KLASKO'S PERM TOP TENS
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TOP TEN AUDIT TRIGGERS

Applications will be selected for audit based upon computer selection, random selection, and selection by the Certifying Officer following a review of the application. Some audits may be chosen based upon the industry, the company, the occupation, or even the attorney. Other than those factors, the following (with ETA 9089 block number indicated) are likely to be audit triggers:

1. **Conversion** (A1). An affirmative answer in block A1 (seeking to use the filing date of a previously filed ETA 750A) will likely result in an audit requiring the employer to produce the ETA 750A to prove that it is "identical."

2. **Foreign language requirement** (H13). A review of the job duties should make clear why a foreign language is required. The audit file must contain a business necessity letter and documentation supporting the business necessity for the foreign language requirement.

3. **Experience gained with the same employer** (J21). The answer to the question on the ETA 9089 should be "no" because experience with the same employer must not be gained in a substantially comparable position. A review of the application, however, will reveal whether the experience requirement is met by the alien based upon experience gained with the same employer. In that case, documentation is required to prove that at least 50% of the time the alien will be performing different job duties from those he performed in the previous position with the employer.

4. **Employer with fewer than 10 employees** (C5). To avoid having to deal with this issue, the employer should be certain to include all employees, including temporary and part-time employees. The audit file must contain documentation of any family relationship between the alien and the employees.

5. **Family relationship between the employer and the alien** (C9). There is no definition of "family" in the regulations. If this question is answered in the affirmative, the documentation required in the regulations must be maintained in the audit file. In addition, documentation sufficient to prove a bona fide job offer and bona fide recruitment should be in the file.

6. **Job requirements beyond "normal"** (H12). In order to avoid answering this question in the affirmative, the employer may need to reduce either the education or experience requirement in order not to exceed the SVP. If the employer

chooses to require a combination of education and experience that exceeds SVP, a business necessity letter must be in the audit file.

7. **Alien with an ownership interest in the employer** (C9). Just as with the family relationship, the regulations specify the documents that must be maintained in the audit file. If this question is answered in the affirmative, ultimately the documentation should prove that the employer has made a bona fide job offer to the employee and that the employer is able to undergo a bona fide recruitment effort and would consider hiring a qualified U.S. worker to replace the alien.

8. **Lay-off in same or related occupation** (I-26). This question must be answered in the affirmative only if the attorney has satisfied himself that there is a "lay-off" and it is in a "related occupation." In that event, the audit file must evidence that the employer has notified and considered "potentially qualified" laid-off workers.

9. **Alternate occupation** (H10). It is best to avoid a requirement of an alternate occupation. Consider using an expansive job title for the job offered or possibly adding requirements in the "Special Requirements" block (H14). If an alternate occupation is required, it must be substantially equivalent to the primary requirement. In addition, both the form and the recruitment letter should indicate that the employer has considered "any suitable combination of education, experience, and training" in evaluating U.S. workers. A business necessity letter should be included in the audit file.

10. **Combination of occupations** (H15). To avoid, try to limit the job description to one O'NET category. The audit file must contain either a business necessity letter or proof that the employer normally employs people in this combination of occupations or that employers in the area of intended employment normally employ workers in the combination of occupations.

TOP TEN RECRUITING ISSUES

1. Must recruitment always include a Sunday advertisement? The only exception to the requirement of a Sunday advertisement is if the newspaper with the widest circulation in a rural area does not have a Sunday edition. In that case, the newspaper with the widest circulation can be used and a weekday advertisement is sufficient. A rural area does not include a suburban area. In the case of a suburban area, a Sunday newspaper advertisement is required.

   One Sunday advertisement is mandatory. The second Sunday advertisement is mandatory except in the case of jobs that require advanced degree and experience. In that case, the employer can use a second Sunday advertisement or a journal advertisement.

2. In order to use a journal advertisement, must the journal be published by a trade or professional association? The answer depends upon whether the journal

advertisement is being used instead of the Sunday newspaper advertisement or whether it is being used as one of the three optional forms of recruitment required for a professional position. If the former, the journal does not have to be published by a trade or professional association. If it is being used as one of the three optional forms of recruitment, however, the journal must be published by a trade or professional association.

3. Are the content requirements for the advertisements the same for the mandatory recruitment and optional recruitment? No. The Sunday newspaper advertisements (or the substitute journal advertisement) must be more specific regarding the particular job opportunity, whereas the optional advertisement can advertise just the "occupation". Although the mandatory recruitment does not have to include all of the job duties or all of the job requirements, there must be a "logical nexus" between the language of the ad and the ETA 9089. On the other hand, the optional recruitment can just list the occupation, such as "seeking civil engineers".

4. Are the requirements for professional advertising tied to whether the alien has a bachelor's degree or higher or whether the employer requires a degree? Neither. The three optional forms of advertising required for professional positions are required if the position appears on "Appendix A" to the regulations. If the position appears on "Appendix A," the optional forms of recruitment are required even if the employer does not require a degree and the alien does not have a degree.

5. Must the employer's name, address, and wage offer be included in the advertisement? The name of the employer must appear in the advertisement. The address of the employer does not have to appear in the advertisement; however, the location of employment must be clear, and the employer contact information must be clear. The wage offer does not have to appear in the advertisement. The only place the wage must appear (or at least a wage range) is in the posting notice.

6. How long do the employer's website posting and the optional online advertising have to run? There is no guidance on this issue in either the regulations or any Department of Labor pronouncement. As a result, employers are left with a "reasonableness and good faith" test. The best practice is to advise an employer to advertise for the length of time that it would normally advertise for position vacancies. As an example, if a newspaper normally runs an online ad for seven days with a Sunday print ad, presumably that should be sufficient.

7. Is it sufficient for an employer to utilize three of the ten optional forms of recruitment even if they are not the three most likely to find qualified workers? This is a critical unanswered question. According to the regulations, newspaper advertisements have to be in the "most appropriate" newspaper and the newspaper "most likely" to produce U.S. workers. Neither of those requirements exists in the regulations for the optional forms of recruitment. Thus, there is an argument that

simply meeting the requirements of the regulations by using any three recruitment sources should be sufficient. It is entirely possible, however, that the Department of Labor's adjudication policy might include reviewing the reasonableness of the employer's choices for the optional recruitment and insisting upon supervised recruitment if the DOL believes that the employer has chosen methods of recruitment that are less likely to find qualified U.S. workers.

8. Can America's Job Bank be used as an optional recruitment source if the state uses it for the job order? No. This would constitute impermissible "double dipping." America's Job Bank can be used as one of the three optional forms of recruitment if it is not used by the state for the job order. If it is used by the state for the job order, any other of the optional recruitment sources may be used, including another form of online advertising.

9. Can the 10 business days for posting include a Sunday if the business is open on Sunday? There is no specific guidance on this issue in the regulations or Department of Labor pronouncements. If a business is open on Sunday, however, such as a hospital, and if workers are present to read a posted notice, presumably a Sunday can be included in the 10 business days.

10. How does an employer complete the ETA 9089 if the employer's advertising is ongoing? This is a difficult legal/ethical question because the application cannot be filed for 30 days after the end date of the advertising. If the advertising is ongoing, the attorney might be troubled to complete the form with an arbitrary end date to the recruitment. If the attorney does not choose an arbitrary end date, however, either the employer would have to terminate its ongoing recruitment, or else it would be prohibited from ever filing a labor certification application. Employers who engage in ongoing recruitment are arguably the ones who are most in need of the labor certification process. Certainly, there is no logical policy reason that could be gleaned for requiring employers who are seeking U.S. workers to stop advertising in order to be able to file a labor certification application. Therefore, although it raises ethical issues, the only logical answer would seem to be that the attorney must pick an arbitrary end date for the advertising.

TOP TEN AREAS OF EXPOSURE FOR ATTORNEYS

The PERM regulations are rife with technical requirements that, if not complied with completely, can lead to attorney malpractice, loss of client goodwill, or incurring substantial additional expenses to readvertise. The following are among the most critical:

1. Any recruitment that is more than 180 days old at the time of filing is too old to be used. The attorney must be certain to have everything completed on a timely enough basis so that the application can be filed before the recruiting is stale.

2. The recruiting also can't be too new. Only one form of optional recruitment can be less than 30 days old at the time of filing.

3. The recruitment that the employer utilizes on the attorney's recommendation must ultimately be acceptable to the Department of Labor. For example, if the attorney suggests that certain forms of optional recruitment are sufficient and the Department of Labor subsequently determines that the sources utilized are not sources likely to find U.S. worker for the position in question, the employer could be faced with requirements of readvertising and refiling. Likewise, if the attorney advises that the position is not a professional position and therefore does not require the optional recruitment, and the Department of Labor subsequently disagrees, the same result occurs.

4. The attorney must make certain that the State job order does not run too long or too short. It must run at least 30 days. Some states will traditionally run a job order for a month, which may be less than 30 days. Likewise, the attorney must make certain that the job order has ended, because the application cannot be filed until 30 days after the job order has stopped running.

5. The attorney must make certain that the job order is not placed too late. For example, if the recruitment commenced at the beginning of March, and the job order is not placed until July, the case can't be filed for at least 60 days after the placement of the job order in July, (30 days for the job order to run, and 30 days after the job order runs before the application can be filed). In that case, the recruitment might age out.

6. The attorney should monitor the length in which the job posting notice is posted by the employer. If it is too short (for example, 10 days but not 10 business days), the application cannot be filed. If, despite the attorney's instructions, the employer does not take down the posting notice, the case cannot be filed until 30 days after it is removed. The attorney must make certain that the application is not filed during this 30 day period.

7. The attorney must make certain that the prevailing wage does not expire. This is mostly a problem with "special handling" college and university teachers. The regulations require that either the application be filed or the recruitment commence before the expiration of the prevailing wage. In most applications, there is no problem at least commencing the recruitment before the prevailing wage expires. In the case of a special handling labor certification application, however, where the recruitment may have long pre-dated the prevailing wage, and the application is not filed before the prevailing wage expiration date, query whether the prevailing wage is still usable under the regulations.

8. The SVPs in the O*NET system are frequently unrealistic. If the attorney exceeds the SVP in a particular application, and answers the question on the

application form regarding whether the job requirements are "normal" in the affirmative, there is a risk that this could lead to a denial of the application.

9. The Department of Labor will be following up with the employer, usually within days of the filing of the application, by asking the employer four questions. All of these questions must be answered and must be answered in the affirmative. If the attorney does not properly advise the employer to make certain the employer answers the questions timely and answers them in the affirmative, the application will be denied.

10. The attorney must always make certain that he has prepared a complete audit file prior to filing the ETA 9089. If the case is audited, and if the attorney has not prepared the audit file in advance, dire consequences could occur to the employer. For example, if the employer has not kept the resumes of the applicants and the audit requests the resumes, the employer cannot comply with the audit request. The result can be not only denial of the labor certification application but also investigation for fraud and/or imposition on the employer of a requirement of supervised recruitment for two years.

Many of these pitfalls that may result in the denial of the application are not terminal. Another application can be filed immediately after the denial, absent fraud. By the time the new application is filed, however, much of the recruitment may be stale and have to be redone at substantial additional expense and loss of client goodwill or worse, such as if the alien's 6th year in H-1B status is expiring.

TOP TEN REASONS FOR CHOOSING EB-1 OVER PERM

With labor certification processing time reduced to a promised 60 days, should counsel who previously would have advised a seemingly-qualified EB-1 applicant to apply for EB-1 change that advice and counsel a PERM filing?

The following are ten reasons why EB-1 remains the strategy of choice…when there is a choice:

1. EB-1 requires no job offer, and no employer sponsorship.

2. EB-1 does not require payment of the prevailing wage.

3. There is no risk of an audit or a subsequent revocation of a labor certification application.

4. There is no issue of availability of U.S. workers.

5. The alien is free to change jobs, change employers, change positions, change location of employment with an EB-1 filing.

6. The substantial expenses of recruitment under PERM are saved.

7. A PERM filing will be in the second or third preference category. An EB-1 filing is obviously in the first preference category. Third preference has become unavailable; and, as of this writing, second preference might become unavailable. It is unlikely that first preference will become unavailable or backlogged.

8. Even though labor certification processing is much more expeditious than before, avoiding the labor certification application will still result in the alien obtaining permanent residence quicker; assuming, of course, that the EB-1 petition is approved.

9. With the EB-1 petition, the beneficiary (and the spouse) are able to obtain employment authorization documents within three months and travel documents in most cases within two to three months. In addition, the more prompt filing of the I-485 will, in most cases, freeze the age of a child under the Child Status Protection Act, whereas the filing of the labor certification application does not freeze the age of the child.

10. All of the problems and issues specified above in the "Top Ten Areas of Exposure for Attorneys" are completely avoided in an EB-1 case, leading to fewer sleepless nights for attorneys, a clear benefit.

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