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Holding the Department of Labor (DOL) Accountable in Program Electronic Review Management (PERM) Labor Certification Adjudications

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We applaud Microsoft Corporation and the numerous parties, including the American Immigration Council and the Chamber of Commerce, who filed amicus briefs last week in a consolidated **Board of Alien Labor Certification (BALCA)** case involving PERM labor certifications filed by Microsoft Corporation on behalf of several of its employees. When the **Department of Labor (DOL)** oversteps its authority in deciding PERM cases, it is imperative to hold the agency accountable.

The single issue in this case is the requirement in the DOL's PERM regulations that if an employer has had a layoff within the 6 month period prior to filing a PERM labor certification the employer must "notify and consider" potentially laid off workers in the same geographic area of intended employment of the PERM job opportunity. The reason for this requirement is that employers may not file a PERM labor certification application on behalf of an employee unless the employer is able to attest that it has not found any able, willing, qualified and available U.S. workers. If a laid-off worker could adequately perform the duties of the PERM position, and if the individual is able, willing and available, then the employer would not be permitted to file the PERM application.

Microsoft sought to satisfy the "notify and consider" requirement by informing its terminated employees that they could visit the company's careers website and apply for any open positions. Since the PERM job opening is posted on the company website, if a former Microsoft employee applied for the PERM position, the individual's application would then be "considered" by the company. Many companies use the above-described "notify and consider" method.

Apparently the analyst at the DOL who decided the Microsoft PERM applications in question did not believe that Microsoft properly notified and considered laid off workers. Yet, Microsoft had previously filed 200 similar PERM cases before filing the applications which are the subject of the litigation, and all the prior applications had been certified, even though the company used the same method of "notification and consideration" in those cases.

Not once since this broadly written "notify and consider" regulation was issued in 2005 has the DOL provided guidance to employers as to what methods of notification and consideration would be acceptable and what methods would not be acceptable. The business community has been grappling and struggling with this issue since the regulations first came out as there are so many

potential methods for notifying and considering workers. Practices among employers range from notifying terminated workers in their termination letters that they can apply for future positions on the company website, and considering those who apply for the PERM position, to sending letters to potentially qualified workers who have been terminated in the last 6 months, notifying them of the specific PERM job opportunity.

The DOL routinely publishes FAQ's on its website to provide specific guidance to employers filing PERM applications. Employers have begged the DOL to issue guidance and provide clarity to the business community on this "notify and consider" issue. This requirement has been a major concern in PERM cases especially since the recession in 2008, as RIFs and layoffs unfortunately have been a common occurrence over the last five years. In July, 2008 the American Immigration Lawyers Association and other stakeholder organizations asked the DOL to issue an FAQ on this subject. The DOL responded: "This is in line to be drafted but DOL has other priorities." As of November, 2013, no FAQ on this subject has been published by the DOL on its website.

When a regulation implementing a statute is written in a broad fashion, yet other regulations implementing the same statute are written much more specifically, courts typically rule that the affected parties should be free to interpret the broadly written regulation in a variety of reasonable ways. To rule otherwise would unjustly punish the affected parties who used their best efforts to interpret the requirement, in the absence of any guidance by the government agency which issued the regulation.

Employers throughout the United States who file PERM cases certainly hope that the BALCA will make the right decision in the Microsoft case and overturn the PERM denials that were based on DOL's view that Microsoft did not properly notify and consider laid off workers. It would be a manifest injustice for the DOL to hold employers to a standard that was never articulated to the public.

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