Ova' by d'Department uh Labuh Nems: Special Handlin's uh Mess!

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Why it is Special

- Created by Congress in 1976 in response to complaints about Department of Labor. Regulations make Special Handling Labor Certification ("SHLC") applications 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.

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Basics of SHLC

- College or university may employ special handling if position involves some "**actual classroom teaching**"
- Job must be full time and permanent
- Streamlined process compared to regular labor certification

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Basics of SHLC

- Employer must show that it hired the **best qualified** applicant, rather than show that there were no minimally qualified and available US applicants
- Employer must document that alien was selected in a competitive recruitment and selection process in accordance with higher education standards
- Only one **print** advertisement in a national professional journal is required

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Basics of SHLC

- Advertisement must spell out job title, duties (including **teaching)**, and requirements
- Notice of Filing must be posted for 10 consecutive business days; and be less than 180 days and more than 30 days old at time of filing; and need not include wage
- Alien must meet advertised requirements at time of selection (e.g can't advertise for a PhD and hire an ABD. If ABDs will be considered, state in the ad or state PhD required by a certain date)

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Basics of SHLC

- "Unduly restrictive requirements" (not "normal" e.g foreign language, combination of duties) generally do not apply to special handling cases
- Employer must pay at least the "prevailing wage" as determined by the DOL National Processing Center
- Case must be filed within 18 months of candidate selection, generally considered date of offer letter.

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Case Preparation

- Obtain prevailing wage determination
- Post notice of filing for 10 consecutive business days and let "rest" for 30 days
- Assemble recruitment documentation and prepare recruitment report signed by official with hiring authority

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Case Preparation

- Create audit file
- Complete and file form ETA 9089
- Maintain recruitment materials in audit file for 5 years after filing case

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Case Preparation

- Applications are certified, denied, or selected for audit
- If certified, file form I-140 (and possibly concurrent I 485, if priority date current)
- if audited, respond within 30 days
- if denied, file motion to reconsider, appeal, or file a new case
- Refiling is usually easy with SH if still within 18 month window

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Contents of Audit File

- Copy of ETA 9089
- Prevailing Wage Determination
- Notice of Filing
- Recruitment report
- Selection memo or offer letter

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Audit File

- Print ad
- Evidence of all other recruitment sources
- Statement regarding alien's qualifications (education/ experience)
- Reference letters if experience required
- Audit file must be kept for five years from date of filing labor certification

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Reselection

- Employer may rerecruit and reselect if recruitment does not meet DOL requirements (e.g no print ad; 18-month filing window missed; or alien failed to meet all requirements at time of selection)
- Pre-PERM regs silent on rerecruitment and reselection, but process generally permitted (see TAG, 656.21a, P. 70)

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Reselection

- PERM regs say that employer who fails to meet SH requirements may utilize the professional recruitment process, but still receives the best qualified standard, 20 CFR 656.18(d) , but does not mandate that process.
- DOL routinely accepts reselection cases pursuant to 656.18 (rerecruitment is obvious in job history, part K of ETA-9089)
- Some institutions view this practice as unethical, and would rather rerecruit by way of professional process, pursue a labor certification exempt category, or refer case to an attorney

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Special Handling Stages

Pre- Hiring

Authorization to recruit

Advertisement

Recruitment records

Offer letter

Post-Hiring

Internal notice

Prevailing Wage

18 month filing period

Offer letter

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Avoiding Problems at the Pre-Hiring Stage

The Advertisement
20 CFR §656.18(3)

Means	Content
At least 1 printed advertisement	Job title
National professional journal	Job duties
Print publication	Educational req.
	Experience req.

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Helpful Recommendations on Content

- It is only necessary to state the minimum degree requirement
- It is not necessary to indicate the salary in the advertisement
- Open rank searches may be done provided titles are listed in addition to duties and requirements for the positions

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Helpful Recommendations

- Searches requiring the Ph.D. by certain date may be done provided the eligibility for the Ph.D. is required at the time of the start date of the job
- Location where the job will take place should be indicated (Texas A&M University in College Station, for example)
- Applicants should be provided contact instructions if this is the regular process followed when advertising for faculty positions (online application, reference to NOV)

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Post Hiring Killers

- No print hard copy advertisement
- Deficient advertisement
- Offer and amended offer letter
- Deficiency in posting the notice
- Documentation provided too late for filing the application before the 18-month deadline
- Irregularities in the conduct of the recruitment
- Individual not meeting experience requirement

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Retesting the Labor Market
Breaking the news

- Are you crazy?
- True job search advertisement (It is not a fake)
- Testing the market for a job which exists and may or may not have someone currently in it
- Temporary vs. permanent (status not tenure/ contract) – FN will leave the position and job will be open
- Same content and means of advertising
- What if a US citizen is found to be more qualified?

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Special Handling Issues

- Regulations are vague; not substantially revised post PERM.

- Fewer than 20 BALCA precedents.

- Mostly ignored by DOL for thirty years.

- Yawn: a "gimme" to higher ed.

- DOL has recently "discovered" special handling.

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Special Handling Issues

- Recently a spate of issues has arisen:
  - Need for print ad? Regulation is silent, but there is a FAQ. *Matter of Syracuse University*.
  - Place of advertising: is publication "too narrow"?
  - Type of position: Is it "academic"?.

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Special Handling Issues

- Amount of teaching: any amount of classroom teaching? Classroom? Type of teaching?
- Professional reselection: "best qualified" standard? *Matter of East Tennessee State University.*
- Prevailing wage determinations valid less than 90 days.

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Special Handling Issues

- Most of the hysteria on these issues is dying down, but they bear watching as we go forward.
- Word to the wise: special handling: "gimme" no longer.
- Proceed with caution.

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Special Handling Issues

- Tips
  - Get depts in line on print ad
  - Try to get them to use a general journal
  - Is teaching "classroom"?
  - Job title should always include something that suggests teaching, eg, instructor, assistant professor, etc.
  - Teaching should be prominently featured in ads and on ETA form.
  - If teaching not clearly at least in part in a "classroom" don't utilize special handling.

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Special Handling Issues

Issue of teaching: Review these issues (from DOL):
- Hours or percent of time teaching
- Syllabi for courses taught
- Location of classroom
- Examinations or other course material
- HR job description which includes teaching
- Guidelines in recruitment standards which address teaching
- Evaluations of employees previously in job
- Admissions documentation regarding teaching

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Questions & Answers

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