

PERM FOR EXPERTS

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1. Supervised Recruitment – 20 C.F.R. § 656.21

- a. DOL seems to be requiring all cases selected for supervised recruitment to obtain a new prevailing wage determination.
- b. What if wage is higher than when you filed?
 - i. If the employer is paying more than the prevailing wage then it's not a big deal.
 - ii. If the wage is substantially higher problematic, then check to see if you really need a new prevailing wage determination.
- c. 20 C.F.R. § 656.21(b) sets for the requirements for supervised recruitment.
 - i. There is no mention of a new PWD having to be obtained prior to the commencement of supervised recruitment. All the reg states is that the advertisement cannot “contain a wage rate lower than the prevailing wage rate”.

d. Validity of Prevailing Wage Rate – 20 C.F.R. § 656.40(c)

- i. To use a prevailing wage rate provided by the NPC [SWA], employers must *file their applications or begin the recruitment period* required by §§ 656.17(e) [basic recruitment] or 656.21 [supervised recruitment] *within the validity period* specified by the NPC [SWA].
 1. The CO would probably have a good argument that this is new recruitment under 20 C.F.R. § 656.21.
- ii. 20 C.F.R. § 656.21(a) defines supervised recruitment as “post filing” recruitment on a “pending application”.

- iii. Look at the date you filed your ETA-9089. Was the PWD valid on that date?

2. Wage Range Issues

- a. DOL allows the use of wage ranges when recruiting.
- b. However, DOL takes the position that the low end of the wage range cannot be lower than the prevailing wage.
 - i. Thus, if your employer normally offers the position with a range of \$40,000 to \$50,000 and you have a PWD of \$43,000, if you place the wage in the advertisements you cannot list the wage was less than \$43,000.
 - ii. If you list for less than the PWD, DOL takes the position that you have violated 20 C.F.R. 656.10(c) which states that the employer must offer a wage that equals or exceeds the prevailing wage.
- c. Is DOL right?
 - i. 20 C.F.R. § 656.17(f)(5)
 - 1. States that *print ads* in newspapers of general circulation or professional journals cannot contain a wage rate lower than the prevailing wage rate.
 - ii. 20 C.F.R. § 656.17(e)(1)(ii)(A-J)
 - 1. None of the other recruitment steps mention anything about the wage being in the “recruitment step”.
 - iii. *Matter of Marcel Cleaners, Inc.*, 2009-PER-00395 (BALCA 02/16/2010).
 - 1. The employer listed a wage range in its SWA job order which had a low end that was less than the prevailing wage. CO denied the application.
 - 2. CO argued “to the extent that employers include a wage range as part of other efforts to publicize the job opportunity those efforts should not offer a wage rate lower than the prevailing wage.”
 - 3. BALCA stated that while the PERM regs don’t expressly state that the SWA order must not state

a wage lower than the PWD, given the fact that ETA only allows the use of wage ranges where the low end is at least the prevailing wage, BALCA felt that denial was proper.

iv. *Matter of Tiede-Zoeller, Inc.*, 2010-PER-00693 (BALCA 09/09/2010).

1. Wage low end of wage range listed with a campus employment office was lower than the prevailing wage.
2. Board followed *Marcel Cleaners*.

v. Neither case has any real legal analysis.

1. In *Marcel Cleaners* the employer does not appear to have been represented by counsel
2. *Tiede-Zoller* doesn't even cite a regulation in the decision.

vi. Argument that these cases were wrongly decided.

1. *Kazarian v. USCIS*, ___ F.3d ___, 2010 WL 725317 (9th Cir. 2010)

- a. EB11 Alien of Extraordinary Ability Case.
 - b. Alien submitted scholarly articles as evidence.
 - c. AAO stated that "we must consider the research community's reaction to the articles" for them to be considered evidence.
 - d. 9th Circuit stated that the AAO could not unilaterally impose novel substantive evidentiary requirements beyond those set forth in the regs.
2. BALCA in many cases has realistically kept DOL in line by not allowing reliance on FAQ's, etc.