MYTHS AND MYSTERIES OF THE SPECIAL HANDLING LABOR CERTIFICATION FOR COLLEGE AND UNIVERSITY TEACHERS

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Why Special?

- DOL, via regulation, has made Special Handling Labor Certification Applications ("SHLC’s") procedurally and substantively much, much easier than labor certifications requiring “professional” recruitment.

- Filing and recruitment for SHLCs are governed exclusively by 20 CFR 656.10(a)-(d), 656.17(a)-(d), and 656.18.

- Plain reading of the regulation excludes most of the strictures of 656.17(e), et seq, from the SHLC process.
Why Special?

- In 1976, Congress created a statutory exception to the normal “only qualified” standard to give colleges and universities the widest possible latitude in selecting the teachers of their choice in order to maintain excellence in the US system of higher education.
- Statutory exception allows picking alien and applying for labor certification on his/her behalf as long as he/she is “better qualified” than each US worker in applicant pool.
Difficulties in Interpretation

- Greatest difficulty in handling SHLC cases is that many aspects of the application are subject to widely varying interpretations because of...
  - Their relative ease and DOL’s laissez faire attitude toward them.
  - Few precedent decisions.
  - Vague regulations and other guidance.
  - Possible misconception that most standard labor certification regulations/guidance apply to SHLC cases.
Difficulties in Interpretations

- In this presentation, we will attempt to give a perspective that makes sense and seems to be widely accepted, according to the regulation, precedent decision, the experiences of the presenters, and other guidance.
The Technical Assistance Guide No. 656/Labor Certifications

- The TAG has not been updated since September 1981, but in the absence of more recent guidance, and since the special handling procedures and statutory framework have remained essentially unchanged post-PERM, it remains valuable guidance.

- The TAG was positively referenced as a sourced of authority several times in prefatory comments to PERM rule of 2005.
Jurisprudence

- BALCA cases involving SHLC’s are scant.
- We have been able to find less than a dozen, some of which are no longer good law, because of statutory or regulatory changes.
Basic Parameters

- Competitive Recruitment Process
- One *print* advertisement in a national professional journal, listing title, duties (including teaching) and minimum requirements.
- Notice of filing: >30 days < 180 days from filing.
Basic Parameters

- Prevailing wage determination.
- Offer letter and acceptance so that “selection” date can be pinpointed.
- must file w/i 18 months of “selection” date.
- Statement of alien’s qualifications.
- Recruitment report: list of applicants and explanation as to why alien more qualified than each US worker.
What Institutions Qualify?

- “College or University” is not defined in the regulations, except with regard to academic exception to prevailing wage calculations.
- GAL 48-94 (5/23/94) defined “College or University” as educational institution which:
  - Admits only high school grads or equivalent
  - Legally authorized by Federal or State govt to provide postsecondary education
  - Provides Bachelor’s or higher degrees, or has programs giving full credit towards such degrees
- GAL 48-94 definition thus excludes vocational and trade schools, unless their programs accepted for credit toward four year degrees.
What Kind of Job?

- Job must be permanent, full time (as determined by institution).
- Job duties must include some “actual classroom teaching” TAG 656.21a, p. 68.
- Must be “permanent” but need not be tenured/tenure-track (cf, Outstanding Professor petition). DOL *permanent* = expected duration > 1yr; expectation of continued employment.
- Eg, postdocs?
- Need not meet the traditional description of “professor”. May include a variety of duties. TAG 656.21a, pp. 68-69.
Teaching—What Is It? How Much?

- “any amount of classroom teaching”. TAG 656.21a, p. 69.
- What is any amount?
- “No minimum hours of actual classroom teaching is required to bring an application within the scope of the special handling procedures for college and university teachers.” GAL 48-94 (5/23/94).
- Team teaching one course seems to suffice.
Teaching - What is it? How Much?

- What is "classroom teaching"? Medical school rounds seems to suffice.
- What about online courses?
- Should course be for credit? Not strictly required, but easier to document if audited.
- See GAL 48-94(5/23/94), allowing CO to ask about number of hours spent teaching.
Add Teaching as a Duty?

- If the employer is willing to allow the alien to teach or team teach at least one course, then a SHLC may be filed.
- Many positions in academia are flexible enough to permit this—e.g., Assistant Professor- Research, coaching, library and extension positions.
- Remember that if this route is chosen, a “systematic” faculty search must be conducted, and this may be a deal killer with employer. See next slide.
Selection Process—How?

- Another area of the SHLC open to much interpretation.
- No definition in regulations, TAG, or other interpretations.
- “The regulations are purposely not specific on the process... A competitive recruitment and selection process also implies... the use of a systematic system to rate the experience and education of individual applicants in relation to each other and the requirements of the position.” TAG 656.21a, p. 69.
Selection—When?

• The SHLC must be filed within 18 months “after a selection is made pursuant to a competitive recruitment and selection process.”

• The only regulatory clue we are given as to what DOL considers the exact moment of selection is an item which must be retained in recruitment documentation in the audit file: “A final report of the...body making the recommendation or selection...” 20 CFR 618(b)(2).[emphasis ours]
Selection—When?

• The wording “recommendation or selection” indicates that actual selection may take place at some later time after recommendation.

• We can interpret this to mean the date the alien accepts the offer of the school, since the school may offer the job to several candidates before a final selection occurs.

• Some schools, following acceptance, must seek final approval for the selection from their governing board, though in most cases this is a formality.

• So, theoretically the latter could be the “outer limit” for selection.
Selection – When?

Leading Cases on Point

• Matter of President and Fellows, Middlebury College, 2001-INA-136 (BALCA 2002): holding says date offer made, although reasoning says date offer accepted.

• However, cf. Matter of Montgomery College, 94-INA-00584 (BALCA 1996), where there was no evidence of a date of offer, the date the alien became eligible to work was deemed the “selection” date.
Reselection of Someone in Job

• Pre-PERM, there was no controversy surrounding the issue of performing a new competitive recruitment and selection, if requirements had not been met.

• “The employer who cannot provide [proper recruitment documentation] may...withdraw the application, recruit through a competitive recruitment and selection process, and refile the application later.” TAG, 656.21a, p. 70.
Reelection

- There was no parallel language in the regulation.
- The current regulation is fairly close to the TAG: “An employer that *can not or does not choose to satisfy* the special recruitment procedures for a college or university teacher under this section may avail itself of the basic process at 656.17. 20 CFR 656.18(d). [emphasis ours]
Reselection

• The PERM regulation neither disavows the TAG nor prohibits reselection of the alien, giving employer the choice of the special handling or regular process.
• DOL practice since PERM has been to accept reselections without question or audit, even in cases that are audited for other reasons.
• The fact that a reselection has occurred is completely transparent on the ETA 9089, since employment history is required, beginning at Part K.
• Warning: some universities uncomfortable with reselection process: “unethical”, “looks bad”, make alien resign and reapply (!).
Unduly Restrictive and Actual Minimum Requirements

- Both pre- and post-PERM, may include the following [all of which are generally prohibited absent business necessity]:
  - Abnormal combination of duties.
  - Skills acquired while in same position with same employer [prior to selection or reselection].
  - Use of a foreign language.
  - Minimum requirements which exceed the number of years of Specific Vocational Preparation for the position.
Unduly Restrictive Requirements

- Under pre-PERM rules, SHLC’s were filed “pursuant to this section [656.20 general filing instructions] and Sec. 656.21a,” thus clearly excluding any prohibition on unduly restrictive requirements.

- This was logical, since colleges and universities were given wide latitude in choosing teachers; even the TAG acknowledged that teaching positions could contain a combination of duties that might be prohibited otherwise. TAG 656.21a, p. 69.
Unduly Restrictive Requirements

- Post PERM, the organization of the regs is closely parallel: “An employer seeking a labor certification for a college or university teacher must apply...under this section [656.10, general filing instructions] and must also file under either Sec. 656.17 or Sec. 656.18.” 20 CFR 656.10(a)(2).

- The employer is given the option of 656.17 because of the reselection provision in 656.18(d), previously mentioned.
Unduly Restrictive Requirements

- 656.10, as in the prior regulation, deals with application attestations, representation, the notice of filing, submission of evidence by third parties, and retention of documentation.
- Nowhere are unduly restrictive or actual minimum requirements mentioned, except in 656.17, which the employer may choose NOT to follow, and instead follow 656.18.
Does DOL Understand Its Own Reg?

- It appears not:
  - Structure of ETA 9089 form, i.e., asks questions irrelevant to SHLC’s.
  - Kellogg language requirement, which is mandated by 656.17(h)(4)(ii) if the alien qualifies solely because of alternate requirements, seems to be outside the regulations governing SHLC’s, but DOL seems to apply this to SHLC’s. However, see, Matter of West VA University College of Creative Arts, 1999-InA-253 (BALCA 2000), concurrence and FN 9.
Is DOL Wrong to Ask Certain Questions on ETA 9089?

- All of the above refer to unduly restrictive reqts.
- According to a strict structural (our) reading of the regs, these should not apply to the SHLC.
- DOL does not claim in any authority that they apply to SHLC.
- DOL may just not understand its own regulations, or may not have given the structure of the form much thought.
- Questions remain for SHLC’s in new proposed 9089.
Possibilities?

- The lack of unduly restrictive and actual minimum strictures for SHLC’s permits:
  - Requirement of skills acquired in same job, with same employer, prior to selection or reselection
  - Combination of duties, common in academia and supported by TAG
  - Exceeding SVP without the need to show business necessity
  - Requirements not considered normal for position
  - Use of foreign language
Advertisement

- 20 CFR 656.18(b)(3) requires:
  - One national print ad containing
    - Title
    - Duties
    - Requirements
  - Note: no timeframe specified on when ad must be published

- *Cf.*, professional recruitment requires 7 or 8 sources of recruitment; all required to name employer, location of job; all must be within 180 days of filing ETA 9089.
Must be published in a *national professional journal*:

- DOL specifically rejected electronic ads in PERM rule intro and subsequent FAQ’s -- must be in print.
- “National professional journal” not defined anywhere in regs or TAG, but traditionally CO’s have wanted:
  - An actual journal, not just a compilation of job postings.
  - A journal in which other employment ads appear.
  - *Chronicle of Higher Education* is always deemed acceptable, no matter the area of teaching, but ad not required to be in *Chronicle*. 
• What about “pointer” ads? [condensed ad that might not include title, description and/or requirements, but that point to full notice of vacancy on employer’s website]
  ▪ Are they “electronic” rather than “print.”?
  ▪ Would not advise prospectively, but might utilize if already placed.
Must include **title:**
- DOL deems to think this an important element of putting US workers on notice as to the nature of the job
- May include more than one title, or may state “all ranks considered, depending on qualifications.”
- May NOT advertise with one title and seek certification for another, ie, advertise for “Assistant Professor” and file for “Instructor”.
Advertisement

- Must include *duties*:
  - Including duties runs counter to some practices, but should be systematically encouraged or mandated.
  - Can be brief and to the point.
  - Must, however, include “teaching” in some form or other, since if there is an audit and there is no mention of teaching in the ad, DOL may question bona fides of filing under the SHLC category. GAL 48-94 (5/23/94).
Advertisement

- Must include *minimum requirements*:
  - Degree, experience, training, expertise, etc.
  - Runs counter to frequent practice, ie, “Everyone knows an Assistant Professor position requires a Ph.D.”
  - If ABD’s (All But Dissertation for PhD) will be considered, must include this in ad. *Utah State*. 
Given internal practice of most universities, SHLC ad requirements can be counterintuitive and difficult to meet. Many universities often wish to include:

- Preferred requirements/wish list, including preferred experience requirements
- “Training” requirements when they don’t really mean “training” in labor certification terms
- Multiple alternate educational requirements (PhD or MD); (PhD or ABD); (PhD or Master’s degree)
- More than degree requirement (Ph.D plus MS).
Notice

- 20 CFR 656.10(d)(5) requires that notice must be posted for 10 consecutive business days and include:
  - Title, duties, and minimum requirements
  - The standard blurb informing persons that evidence may be provided to the CO, and his/her address, etc.
  - Need not contain wage, other specifics set out in 656.17(f), such as name of employer, location of job, requirements or duties which exceed those on ETA 9089, etc.
Notice

- Must be less than 180 days old, but over 30, when ETA filed.
- Must be posted in “all in-house media, whether electronic or print . . . within the employer’s organization” if employer normally uses such media for recruitment.
Audit File

- Must contain:
  - Statement of complete recruitment procedure, signed by hiring authority, including:
    - Total number of applicants.
    - Report of recruitment body recommending alien.
    - Copy of one print ad in nat’lprof’l journal.
Audit File

- Evidence of all other recruitment sources used (none required).
- Written attestation from employer re alien’s qualifications.
- Executed notice of filing.
- Prevailing Wage Determination.
- Signed offer letter, to show date of selection

Note: In January 9, 2008 Stakeholder Liaison Meeting Report, DOL confirmed that employer can prepare one summary report that contains all the information and elements necessary in a special handling case.
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- Greatest difficulty in handling SHLC cases is that many aspects of the application are subject to widely varying interpretations because of...
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  - Need not contain wage, other specifics set out in 656.17(f), such as name of employer, location of job, requirements or duties which exceed those on ETA 9089, etc.
Notice

- Must be less than 180 days old, but over 30, when ETA filed.
- Must be posted in “all in-house media, whether electronic or print . . . within the employer’s organization” if employer normally uses such media for recruitment.
Audit File

- Must contain:
  - Statement of complete recruitment procedure, signed by hiring authority, including:
    - Total number of applicants.
    - Why the alien was more qualified than EACH US worker *Matter of Stanford University*, 91-IN-40 (BALCA 1992).
    - Report of recruitment body recommending alien.
    - Copy of one print ad in nat’l’prof’l journal.
Audit File

- Evidence of all other recruitment sources used (none required).
- Written attestation from employer re alien’s qualifications.
- Executed notice of filing.
- Prevailing Wage Determination.
- Signed offer letter, to show date of selection

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