appearing attorney, along with a letter of explanation.

Should one submit proof that the employee gained experience with

the petitioner in a position that is not substantially comparable?

If the employee began working for the employer under the same employer tax identification number and is qualifying based on this on-the-job experience, then the employer must prepare documentation to show that either it is no longer feasible to train for the position or that the offered position involves performance of the same job duties less than 50 percent of the time. Note that the audit letter does not request the documentation that it is no longer feasible to train or the time allocations to document that the 50 percent-test is met. However, some practitioners do volunteer the percentage allocation of job duties for the proposed position and the qualifying position with the employer. Some members report denials for requiring experience gained with the petitioner without affording an opportunity to provide such information. Hopefully, DOL will confirm that such a denial would be inappropriate, but some members have attempted to head off such a denial

by voluntarily disclosing the percentage time breakdown for each duty in the ETA 9089 form at items H11 and in Section K. Until this is clarified, the conservative practitioner should include the job descriptions with time breakdown in the audit response if it is not already in the ETA 9089 form.

Should one submit résumés of rejected applicants?

The rule and audit letter do not require the employer to furnish résumés of U.S. applicants. The rule specifically authorizes DOL to request résumés *after* the initial audit documentation has been reviewed (*see* 20 CFR §656.17(g)). We are unaware of any requests for résumés in outstanding audits, but it is entirely possible that DOL will later begin to request résumés to provide a baseline for the recruitment reports it has been reviewing. Given the language in the rule, it should not be necessary to furnish résumés with the audit in the absence of an express request for them. →

Should the recruitment report detail reasons for rejection?

The audit letter does not request detailed reasons for rejecting applicants; only the summary report of number rejected for each reason is required for basic processing cases. The kind of close questioning of each rejection in applications prior to PERM will not resurface unless DOL begins to request copies of résumés. Even then, it will be difficult for DOL to focus on rejection of a particular applicant since the employer is not required to link the reasons to a particular résumé. Moreover, failure to interview or telephonically screen applicants whose résumés fail to mention special requirements cannot be addressed since the reports are not required to disclose the number of applicants contacted or interviewed. However, recruitment reports with manifestly inappropriate grounds for rejection—such as failure to meet a requirement not mentioned in the application, over-qualified applicants, or applicants rejected for subjective or speculative reasons—will be expected to result in denials.

What are the requirements for in-house postings, electronic or print?

DOL has provided guidance in FAQs that appear at odds with the statutory and regulatory mandate to post in the employer's customary manner, because the FAQs incorporate requirements from the DOL regulations required for the physical posting, which is clearly not intended to be the customary employer posting. First, the physical posting advises the applicant pool that the job is the subject of a labor certification (*see* 20 CFR §656.10(d)(3)(i)). In fact, DOL's FAQs require the employer to indicate that any person may submit documentary evidence bearing on the application to the certifying officer and to furnish the address of the certifying officer (*see* PERM FAQ Set, Round 10 (May 9, 2007); 20 CFR §656.10(d)(3)(ii, iii)). Clearly, the FAQ requirement that the in-house posting disclose the dollar amount or range of the wage is anything but customary. Finally, DOL opines that the in-house media should publish the posting for 10 consecutive business days or the period customarily used, whichever is longer (*see* PERM FAQ Set, Round 2 (April 6, 2005)).

These FAQs are DOL's interpretation of the rules, but they do not have the legal effect of a regulation, and where the Board of

Alien Labor Certification Appeals (BALCA) finds them at odds with the rules, it will not hesitate to determine that an FAQ can be ignored. (*See e.g., Matter of HealthAmerica*, 2006-PER-1 (BALCA Jul. 18, 2006) (en banc) at 14 stating, “[W]e find that FAQ No. 5 imposes substantive rules not found in the PERM regulations, nor supported by PERM's regulatory history, nor consistent with notions of fundamental fairness and procedural due process.”)

If the newspaper ad tear sheet is not available, will a photocopy suffice?

DOL has not provided guidance for documenting Sunday newspaper advertisements under PERM, but regional certifying officers had usually accepted photocopies, provided the copy shows the full page so that DOL can determine if it was in the appropriate section of the paper. Also they accepted proof of publication provided by the newspaper, but not bills, invoices, requisitions, or copies of the ad text standing alone. (DOL, Alien Labor Certification Program Q&As, Part I, Case Processing, Q. 24 (1995) provides that photocopies are acceptable, so long as they are copies of the entire page and the date of publication does not appear to have been altered. The employer also may submit a “proof of publication” from the newspaper indicating the dates of publication.)

If the employer places the ad on its website but did not copy the ad before it was taken down, will an affidavit be acceptable?

DOL has issued an FAQ stating that the employer may submit an affidavit as to alternative documentation not specified in the rule at 20 CFR §656.17. If an actual printout is unavailable, then the employer may submit an affidavit under pains and penalties of perjury of the company official responsible for posting the position attesting to the fact it was posted. Whether it will be accepted in a given instance will depend on the nature of the submission, including the presence of other primary documentation (*see* PERM FAQ Set, Round 10 (May 9, 2007)). The FAQ does not indicate what it means by other primary documentation, but presumably, a requisition for the posting—actual e-mails requesting or referring to it—will be helpful. Presumably, failure to keep the records of posting on other

job search websites or campus recruitment could be documented using alternative documentation of a similar nature. It is interesting to note the latitude given with an online posting as opposed to a newspaper ad. Presumably, this is because normally, newspapers keep archive copies of old ads whereas online services do not.

Is it necessary to document that the job duties are those normally encountered in the occupation?

Notwithstanding the language of the audit letter requiring proof of business necessity if the duties or requirements are beyond those defined by the SOC/O*NET, the rule actually does not expressly require business necessity for the duties unless there is a combination of occupations or the SVP is exceeded. (20 CFR §656.17(h)(1) states that the requirements must not exceed the SVP. There is no mention of duties, but where the SVP is exceeded with respect to job requirements, it does state that both the “duties and requirements” must bear a reasonable relationship to the occupation in the context of the employer's business and be essential to perform the job.) The rule does state that, where excessive experience or education is required, business necessity must be established by showing, among other things, that “the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business” (*see* 20 CFR §656.17(h)(1)). BALCA decisions under the prior rule had held that the employer must justify the requirements, not the need for someone to do the job duties (*see Matter of Chang*, 88-INA-536 (BALCA 1989) [certifying officer reversed where the challenged job required tutor of Mandarin Chinese and Taiwanese]).

How should a combination of occupations be documented?

If the audit request suggests that the position combines occupations, it behooves the employer to show that it has employed others performing the same combination of duties, and/or that workers customarily perform the combination of occupations in the area of intended employment, and/or that the combination is based on business necessity. Position descriptions, relevant payroll records, and/or letters from other employers stating their workers normally perform the →

combination of occupations in the area of intended employment, and/or a business necessity letter will be helpful. The business necessity letter may be required to show such a level of impracticability as to make the employment of two workers infeasible (see *Matter of Robert L. Lippert Theatres*, 88-INA-433 (BALCA 1990) (en banc)). However, where the job definition contemplates disparate duties, such documentation is not required (see *Matter of Gulliver Preparatory School*, 87-INA-549 (BALCA 1988) [documentation not required when DOT definition includes disparate duties. Teacher expected to coach as well as teach substantive course]. Under PERM, one would look to the O*NET definition instead of the DOT).

How does one determine if the job involves a combination of occupations?

A good rule of thumb under PERM would be to see if the duties are embraced by the SOC/O*NET definitions. If they are, then there is no combination of occupations and no further documentation should be needed. If the specific duties are not mentioned, then look more closely at the O*NET tasks and see if there is a basis there for including the duties in the occupation. If not, do a word search for the duties not mentioned and see if they relate to another occupational classification. If they do, then there is a probable combination of occupations and should assemble the required documentation or consider deleting the duty.

When is it necessary to document special requirements?

The PERM rule simply states that the requirements must be those “normally required for the occupation” (see 20 CFR §656.17(h)(1)). DOL has opined that if the requirement is not found in the O*NET job 1/2 pasummary for the occupational code used by the SWA in its PWD, then it must be documented as arising from business necessity. If the requirements are not found in the O*NET, and the employer has indicated in item H12 that the requirements are normal, then the case will be denied whether or not business necessity documentation is available (see PERM FAQ Set, Round 1 (March 3, 2005)).

Often, it will not be clear whether the requirement was specified in the O*NET

because the O*NET requirements are quite general. Does this mean that if the language is not literally found that documentation is required and the position will be deemed not “normal?” Prior to PERM, guidance indicated that the employer should not use the precise language of the DOT, and cases that quoted the DOT verbatim would be viewed with suspicion. Quite clearly, the system will break down under its own weight if the requirement must be literally stated in the O*NET. DOL should be pressing the issue only where the requirement goes beyond O*NET and the ambit of what was generally discussed. If the requirement is a specific instance of a skill mentioned in O*NET, then further documentation should not be necessary. However, DOL has not provided any guidance on this issue.

How can O*NET be used to document special requirements?

O*NET provides a summary report for each occupation and a summary and details tab under that. The details tab is useful in that it sometimes provides more specific skills, and it also shows the percentage of jobs requiring such skills. The guidance only sanctions the use of the summary, but both the details and summary tab are part of the job summary for the occupation, so arguably both can be used.

The summary tab lists various tools and knowledge used in the job. The tools are quite concrete. For instance, it lists AutoCad for an architect. The knowledge required is fairly general, though, and not of a level of detail found in a normal job requirement. For instance, under knowledge required for an architect, it specifies “[k]nowledge of materials, methods, and the tools involved in the construction or repair of houses, buildings, or other structures such as highways and roads.” Under “knowledge”, it lists some fairly general knowledge needed, such as knowledge of algebra, calculus, statistics, and their applications. It lists time management skills in the skills section. While this will be more general than the type of requirements employers specify that are pegged to their specific work environment, O*NET will sometimes expressly mention a required skill. More frequently, it will provide a context with which one can argue a requirement is reasonable in combination with other evidence, such as a detailed →

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explanation from the employer or third party documentation.

Can an in-house test be required?

BALCA decisions held under the rule prior to PERM that employers may require a performance test even if it is not stated as a requirement. However, the employer was required to document its reasons for rejecting U.S. applicants based on their performance test (see *Matter of Franco Wood Crafting, Inc.*, 98-INA-131 (BALCA Dec. 22, 1998)). Some cases further required the employer to provide a copy of the test used, correct answers, and copies of the answers given by both the foreign national prior to hire and the U.S. applicant. Needless to say, if the foreign national had been hired several years earlier, those records are not necessarily maintained.

What documentation should be provided of a foreign language requirement?

If the position is for an interpreter, translator, or foreign language teacher, then it is

intrinsic to the occupation and this should be sufficient to demonstrate business necessity under the rule (see 20 CFR §656.17(2)(i)). Alternatively, the employer can document that a foreign language is needed to communicate with a large majority of the employer's customers, contractors, or employees who cannot communicate effectively in English. The employer may do this by furnishing the number and proportion of its customers, clients, contractors, or employees¹ who cannot communicate in English. If they speak English, but not well enough to transact needed business, then it is acceptable to document that they cannot communicate in English.

However, if customers or clients can communicate in English, but prefer to conduct business in their native tongue, the case will be more difficult and it will be necessary to show the percentage of such customers, and the circumstances why it is reasonable to believe they would take their business elsewhere if the employer did not have a native speaker for this position.² In all cases, provide a detailed explanation of why the duties of the position require frequent contact and communication with customers, employees, or contractors who cannot communicate in English and why it is reasonable to believe the foreign-language-speaking customers, contractors, or employees cannot communicate in English.

Further, explain why it will not be feasible to use a part-time interpreter or translator. If the need arises from plans to market in a foreign country, provide a detailed marketing plan. If the need arises from future expansion of the business, provide concrete documentation of any steps taken toward implementation of such a plan such as contracts, plans, or letters from vendors or other third parties involved in the implementation. Attach as many of the following as possible: samples of letters, memos, faxes, product or promotional literature using the language, telephone bills with international phone calls to the relevant country highlighted, and/or proof of travel to such countries.

If, upon your own review, you decide that the documentation is deficient, can you withdraw and refile?

Once the audit letter is issued, the application cannot be withdrawn. The employer must respond or face the consequences (see

PERM FAQ Set Round 4 (June 1, 2005)). Presumably, DOL will want to examine whether the failure to provide documentation was a deliberate manipulation warranting an order of supervised recruitment as authorized by the rule.³ The prudent practitioner will thus obtain all documentation required for the audit before filing. That being said, as understanding of the rules is constantly evolving, there may be situations where the documentation did not seem necessary at the time of filing, but was deemed necessary as a result of interpretations or case experience subsequent to filing. This can turn the audit from a simple transmittal of existing documentation into a stressful experience assembling additional documentation in a tight timeframe. No doubt labor certifications will continue to deserve the moniker, the "root canal" of immigration practice. ■

Notes

1 *Matter of Lucky Horse Fashion, Inc.*, 1997-INA-182 (BALCA Aug. 22, 2000) (en banc) held that the need to communicate with the employer's employees does not, standing alone, provide business necessity. However, the PERM rule specifically provides for the need to communicate with employees. 20 CFR §656.17(h)(2)(ii). This was not an oversight. The supplemental information to the rule expressly noted that AILA comments were well taken, mentioning the need to communicate with coworkers and subordinates as well as the fact that "there are working environments where safety considerations would support a foreign language requirement." 69 *Fed. Reg.* 77326, 77352 (Dec. 27, 2004).

2 The rule does not preclude necessity of a foreign language based on convenience of the customer as opposed to actual necessity, and uses the accommodating language, "need to communicate with ... customers ... who can not communicate effectively in English." 20 CFR §656.17(h)(2)(ii). Although the rule does specify inability to communicate "effectively" in English, it can be argued that it is not effective if the person will take their business elsewhere and that the question isn't language capacity, but business impact of the language. See also *Matter of Prestige Cars Corporation*, 88-INA-351 (BALCA July 17, 1989); *Matter of Isak Sakai*, 90-INA-330 (BALCA Oct. 31, 1991); *Matter of Dimitri's, Inc.*, 89-INA-169 (BALCA Mar. 4, 1990).

3 A substantial failure to provide documentation will result not only in denial under 20 CFR §656.24, but an order of supervised recruitment for up to two years. 20 CFR §656.20(b), 21.

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