



Practice Pointer: Using Section H.14 of ETA Form 9089 to Reduce the Potential for an Audit

By the AILA DOL Liaison Committee¹

The PERM Labor Certification process is designed to be highly standardized and efficient. This is what has allowed the Department of Labor (DOL) to maintain relatively fast PERM processing times despite an ever-increasing filing volume and a shrinking budget. However, this standardization can create challenges when stakeholders have a case that includes unusual job duties or requirements, the result of which can be an audit of the PERM application by DOL. This issue would be resolved if stakeholders were able to properly explain unusual duties and requirements in order to avoid an audit or denial. This practice pointer will offer some suggestions for using the open text section H.14 field of ETA Form 9089 to help address and hopefully avoid some of the more common audit triggers released in a Freedom of Information Act (FOIA) request² and based on experience.

In a recent webinar conducted in August 2017, the DOL's Office of Foreign Labor Certification (OFLC) suggested that the open text box on ETA Form 9089 at section H.14 is perfect for this purpose.³ Section H.14 has no character limit, despite user instructions, which suggest limiting characters to 4,000.⁴ It is important to remember that despite the lack of a character limit, if you cannot see the text that is typed onto the form when you print a draft copy of the ETA Form 9089, neither will USCIS when the PERM application is certified and an I-140 immigrant petition is filed. Therefore, you should ensure that anything entered on section H.14 that is important for the I-140 petition filing is visible when you print the draft ETA Form 9089. In addition, when using this open space field for an explanation, rather than list requirements, it is important to clearly delineate where the requirements end and where the explanation begins. Using a return/enter space and a series of asterisks is one potential option, as is clearly labeling the explanation in all capital letters, e.g., "EXPLANATION OF SPECIAL REQUIREMENTS."

Live-In Requirement (Non-Domestic Employee)

Whenever the employer and foreign national's addresses are identical or similar, DOL will assume a live-in requirement, and will frequently audit for an explanation. For a domestic employee, the requirements are carefully spelled out in the regulations.⁵ When dealing with non-domestic employees, a live-in requirement is generally deemed "unduly restrictive," or at least, highly unusual. Moreover, BALCA has repeatedly found that if there is a live-in requirement, it must appear in all advertisements and postings, as well as on the ETA Form 9089.⁶ As a

¹ Special thanks to AILA member David Ware for his contributions to this practice pointer.

² DOL ETA/OFLC Audit Tiers Information, AILA Doc. No. 16062003, April 8, 2016.

³ Department of Labor, Office of Foreign Labor Certification, "PERM Audit Response Submission Practice Tips.", Aug. 16, 2017, available at https://www.foreignlaborcert.doleta.gov/pdf/PERM_Audit_Webinar_Presentation-08.17.17.pdf.

⁴ Department of Labor, "Permanent Online System User's Guide", pg. 31, available at <https://www.plc.doleta.gov/onlinehelp.pdf>.

⁵ 20 C.F.R. §656.19.

⁶ See e.g., *In Matter of Jack Passadore*, 2010-PER-01407 (Bd. Alien Lab. Cert. App. Nov. 28, 2011); *Maurice Deane*, 2011-PER-01381 (Bd. Alien Lab. Cert. App. Dec. 26, 2012).

result, it is best to explain this requirement in section H.14. In a recent application involving a private boarding school, which requires teachers to live on-campus, an employer wrote in section H.14 “The employer is a private boarding school for grades 1-7. Due to the tender age of our charges and their need for close supervision at all times, we require all teachers to reside on our campus.” Similar language in related cases can reduce the likelihood of an audit asking for details regarding the live-in requirement.

Relationship by Blood or Marriage

Undue influence of the foreign national beneficiary over the recruitment process is a frequent audit trigger and has been the subject of numerous BALCA decisions.⁷ The relevant question on the ETA Form 9089 is C.9; if you answer “yes” to this question, an audit will usually ensue. If you answer “no” and the parties appear to have a relationship, either by address or name similarity, an audit may arise as well. In either case, consider explaining the circumstances regarding undue influence due to a family relationship in the open text box in section H.14. The main concern, according to BALCA, is the beneficiary’s actual involvement in recruitment.⁸ A typical explanation might say, for example, “Recruitment and all applicant contact conducted exclusively by HR Manager, Helen Smith, who has no familial relationship to the beneficiary. The beneficiary has had absolutely no involvement in this process.”

Another problem may occur if the employer and beneficiary share an identical family name, and the employer answers “no” to C.9. In a recent case, one employer remedied this situation by including an explanation in section H.14 stating: “Please note that although the employer and the foreign national beneficiary share the same surname, there is no biological or marital relationship between the two.”

Foreign Language Requirements

In many cases, the need for a foreign language is obvious, and one can simply underscore that need in section H.11. For example, “Spanish Teacher. Impart instruction to students in the Spanish language...” In other circumstances, the need is subtler. For example, a marketing specialist for Latin America might have as part of his or her job duties translating marketing materials into Spanish or Portuguese, and fluency in one or both is a requirement for the job. At first blush, this could be viewed by OFLC as unduly restrictive, unless the necessity is properly explained. Practitioners might consider adding in section H.14 language such as “The employer derives 40% of its revenue from sales outside the U.S. Of that 40%, 35% is to Spanish- and Portuguese-speaking countries. Someone with a keen understanding of marketing and sales is best equipped to translate our marketing materials into the local language, in an accessible, colloquial and appealing way.” Such an explanation can go a long way to demonstrate the requirements and thus avoid a potential audit. It is important in this scenario for the employer to document the actual need, and not just a preference, for the foreign language.

Exceeding the Specific Vocational Preparation (SVP) or Combination of Occupations

Explanations of business necessity in these areas tend to be complicated and voluminous. In this situation, the creative use of section H.14 may hit a brick wall, as OFLC conveyed in its webinar and during stakeholder meetings that it is not interested in a lengthy novel in section H.14.⁹ If you can, for example, briefly describe why your

⁷ See e.g., Matter of Johnman U.S.A., Inc., 2012-PER-03149 (Bd. Alien Lab. Cert. App. Oct. 21, 2016), Transmark Real Estate, 2011-PER-00475 (Jun. 8, 2012); Modular Container Systems, Inc., 1989-INA-228 (Jul. 16, 1991)(*en banc*).

⁸ See e.g., Matter of Step by Step Day Care, LLC., 2012-PER-00737; (Bd. Alien Lab. Cert. App. Sep. 25, 2015); Matter of Johnman U.S.A., 2012-PER-03149 (Bd. Alien Lab. Cert. App. Oct. 21, 2016); Matter of Good Deal, Inc., 2009-PER-00309 (Bd. Alien Lab. Cert. App. Mar. 3, 2010).

⁹ Department of Labor, Office of Foreign Labor Certification, “PERM Audit Response Submission Practice Tips,” Aug. 16, 2017, available at https://www.foreignlaborcert.doleta.gov/pdf/PERM_Audit_Webinar_Presentation-08.17.17.pdf.

beneficiary needs a certain degree, when you are dealing with a Standard Occupational Classification (SOC) Code that carries a Job Zone 4, or is apparently required to perform two jobs, then you should do so. If the explanation requires a much lengthier discussion and additional documents, section H.14 may have limited use.

However, if you attempt to abbreviate a lengthy explanation, ideally supported by scores of corporate documents, examples of work, organizational charts, and so on, you are likely asking for an audit, rather than avoiding one. Note that in practice, despite conventional wisdom to the contrary, neither exceeding the SVP nor combining duties from two SOC codes triggers an audit in many circumstances. A good example is requiring a bachelor's degree plus five years of experience for an occupation in Job Zone 4. Thousands of PERM applications are filed each year with those requirements and do not routinely result in an audit. That said, always be prepared with explanations and supporting documentation from the employer to justify why the minimum requirements must exceed the SOC's SVP or why the job involves a combination of duties.

Summary

The open text box in section H.14 of ETA Form 9089 is a great tool for including supplemental information and facts on a case to potentially avoid triggering an audit. However, brevity is important when including additional information in this section. Forcing yourself to be brief will produce clearer reasoning that an analyst can grasp in the limited time that he or she has to process a PERM application. It can also save the employer the time, expense, and delay associated with preparing an audit response.