U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 April 2013

BALCA Case No.: 2010-PER-01250
ETA Case No.: A-07317-95346

In the Matter of:

SAP AMERICA, INC.,
Employer,

on behalf of

RAJANIKANTH KRISTAM,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Rahul M. Shah, Esquire
Fragomen, Del Rey, Bernsen & Loewy, LLP
Mattawan, New Jersey
For the Employer

Gary M. Buff, Associate Solicitor
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Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Scott D. Pollock, Esquire
Chicago, Illinois
For Amicus Curiae, American Immigration Lawyers Association

Before: **Colwell, Johnson, McGrath, Price, and Sarno**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
GRANTING CERTIFICATION

This matter is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1182(a)(5)(A), and the implementing regulations promulgated by the U.S. Department of Labor ("the Department") at 20 C.F.R. part 656. The Employer, SAP America, Inc. ("SAP"), seeks administrative review of the Certifying Officer's ("CO") decision to deny the *Application for Permanent Employment Certification* that SAP filed on behalf of Mr. Rajankanth Kristam. The sole issue on appeal is whether SAP's failure to timely submit a copy of its request for a prevailing wage determination warranted the denial of certification under 20 C.F.R. § 656.20(b). Because this issue was interpreted inconsistently by several of the Board's panels, we *sua sponte* granted *en banc* review to resolve the dispute. For the reasons set forth below, we find that the CO erred in denying certification. Accordingly, we vacate the CO's denial and remand this matter to the CO for certification.

BACKGROUND

On December 31, 2007, SAP filed an *Application for Permanent Employment Certification* with the Department's Employment and Training Administration ("ETA"). AF 154-166.[1] Thereafter, on February 7, 2008, the CO issued an audit notification letter instructing SAP to submit certain specified documentation, including "[a] copy of the Prevailing Wage Determination received from the State Workforce Agency (SWA) and if not included in the Prevailing Wage Determination, a copy of the request for the determination as originally submitted to the SWA." AF 151. SAP submitted its response to the audit notification letter on March 6, 2008. AF 45-150. This response included, *inter alia*, a copy of the Prevailing Wage Determination ("PWD") that SAP had obtained from the Pennsylvania Bureau of Workforce Development Partnership ("Pennsylvania SWA"); it did not, however, include a copy of its request for a prevailing wage as originally submitted to the Pennsylvania SWA. AF 100.

On February 2, 2010, the CO issued a decision denying certification. AF 43-44. The only basis cited in support of the denial was SAP's "fail[ure] to provide documentation as requested in the Audit Notification letter." AF 44. "Specifically," the CO stated, "the employer failed to provide a copy [of] the prevailing wage request for the prevailing wage determination." *Id*. As authority for the denial, the CO cited a subsection of the regulation governing audit procedures, 20 C.F.R. § 656.20(b), which states: "A substantial failure by the employer to provide required documentation will result in that application being denied." *Id*.

On February 26, 2010, SAP petitioned the CO for reconsideration and, in the event reconsideration was denied, BALCA review. AF 12-42. In the petition, SAP maintained that it inadvertently omitted the PWD request form from its audit response materials since, unlike most SWAs, the Pennsylvania SWA does not issue a PWD on the original request form or return a copy of the original request form with its final determination. AF 13-14. As a result, SAP

[1] Citations to the Appeal File in this matter will be abbreviated "AF" followed by the page number.

asserted, it erroneously assumed that the PWD included with its audit response was sufficient. *Id*. SAP maintains that after learning of the omission, it located a copy of the prevailing wage request it had submitted to the Pennsylvania SWA. AF 14. Accordingly, SAP attached a copy of this request to its petition. AF 24-27.

On July 16, 2010, the CO issued a decision reaffirming the denial. AF 1. Although the CO acknowledged that SAP's petition for review included a copy of SAP's request for a prevailing wage as originally submitted to the Pennsylvania SWA, he nevertheless found that SAP did not overcome the deficiency stated in the denial. Specifically, the CO noted that per 20 C.F.R. § 656.24(g)(2)(i), "a request for reconsideration submitted on behalf of an application may include only documentation received from the employer in response to a request from the Certifying Officer." *Id*. Accordingly, the CO refused to consider any newly submitted evidence and reaffirmed the denial based on SAP's "substantial failure . . . to provide required documentation." *Id.* (citing 20 C.F.R. § 656.20(b)).

The case was forwarded to BALCA, and on September 1, 2010, the Board issued a Notice of Docketing and Order Requiring Submission of Statement of Intent to Proceed. SAP confirmed its intent to proceed on September 15, 2010; the CO filed a statement of position on October 20, 2010. Before this matter was assigned for decision, however, the Board discovered a conflict had developed among its panels regarding the CO's authority to deny certification when an employer fails to submit a copy of its request for a PWD as originally submitted to the SWA.[2] Accordingly, the Board *sua sponte* voted to grant *en banc* review to resolve the conflict and maintain uniformity among its panels.

The Board issued a Notice of *En Banc* Review on April 20, 2012, informing the parties that the case would be reviewed *en banc*. In this Notice, the Board provided the parties an opportunity to file supplemental briefs and invited interested parties to participate as *amici curiae*. Both parties filed supplemental briefs, and the American Immigration Lawyers Association ("AILA") filed an amicus brief urging us to adopt the reasoning put forth by the panels in *SAP Labs, LLC*, 2010-PER-1233 (Nov. 15, 2011), and *Schnabel Engineering, Inc*., 2010-PER-1125 (Nov. 9, 2011).

DISCUSSION

The regulation governing prevailing wage determinations is found at 20 C.F.R. § 656.40. At the time SAP filed its application, Section 656.40(a) provided:

The employer must request a prevailing wage determination from the SWA

[2] Two separate BALCA panels affirmed the CO's denial of certification when the petitioning employer failed to provide a copy of its request for a PWD as originally submitted to the SWA. *See JDA Software*, 2010-PER-932 (July 12, 2011); *Misoya, Inc.*, 2010-PER-200 (Feb. 28, 2011). But one of these panels later reversed course and vacated the CO's denial of certification in a case with similar facts. *See Schnabel Engineering, Inc.*["*Schnabel*"], 2010-PER-1125 (Nov. 9, 2011) ("There is nothing in the regulations requiring that the original request to the SWA be provided, or stating that it is necessary for the CO to verify an employer's attestation of the PWD."). A third BALCA panel agreed with *Schnabel* and held that the CO may not deny certification based on a petitioning employer's failure to submit a copy of its PWD request form. *See SAP Labs, LLC*, 2010-PER-1233 (Nov. 15, 2011).

> having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

20 C.F.R. § 656.40(a) (2007).[3] The "Definitions" section of the regulations specified that a "[*p*]*revailing wage determination* (PWD) means the prevailing wage provided by the State Workforce Agency." 20 C.F.R. § 656.3 (2007).

Even though Section 656.40 only stated that an employer needs to "maintain[] the SWA PWD in its files" and submit "the determination . . in the event it is requested in the course of an audit," Counsel for the CO asserts that an employer must also submit a copy of its request for a prevailing wage as originally submitted to the SWA if this document is requested in the course of an audit. According to Counsel for the CO, the PERM regulations authorize the CO to determine which documentation "an employer needs to submit in order for the CO to fully review that employer's application," and correspondingly, the authority to deny an employer's application when an employer fails to provide the requested documentation. (CO's May 18, 2012 Statement of Position at 2). To justify this authority, Counsel for the CO relies on the placement and use of the term "required documentation" in the regulation governing audit procedures, 20 C.F.R. § 656.20.

Section 656.20 provides, in pertinent part:

> (a) If an application is selected for audit, the Certifying Officer shall issue an audit letter. The audit letter will:
>
> (1) State the documentation that must be submitted by the employer;
>
> (2) Specify a date, 30 days from the date of the audit letter, by which the required documentation must be submitted; and
>
> (3) Advise that if the required documentation has not been sent by the date specified the application will be denied.
>
> (i) Failure to provide documentation in a timely manner constitutes a refusal to exhaust available administrative remedies; and
>
> (ii) The administrative-judicial review procedure provided in § 656.26 is not available.
>
> (b) A substantial failure by the employer to provide required documentation will result in that application being denied under § 656.24 and may result in a

[3] As of January 1, 2010, the Department of Labor assumed responsibility for the issuance of PWDs to employers seeking permanent labor certifications on behalf of foreign workers. Employers are now directed to submit a standard Prevailing Wage Determination Request form to ETA's National Processing Center. *See* 69 Fed. Reg. 77386 (Dec. 27, 2004), as amended at 73 Fed. Reg. 78020, 78068 (Dec. 19, 2008).

> determination by the Certifying Officer pursuant to § 656.24 to require the employer to conduct supervised recruitment under § 656.21 in future filings of labor certification applications for up to 2 years.
>
> …
>
> (d) Before making a final determination in accordance with the standards in § 656.24, whether in course of an audit or otherwise, the Certifying Officer may:
>
> (1) Request supplemental information and/or documentation; or
>
> (2) Require the employer to conduct supervised recruitment under § 656.21.

20 C.F.R. § 656.20. Counsel for the CO asserts that the term "required documentation" in subsection (b) "refers not to documentation broadly required by the PERM regulations, but rather to the documentation required to be produced in response to the audit notification." (CO's May 18, 2012 Statement of Position at 3). As Counsel for the CO explains:

> Section 656.20(a)(1) clearly authorizes the CO to require "the documentation that must be submitted by the employer." 20 C.F.R. § 656.20(a)(1). The reference to "required documentation" in Section 656.20(b) relates back to the documentation that employers are required to submit in response to an audit under subsection (a), not to any documents mentioned or referenced in other sections of the regulations. That this phrase refers to the documentation required via the audit notification is supported by the use of [sic] same phrase in § 656.20(a)(3), which requires the audit letter to "[a]dvise that if the required documentation has not been sent by the date specified the application will be denied." 20 C.F.R. § 656.20(a)(3) (emphasis added). In (a)(3) it is clear that "required documentation" refers to the documents required to be submitted by the "date specified"—that is, the date specified by the audit letter. Giving the same phrase found in (a)(3) and (b) two meanings, which the Board's decision [in *Schnabel*] implicitly does, is illogical given the relationship between subsections (a) and (b) of Section 656.20.

(CO's May 18, 2012 Statement of Position at 3).

SAP and AILA dispute the CO's broad interpretation of Section 656.20(b). In their view, the CO may only deny certification when a petitioning employer fails to produce documentation that is "specified" in the regulations. To support this narrower interpretation of the CO's authority under Section 656.20(b), SAP and AILA cite to the Board's decision in *A Cut Above Ceramic Tile* [*A Cut Above*], 2010-PER-224 (Mar. 8, 2012) (*en banc*). In particular, they cite to the Board's holding that "[w]hen a regulation does not require an employer to retain a particular type of evidence to document compliance with a recruitment step, such evidence is not 'required documentation,' and the CO may not deny certification based on a failure to produce such documentation." *Id*., slip op. at 11. In *A Cut Above*, the Board vacated a denial based on the petitioning employer's "fail[ure] to provide proof of publication of the job order from the State Workforce Agency (SWA) containing the content of the job order, as requested in the Audit Notification letter." *Id*. at 3. After examining the plain language of the regulation governing SWA job orders, which stated that "the start and end dates of the job order entered on the

application serve as documentation of this step," as well as the regulatory history preceding the Department's implementation of the PERM program, the Board held: "[P]roof of publication of the SWA job order is not 'required supporting documentation,' and therefore, the CO's denial of certification under Section 656.20(b) was improper." *Id.* at 12-13.

Upon further examination, we find that *A Cut Above* conflated the "supporting documentation" an employer must retain under Sections 656.10(f) and 656.17(a)(3) with the "required documentation" an employer must produce in response to an audit under Section 656.20(b). For the reasons stated in *A Cut Above*, we agree that the "supporting documentation" an employer must retain under Sections 656.10(f) and 656.17(a)(3) is limited to the documentary evidence specified in the regulations. However, after reviewing the plain language of the audit provision, we agree with Counsel for the CO that the "required documentation" referenced in subsection (b) relates back to the documentation in subsection (a), *i.e.*, the documentation identified for production in an audit notification letter. Significantly, the required documentation referenced in subsection (a) is not necessarily limited to the "supporting documentation" specified in the regulations, since the CO may also request certain "supplemental information and/or documentation" in the course of an audit. *See* 20 C.F.R. § 656.20(d) ("Before making a final determination in accordance with the standards in § 656.24, whether in course of an audit or otherwise, the Certifying Officer may . . . Request supplemental information and/or documentation . . ."). But it is also clear that the CO may not deny an application for just any failure to provide "required documentation." By its very terms, Section 656.20(b) limits the denial of certification to a "*substantial failure* by the employer to provide required documentation." Although the regulation itself does not specify what types of omissions constitute a "substantial failure . . . to provide required documentation," the use of the word "substantial" indicates that not every failure to provide "required documentation" will necessarily result in a denial. The meaning of "substantial violation" is thus critical to the resolution of this case.

The regulatory history indicates that the documentation an employer must maintain and produce in response to an audit is, for the most part, the "supporting documentation" specified in the regulations. For instance, in the Notice of Proposed Rulemaking ("NPRM") published prior to the implementation of the PERM program, the Department stated: "the proposed regulation would provide, in virtually all instances where an employer could be required to submit documentation in support of its attestations, the type of documentation the employer would be required to maintain and furnish in the event of an audit." 67 Fed. Reg. 30466, 30475 (May 6, 2002). And in the preamble to the Final Rule, the Department confirmed that "the regulations indicate what documentation employers are required to assemble, maintain, and submit to respond to an audit letter." 69 Fed. Reg. 77326, 77358-59 (Dec. 27, 2004). In fact, in guidance issued after the PERM program was implemented, the Department reiterated that "the documentary evidence the regulations require the employer to maintain in its compliance file is what is sought in an audit request." *See* www.foreignlaborcert.doleta.gov/pdf/perm_faqs_5-9-07.pdf (FAQ Round 10).

The regulatory history also suggests that requests for "supplemental documentation" are not subject to the CO's unbridled discretion. For instance, in the NPRM, the Department described a request for "supplemental documentation" as follows:

> Before making a final determination in accordance with the standards in § 656.24 of this part, the Certifying Officer could request supplemental documentation or require the employer to conduct supervised recruitment. A request for supplemental documentation could include a request for certain limited information not specified in the regulations, but that should be readily available to the employer. For example, if an application under review involves a job opportunity for a specialty chef, the Certifying Officer could request a copy of the restaurant's menu to aid in determining whether there was a bona fide job opening available for a specialty chef.

67 Fed. Reg. at 30475. Thus, even though the Department anticipated that there would be requests for "certain limited information not specified in the regulations," it intended to limit such requests to information or documentation "that should be readily available to the employer." And, as the example of a request for a restaurant menu illustrates, the Department intended to limit such requests to situations where it is necessary to verify an attestation that is not easily subject to a universal documentation requirement (and not to require the production of a document—such as a prevailing wage determination request form—that is common to all applications but not specified in the regulations as evidence that an employer must retain).

BALCA has consistently affirmed denials under Section 656.20(b) when the "required documentation" an employer fails to produce is specifically identified in the regulations as the evidence necessary to document a particular attestation, *i.e.* the "supporting documentation" an employer is required to retain under Sections 656.10(f) and 656.17(a)(3)). *See, e.g., Yakima Steel Fabricators*, 2011-PER-1289 (July 5, 2012) (failure to provide proof of print advertisements, as required by Section 656.17(e)(1)); *Gotham Distribution*, 2011-PER-1352 (Aug. 2, 2012) (failure to provide a Notice of Filing, as required by Section 656.10(d)); *Marlenny's Haircutters*, 2009-PER-13 (Jan. 29, 2009) (failure to produce a recruitment report, as required by Section 656.17(g)). Notably, under these circumstances, the Department spoke to the important nature of the omitted documentation when it promulgated the PERM regulations, and the regulations place the employer on notice that documentation needs to be retained and produced in the event of an audit. It is thus not unfair to presume that the omission of "supporting documentation" constitutes a "substantial failure by the employer to provide required documentation." This is not the case, however, when omitted "required documentation" is merely "supplemental documentation" that is not specified in the regulations. In this latter situation, absent a sufficient explanation by the CO, we are left to guess why the omission constitutes a "substantial failure by the Employer to provide required documentation." We thus decline to summarily affirm denials issued under Section 656.20(b) when the documentation an employer fails to produce is "supplemental documentation." Rather, in such cases, we must find that (1) the CO reasonably requested the omitted documentation (*i.e.*, the documentation should have been readily, or at least reasonably, available to the employer, and tailored to the CO's review of the employer's application); and (2) the omission of this documentation is material enough to constitute a "substantial failure . . . to provide required documentation."

In the instant case, the CO denied certification based on SAP's failed to provide "a copy [of] the prevailing wage request for the prevailing wage determination." As discussed above, the

PERM regulations in place at the time that SAP filed the application required an employer to "maintain[] the SWA PWD in its files" and submit "the determination . . . to an ETA application processing center in the event it is requested in the course of an audit." *See* 20 C.F.R. § 656.40(a) (2007). The CO does not dispute that SAP maintained the PWD it was issued by the Pennsylvania SWA in its files. Nor does the CO dispute that SAP timely submitted the determination to the CO after it was requested in the course of an audit. Rather, the CO asserts that SAP's failure to submit a copy of the prevailing wage request originally submitted to the Pennsylvania SWA constitutes a substantial failure to provide required documentation.

As proof that the Department intended a PWD request form to be included among the documentation sought in an audit, Counsel for the CO cites to a comment in the preamble to the PERM regulations, wherein the Department states: "The state workforce agency PWDR form must be retained by the employer, and will be submitted only if the application is selected for an audit or as requested by the CO." Final Rule, 69 Fed. Reg. 77326, 77365 (Dec. 27, 2004). But this comment is not consistent with the Department's representations in earlier sections of the preamble, and it fails to provide employers with adequate notice that they must retain a copy of the prevailing wage request form that they submit to the SWA. *See, e.g.*, 69 Fed. Reg. at 77341 (stating employers will be "expected to provide the PWD they received from the SWAs in the event of an audit or other request from the CO," without mentioning a duty to retain the request for a PWD submitted to the SWA); 69 Fed. Reg. at 77333 ("The employer will be expected to retain the state prevailing wage determination form to furnish to the CO if requested to do so in the event of an audit or otherwise.").[4]

[4] In fact, as explained in this footnote, the reference to a "PWDR" may have been made in error. When the Department initially announced its intent to revise the permanent labor certification program in the Notice of Proposed Rule Making ("NPRM"), the application was to be comprised of two standardized forms: (1) a *Prevailing Wage Determination Request* ("PWDR"), referred to as ETA Form 9088; and (2) an *Application for Permanent Labor Certification*, referred to as ETA Form 9089. 67 Fed. Reg. 30466 (May 6, 2002). Prior to filing, a petitioning employer would complete the standardized PWDR and submit it to the appropriate SWA for issuance of a prevailing wage determination. *Id*. at 30466-67. The SWA would enter its determination on the employer's PWDR form and return the form to the employer with its endorsement. *Id*. The employer would then submit both the endorsed PWDR and the *Application for Permanent Labor Certification* to an ETA servicing office for processing. *Id*. at 30470. But the Department later abandoned its proposal for a standardized PWDR form (ETA Form 9088). In the Final Rule published in 2004, the Department consolidated the information on the proposed *Application for Permanent Employment Certification* and standardized PWDR into a single, revised *Application for Permanent Labor Certification* (ETA Form 9089). *See* 69 Fed. Reg. at 77333. Employers still needed to obtain a PWD from the appropriate SWA prior to filing an application, but instead of using the standardized PWDR form, but they were instructed to "us[e] the form required by the state in which the job is being offered." As the Department explained:

> This final rule does not require a particular form for employers to submit request for wage determinations to SWAs or for SWAs to use in responding to requests for wage determinations. Employers will, however, be expected to provide the PWD they received from the SWAs in the event of an audit or other request from the CO.

69 Fed. Reg. at 77341 (emphasis added). The Department thus acknowledged that employers would use various forms to request a PWD, and that SWAs would use various forms to respond to requests for PWDs, but only noted that employers would be expected "to provide the PWD they received from the SWAs in the event of an audit or other request from the CO." *Id.* (emphasis added). The reference to a PWDR to which the CO cites is located in a later section of the preamble, which states, in pertinent part:

In our opinion, Section 656.40(a)'s explicit requirement that employers maintain the PWD issued *by* the SWA implies that employers need not maintain a copy of the prevailing wage request submitted *to* the SWA. It is unreasonable for the CO to assume that the latter document "should be readily available to the employer" at the time of an audit when the regulations provide employers with no notice that this form must be copied before it is submitted to the SWA.[5] If the CO needs to review this request form in every case he audits—as Counsel for the CO appears to suggest—then the Department should have drafted the regulations to provide employers with adequate notice that the form must be copied and retained.

Moreover, even if we found that a copy of the prevailing wage request constitutes a reasonable request for "supplemental documentation," there is no indication that the omission of this document constitutes a "substantial failure . . . to provide required documentation." In his denial, the CO provided no explanation as to why this omission materially affected his review of SAP's application. Upon appeal, Counsel for the CO argues that when auditing an application—seemingly any application—the CO must "review the information submitted on the PWDR to determine whether the prevailing wage included on the employer's application and advertisements is appropriate and accurate for the job opportunity for which the employer seeks certification." (CO's May 18, 2012 Statement of Position at 1.) According to Counsel for the CO: "Without this information, the wage determination is largely meaningless." *Id.* But, as noted by AILA, the CO could have alternatively assessed whether the prevailing wage listed on SAP's application "was appropriate and accurate for the job opportunity for which the employer seeks certification" by comparing the job title, job requirements, job duties, and job location that SAP provided on the ETA Form 9089 with the PWD instructions that the Department issued to the SWAs. The information on the PWD request form was thus not imperative to the CO's inquiry of whether the prevailing wage included on the employer's application and advertisements was appropriate and accurate for the job opportunity for which the employer seeks certification.

In light of the foregoing, we find that SAP's failure to produce "a copy [of] the prevailing wage request for the prevailing wage determination" did not constitute a "substantial failure by the employer to provide required documentation" under Section 655.20(b). Accordingly, we

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> As explained in our discussion to consolidate the ETA 9088 and ETA 9089 into a single application form, under this final rule, the employer will request a prevailing wage determination using the form required by the state where the job opportunity is located. Information from the proposed PWDR form, such as the prevailing wage, occupational code and level of skill, job title, state prevailing wage tracking number, and the date the determination was made will be included on the ETA Form 9089. The state workforce agency PWDR form must be retained by the employer, and will be submitted only if the application is selected for an audit or as requested by the CO.

Id. at 77365. Notably, this section refers back to the earlier discussion discussed above, wherein the Department stated that it expected employers to retain "the PWD they received from the SWAs," without mentioning an employer's duty to retain a copy of the request for a PWD that they submitted *to* the SWA. *See* 69 Fed. Reg. at 77341. Accordingly, the reference to a PWDR may be a mistaken vestige of the form that was initially proposed.

[5] We recognize that SAP actually retained a copy of the request that it submitted to the Pennsylvania SWA; however, we decline to place SAP in a worse position than an employer who reasonably did not think to make a copy of its request before submitting it to the SWA.

find that the CO erred in denying SAP's application. We thus reverse the CO's denial and remand the matter to the CO for certification.

ORDER

IT IS HEREBY ORDERED that the denial in this matter is REVERSED and REMANDED for certification.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

U.S. Department of Labor

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Issue Date: 08 March 2012

BALCA Case No.: **2010-PER-00224**
ETA Case No.: A-08325-07903

In the Matter of:

A CUT ABOVE CERAMIC TILE,
Employer,

on behalf of

FERNANDO BUENO-PEREZ,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Dustin W. Dyer, Esquire
Dyer Immigration Law Group
Glen Allen, Virginia
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Office of the Solicitor
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Washington, DC
For the Certifying Officer

Scott D. Pollock, Esquire
Chicago, Illinois
For Amicus Curiae, American Immigration Lawyers Association

Before: **Colwell, Krantz, Malamphy, Price, and Purcell**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

EN BANC DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the PERM regulations found at Title 20, Part 656 of the Code of Federal Regulations. *En banc* review was granted in the matter to resolve a conflict among panels of the Board regarding whether an Employment and Training Administration ("ETA"), Office of Foreign Labor Certification, Certifying Officer ("CO") may deny certification based on an employer's failure to provide proof of publication of the State Workforce Agency ("SWA") job order containing the content of the job order.

STATEMENT OF THE CASE

On January 8, 2007, the Employer filed an application for permanent labor certification on behalf of the foreign worker for the nonprofessional position of "Tile Setter." (AF 63-73).[1] As a part of its domestic recruitment efforts, the Employer attested that it placed a job order with the SWA in the area of intended employment from July 13, 2006 through August 12, 2006. (AF 65).

The CO issued an Audit Notification on June 11, 2009, instructing the Employer to submit, among other documentation, "[a] copy of the job order placed with the SWA serving the area of intended employment downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the content of the job order, where a job order is required by the recruitment provisions of 20 CFR 656 and/or a job order is listed on the ETA Form 9089 as a recruitment source." (AF 48-50).

[1] In this decision, AF is an abbreviation for Appeal File.

The Employer responded to the Audit Notification and included a copy of its completed Employer Job Order Information Sheet from VaEmploy.Com. (AF 41-44). On October 14, 2009, the CO denied the Employer's application for permanent labor certification because the Employer "failed to provide proof of publication of the job order from the State Workforce Agency (SWA) containing the content of the job order, as requested in the Audit Notification letter." (AF 10-11). Citing 20 C.F.R. § 656.20(b) as the regulatory basis for denial, the CO found that the copy of a completed Employer Job Order Information Sheet from VaEmploy.Com "does not confirm that the SWA ran the job order and does not show the final content of the job order as run by the SWA." (AF 11).

The Employer requested reconsideration, arguing that the PERM regulations provide that the SWA job order is documented by the start and end date as entered on the application. (AF 1-9). The Employer also argued that it had attempted to obtain proof of publication of the SWA job order from the Virginia SWA, but was unable to obtain the requested documentation. The Employer included an email from a representative from the Virginia SWA, who stated that "any job orders that were in [the SWA's] database 13 months prior to the November 2007 transition [were] deleted." (AF 4).

The CO affirmed the denial on January 13, 2010 and forwarded the matter to BALCA. On April 6, 2011, a BALCA panel affirmed the denial, finding that the Employer's documentation only showed that the job order was placed for the required 30-day period. The panel found that the Employer failed to provide proof of publication of the job order containing the job order's content, as requested in the CO's Audit Notification. Therefore, the panel found that the Employer substantially failed to provide the required documentation and affirmed the CO's denial under Section 656.20(b).

On May 3, 2011, the Employer requested en banc review, arguing that the Employer fully complied with the applicable regulations pursuant to the panel decision in *Mandy Donuts Corp.*, 2009-PER-481 (Jan. 7, 2011). The Board granted en banc review

on September 26, 2011 in order to resolve the conflict between *Mandy Donuts* and the panel decision in this case. The Board invited the American Immigration Lawyers Association ("AILA") and the American Immigration Council to participate as *amici curiae* and required the parties and *amici* to file briefs within 45 days.

The Employer filed its en banc brief on November 10, 2011, arguing that Section 656.17(e)(2)(i) provides that the SWA job order recruitment step is documented by the start and end dates on the application, and that the Employer fully complied with this regulation. Additionally, the Employer drew a contrast between the SWA job order documentary requirements under the PERM program and the H-2B program in support of its argument that the PERM regulations do not require an employer to provide proof of publication of the SWA job order. The Employer noted that unlike the PERM regulations, the H-2B regulations specifically require an employer to maintain proof of publication from the SWA containing the text of the job order. The Employer also contrasted the evidence required by the PERM regulations to document a SWA job order as opposed to a newspaper advertisement.

Counsel for the CO submitted its en banc brief on November 16, 2011. The CO argues that the *Mandy Donuts* panel decision was improperly decided and urges the Board to follow the panel decision in *Bettina Equities*, 2010-PER-151 (Mar. 4, 2011). The CO argues that the PERM regulations require the employer to maintain all documentation necessary for approval of the labor certification application and submit its supporting documentation when required by the CO. The CO asserts that the panel in *Mandy Donuts* misinterpreted Section 656.17(e)(2)(i) because Section 656.17(e)(2)(i) governs how to document the timing of the SWA job order, rather than the actual placement of the SWA job order. The CO contends that the regulations require an employer to maintain documentation to establish that the job order was published.

AILA filed an amicus brief on November 17, 2011, arguing that ETA's response to comments during rulemaking demonstrates ETA's intent that employers are not

required to submit additional evidence to document that the job order was placed. AILA points out that during rulemaking, ETA noted that supporting documentation is that which is "specified in the regulations." As the regulations do not specifically require retention of the SWA job order, AILA contends that the SWA job order is not "required supporting documentation," and therefore, the CO may not deny certification for failure to submit a copy of the job order in the event of an audit.

DISCUSSION

The PERM regulations require an employer filing for permanent labor certification to place a job order with the State Workforce Agency ("SWA") serving the area of intended employment. 20 C.F.R. § 656.17(e)(2). Specifically, the PERM regulations require:

> Placing a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application serve as documentation of this step.

20 C.F.R. § 656.17(e)(2)(i).

The regulations also require that all documentation supporting the permanent employment certification application be retained for five years after filing the application. 20 C.F.R. § 656.10(f). An employer must furnish "required supporting documentation" to the CO if its application is audited. 20 C.F.R. § 656.17(a)(3). The audit regulations provide that a substantial failure by the employer to provide the required documentation will result in denial of the application. 20 C.F.R. § 656.20(b).

The Employer urges us to adopt the holding in *Mandy Donuts*. In *Mandy Donuts*, the employer submitted a copy of its SWA job order request and order form in response to the audit, but the CO denied certification based on the employer's failure to provide proof of publication of the SWA job order containing the content of the job order. The

Mandy Donuts panel noted that the PERM regulations require "placement" of a SWA job order and provide that placement of a job order for 30 days is documented by the start and end dates entered on the application. Therefore, the panel found that the regulations do not permit the CO to deny certification based on failure to produce evidence establishing that the SWA job order was actually run. Slip op. at 5-6. The panel considered the language in Section 656.17(e)(2)(i) and contrasted it to the regulatory language used to state how placement of a newspaper advertisement is documented. Unlike SWA job order regulations,[2] the regulations governing placement of a newspaper advertisement provide that "[d]ocumentation of this step can be satisfied by furnishing copies of the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper." 20 C.F.R. §§ 656.17(e)(1)(i)(B)(3) (professional occupations); 656.17(e)(2)(ii)(C) (nonprofessional occupations).

We agree with the *Mandy Donuts* panel that this distinction is one of relevance. While the PERM regulations clearly require an employer to be able to provide proof of publication of its newspaper advertisement, the regulations do not require an employer to be able to provide proof of publication of its SWA job order. Likewise, we are also mindful of the Employer's argument that had ETA intended employers filing an application for permanent labor certification to provide proof of publication of the SWA job order, it would have drafted the PERM SWA job order regulation the same way that it drafted the H-2B SWA job order regulation. Under the H-2B temporary nonagricultural labor certification program, which is also administered by ETA, documentation of the placement of the SWA job order "shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting." 20 C.F.R. §

[2] An employer sponsoring a foreign worker for a nonprofessional occupation is required to place a job order with the SWA under Section 656.17(e)(2)(i) and an employer sponsoring a foreign worker for a professional occupation is required to place a job order with the SWA under Section 656.17(e)(1)(i)(A).

655.15(e)(1).[3] When the CO audited the Employer's application, it requested the precise documentation required by the *H-2B* regulations. The PERM regulations, however, do not state that an employer must maintain documentation of proof of publication of the job order, and we find that the CO has conflated the documentation requirements of the PERM and the H-2B regulations.

A fundamental principle of statutory construction is that where Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion of exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). As such, we presume that ETA intentionally drafted the H-2B and PERM SWA job order regulations with different documentary requirements. We acknowledge that the H-2B regulations are more recent than the PERM regulations, and therefore the distinction may reflect either a policy change or concern with the PERM SWA job order regulation as written. Nevertheless, both the plain language of the regulation and the regulatory history of the PERM regulations support the conclusion that, at the time that the PERM regulations were published, ETA did not mandate retention of documentation that the SWA job order was actually run.

The *Mandy Donuts* panel considered the regulatory history of the PERM program to determine if ETA provided any guidance about the type of documentation, if any, that an employer needed to retain to document the placement of a SWA job order. While the CO asserts that we should not consider the regulatory history where the regulatory requirements are explicit, neither Section 656.17(e)(2)(i), nor any other section of the

[3] *See also* 73 Fed. Reg. 78020, 78031 (Dec. 19, 2008) (final H-2B regulations) ("Documentation of a SWA job order will be satisfied by copies of the job order downloaded from the Internet showing the beginning and the ending date of the posting or a copy of the job order provided by the SWA with the dates of posting listed, or other proof of publication from the SWA containing the text of the job order."); 73 Fed. Reg. 29942, 29949 (May 22, 2009) (proposed H-2B regulations) ("Documentation of a SWA job order will be satisfied by copies of the job order downloaded from the Internet on the first and last day of the posting, or a copy of the job order provided by the SWA with the dates of posting listed.").

PERM regulations explicitly requires employers to retain and furnish published copies of the SWA job order when requested by the CO. Accordingly, we find it appropriate to consider the regulatory history. Like the panel in *Mandy Donuts*, we find that the regulatory history indicates that employers are not required to maintain proof of publication of the SWA job order. In responding to comments regarding the audit process and expanding the time an employer has to respond to an audit to 30 days, ETA stated:

> 3. Sending and Responding to the Audit Letter
>
> ***
>
> To account for possible delays in mail delivery, and for other delays caused by circumstances beyond the control of the employer, we have extended the response time to 30 days. Employers' responses must be sent within the 30-day time limit, but need not be received by DOL by that date. As stated in the preamble to the proposed rule, the employer is expected to have assembled the documentation required before filing the application. None of the commenters stated this expectation is unreasonable.
>
> One commenter stated some records may be purged in the state system after a short period of time, such as 30 or 60 days, making it impossible to retrieve information by the time an audit is requested.
>
> The *Application for Permanent Employment Certification* requires the employer to provide the start and end date of the job order on the application form *to document the job order has been placed.* Gathering additional information on the job order from the SWA will not be necessary; therefore, no extension of the response time is warranted for this purpose.

ETA, Final Rule, *Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 69 Fed. Reg. 77326, 77359 (Dec. 24, 2004) (emphasis added). Accordingly, contrary to the CO's assertion that Section 656.17(e)(2)(i) only relates to how an employer documents the timing of a SWA job order, the regulatory history clearly indicates that Section 656.17(e)(2)(i)

establishes how an employer documents the placement of the SWA job order. Neither the regulation nor the regulatory history provide any indication that an employer is required to retain documentation of proof that the job order ran. In fact, the regulatory history suggests the opposite – that all an employer has to do to document the placement of a SWA job order is to list the relevant dates on the application and that the CO will not later request additional information about the SWA job order.

The CO urges the Board to adopt the holding from *Bettina Equities*, where a BALCA panel found that an employer was required to provide proof of publication of the SWA job order if requested by the CO. The panel held that "where a document has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document, if requested by the Certifying Officer, must be adduced." *Bettina Equities*, 2010-PER-151, slip op. at 4 (*quoting Gencorp*, 1987-INA-659 (Jan. 13, 1989)(en banc)). The panel found that proof of publication of the SWA job order had a direct bearing on the resolution of the issue, and, in light of the regulations' requirement that an employer retain all supporting documentation for five years after filing the application, found that proof of publication should be obtainable by reasonable efforts. *Bettina Equities*, 2010-PER-151, slip op. at 5.

We disagree with the panel's holding in *Bettina Equities* and find that reliance on *Gencorp* is misplaced. In *Gencorp*, the employer claimed that a U.S. applicant lacked the academic coursework that was required for the position, and stated that it based that determination on the applicant's academic transcript. *Gencorp*, 1987-INA-659, slip op. at 2. While the employer described the transcript, it did not submit a copy of the U.S. applicant's transcript for the CO's verification. *Id.* The Board determined that the transcript had a direct bearing on whether the employer had lawfully rejected the U.S. applicant and that the transcript was reasonably obtainable by the employer, as the employer had already indicated that it had the transcript in its possession. *Id.* at 3. The Board remanded the case to provide the CO the opportunity to specifically request, and the employer the opportunity to submit, the U.S. applicant's transcript. *Id.*

In *Gencorp*, the Board explained that where a provision of the regulations requires information to be furnished in a specific form, the regulation controls. *Id.* at 2. Only if the regulation does not provide any specific manner of documentation does the "direct bearing/reasonably obtainable" standard apply. In this case, the SWA job order regulation is not silent. Rather, it clearly states that start and end dates of the job order, as entered on the ETA Form 9089, serve as documentation of placement of the job order. In *Gencorp*, the Board considered whether an employer had submitted sufficient documentation to demonstrate why a U.S. applicant was not qualified for the job. Here, on the other hand, we are considering whether the employer submitted sufficient documentation of one of its pre-filing recruitment steps under Section 656.17(e). The "direct bearing/reasonably obtainable" standard has limited, if any, applicability to the pre-filing recruitment provisions under Section 656.17(e), as these provisions specify how each of the steps is to be documented.

Finally, assuming *arguendo* that the "direct bearing/reasonably obtainable" standard has any applicability to the pre-filing recruitment provisions under Section 656.17(e), we disagree with the assumption in *Bettina Equities* that an employer can obtain a copy of the published SWA job order by reasonable efforts if requested by the CO. As was discussed during rulemaking, SWAs may purge closed job orders from their systems prior to the CO's request for this information. In this case, the Employer has argued that it attempted to obtain proof of publication of the SWA job order upon receipt of the Audit Notification, but was unable to receive this documentation from the Virginia SWA. In fact, the Employer's request for reconsideration includes email correspondence with a representative from the Virginia SWA, who stated that "any job orders that were in [the SWA's] database 13 months prior to the November 2007 transition [were] deleted." (AF 4). The CO has not challenged the Employer's contention that its SWA job order has been purged from the SWA's system.[4]

[4] We note that an employer that waits until receipt of an audit notification to begin compiling the specific documentation required to be maintained under the regulations is not be excused from producing this evidence merely because it is later difficult to obtain the documentation.

When a regulation does not require an employer to retain a particular type of evidence to document compliance with a recruitment step, such evidence is not "required documentation," and the CO may not deny certification based on a failure to produce such documentation. *See e.g., SAP Labs, LLC*, 2010-PER-1233 (Nov. 15, 2011); *Schnabel Engineering, Inc.*, 2010-PER-1125 (Nov. 9, 2011). In *Schnabel Engineering*, a BALCA panel reversed the CO's denial of certification based on the Employer's failure to provide a copy of the prevailing wage determination ("PWD") request form that the CO requested in the Audit Notification. The panel noted that "the CO does not have carte blanche to require just any documentation. The application may only be denied under § 656.20(b) when the absent documentation is *required*." (emphasis in original) Slip op. at 5. Likewise, a separate panel in *SAP Labs* also reversed the CO's denial of certification based on the Employer's failure to provide a copy of the PWD request form that the CO had requested in the Audit Notification. The panel followed the same approach as the *Schnabel Engineering* panel, finding that because the PWD regulation specifically requires that an employer maintain its PWD, under the doctrine of *expressio unius est exclusio alterius*, an employer need not maintain or submit any other evidence, including the PWD request, to comply with the regulation. *SAP Labs, LLC*, 2010-PER-1233, slip op. at 4. Therefore, the panel in *SAP Labs* found that the PWD request was not "required supporting documentation" within the meaning of Sections 656.17(a)(3) and 656.20(b).

This approach is consistent with ETA's own guidance during rulemaking about the meaning of "supporting documentation." In explaining the PERM program's new attestation-based process, ETA stated:

> The employer will not be required to submit any documentation with its application, but will be expected to maintain the supporting documentation *specified in the regulations*. The employer will be required to provide the supporting documentation in the event its application is selected for audit and as otherwise requested by a Certifying Officer.

69 Fed. Reg. at 77327 (emphasis added). This guidance plainly notifies employers that they must maintain the recruitment documentation that is specified in the regulations. Correspondingly, evidence that is related to recruitment but that is not specified by the regulations is not "supporting documentation," and therefore need not be maintained under Sections 656.10(f) and 656.17(a)(3). Based on the foregoing, we find that proof of publication of the SWA job order is not "required supporting documentation," and therefore, the CO's denial of certification under Section 656.20(b) was improper.

Likewise, we note that the SWA job order request is also not required documentation, as the regulations provide that placement of the SWA job order is documented by start and end dates on the application. Nevertheless, as the panel noted in *Mandy Donuts*, the CO has both a reasonable and highly useful purpose in requesting this documentation to ensure that the job opportunity was clearly open to U.S. workers.[5] As such, we endorse the CO's authority to request documentation of the SWA job order, and any employer that has this documentation should submit it. However, because this documentation is not "required" under the PERM regulations, the CO may not deny

[5] The spirit and context of the PERM regulations, which are grounded in attestations backed up by retained documentation to support the attestations, strongly suggest that an employer should retain and be able to produce documentation about the content and dates of action on all elements of recruitment. We would anticipate that most employers recruiting in good faith will have retained documentation in some form to show the content of the job order, and if so be able to produce it. Moreover, the CO is not barred from denying certification based on a deficiency in the content of the SWA job order. *See, eg., Chemical Abstracts Service*, 2010-PER-1164 (Sept. 23, 2011) (denial affirmed where the wage in the SWA job order was more than $18,000 less than the prevailing wage); *Vila & Son Landscaping*, 2010-PER-1332 (Sept. 23, 2011) (denial affirmed where the wage in SWA job order was $1,200 less than the wage offered to the foreign worker); *Wright State University*, 2010-PER-1220 (June 3, 2011) (denial affirmed where documentation of SWA job order strongly suggested that the employer's law firm's name was displayed on the job order rather than the employer's name); *Xceed Technologies, Inc.*, 2010-PER-80 (July 27, 2010) (denial affirmed where the SWA job order listed a 24-month experience requirement, whereas no experience requirement was listed on the Form 9089).

In view of our finding, however, that documentation of the SWA job order is not expressly and specifically required to be retained under the PERM regulations, an employer's failure to produce the SWA job order cannot be the sole basis for a denial. If ETA wants an employer to retain such documentation, it needs to revise the PERM regulations along the lines of the H-2B regulations.

certification under Section 656.20(b) solely based on an employer's failure to provide this documentation.

Based on the foregoing, we reverse the CO's denial and remand this matter for certification.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **REVERSED** and **REMANDED** for certification.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 September 2013

OALJ Case No.: 2013-PED-00003

ETA Case No.: C-06032-81728

In the Matter of

SNS ENTERPRISES, INC.,
Employer

on behalf of

NASRUDDIN SULTAN ALI,
Alien

Certifying Officer: Chicago National Processing Center

Appearances: Vincent C. Costantino
on behalf of the Certifying Officer

Chiranjaya Nanayakkara,
on behalf of Employer

Before:**Romero, Price, Rosenow**
Administrative Law Judges

DECISION AND ORDER

This case arises from a request for review of a revocation of an approved labor certification by the Office of Foreign Labor Certification dated October 9, 2012, under 20 C.F.R. Sections 656.26, 656.30(d), and 656.32.[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.).

By letters dated March 20-21, 2013, Employer requested reconsideration of the Certifying Officer's (CO) decision.[2] The CO found that Employer's request did not overcome the deficiency that led to the revocation, and forwarded the case to the BALCA.[3] Employer

[1] Appeal File (AF) 87-88.
[2] AF 6-86.
[3] AF 1-5.

requested BALCA review in accordance with 20 C.F.R. Sections 656.26 and 656.27. Both Employer and the CO submitted briefs to the panel.

PROCEDURAL HISTORY

Employer submitted an ETA Form 9089 for the position of "Alteration Tailor" on February 1, 2006.[4] Employer indicated in Section A.1 that it was seeking to use a filing date from a previously-submitted application, with a priority date of March 30, 2001.[5] The prior ETA Form was filed on March 20, 2001 for an employer entitled Kalam Enterprises, Inc., DBA Arcola Food Market, on behalf of the same alien beneficiary, for the position of "Manager, Convenience Store." The appeal file does not contain a prior ETA Form 9089, but does include correspondence related to it from the Texas Workforce Commission on April 18, 2001[6] and a letter to the same from Employer stating that it wished to withdraw its case, effective September 25, 2002.[7]

On June 19, 2006, the CO sent notice that Employer's application for "Alteration Tailor" had been certified and instructed Employer to file it and an I-140 petition (Immigrant Petition for Alien Worker) with the appropriate office of the United States Citizenship and Immigration Services (USCIS).[8]

A letter from Employer's attorney to the USCIS Texas Service Center dated December 23, 2009 states that the ETA Form 9089 filed on February 1, 2006 and approved on June 19, 2006 contained an error, stating a priority date of March 30, 2001, when the proper date should have been February 1, 2006.[9] The letter urged that this was harmless error on the part of the preparer, Mr. Harry Patel. On November 16, 2011, the USCIS sent a letter to Employer stating that its Form I-140 was denied.[10] Employer appealed the USCIS determination on December 19, 2011.[11]

On February 2, 2012, the USCIS notified Employer that the proceedings would be held in abeyance because it had determined that consultation with the US Department of Labor (DOL) was necessary.[12] Specifically, there were concerns about the validity of the labor certification, since 20 C.F.R. Section 656.17(d) does not permit using a filing date based on a previously-filed labor certification for an alien beneficiary unless it is for an identical job opportunity. The USCIS Administrative Appeals Office indicated it would refer the approved ETA Form 9089 to the DOL for advice about the certification's validity.

On February 27, 2012, the DOL Office of Foreign Labor Certification responded to the USCIS, stating that it intended to revoke Employer's permanent labor certification.[13] This was based on

[4] AF 134-42.
[5] AF 134.
[6] AF 133.
[7] AF 132.
[8] AF 124.
[9] AF 114.
[10] AF 108-113.
[11] AF 102-107.
[12] AF 98-99.
[13] AF 96-97.

the discovery that Employer had used an improper priority date (March 30, 2001) on its application. Specifically,

> [a]s evidenced by Departmental records and the documentation provided with your letter, application C-06032-81728 was filed by [Employer] for the position of Alteration Tailor in Houston, Texas on February 1, 2006, and certified on June 20, 2006, but was awarded the earlier filing date pursuant to the aforementioned provision [20 C.F.R. § 656.17(d)] as a result of the employer indicating on the form its desire to use the filing date of a previously submitted Form ETA 750, application 0059320, filed under the regulations in effect prior to March 28, 2005. This initial application, filed by Kalam Ent Inc. DBA Arcola Food Market for the position of Manager, Convenience Store in Arcola, Texas, was submitted to the Texas Workforce Commission on March 30, 2001, and withdrawn on September 25, 2002. The use of the application 0059320 filing date was unwarranted because the applications' job opportunities were not identical and application 0059320 was not in process when the ETA Form 9089 was filed in 2006, having been withdrawn in 2002.[14]

On May 11, 2012, the DOL sent Employer a Notice of Intent to Revoke (NOIR), based on the finding that the certification was not justified because it was issued an illegitimate filing date based on erroneous information provided by Employer.[15] It stated that Employer had to submit any rebuttal evidence within 30 days of receipt of the Notice, after which the CO would review the relevant documentation and make a final decision within 30 days of receiving the evidence. The NOIR also stated that if the CO's final determination was to uphold the revocation, Employer could request BALCA review per 20 C.F.R. Section 656.26. If Employer did not submit any rebuttal evidence, the letter stated, it could not file an appeal with the BALCA.

Nearly five months later, on October 9, 2012, the DOL sent a Revocation Notice to Employer, noting that it had not received any response to its NOIR.[16] Because Employer did not file rebuttal evidence within 30 days of receiving the Notice of Intent to Revoke, it became the final decision of the Secretary, per 20 C.F.R. Section 656.32(b)(2). The letter also stated:

> [t]he Department received notification from the U.S. Postal Service (USPS) that it was unable to deliver and/or forward the mail to the employer point of contact's address or to the attorney's address as listed on the ETA Form 9089. The application's file does not indicate a change of address was provided to the Department; however, the USPS provided the Grants Lake Boulevard address listed below for the employer point of contact. As a courtesy, a copy of this letter is being sent to that address.[17]

[14] *Id.*
[15] AF 89-95.
[16] AF 87-88.
[17] AF 88.

POSITIONS OF THE PARTIES

On March 20, 2013, Employer requested review of the revocation and stated that it was filing within 30 days of receipt of the copies of the NOIR and the Revocation Notice.[18] Employer stated that it did not know about the DOL's decision until it was referred to by the USCIS in its denial of the I-140 petition on March 4, 2013. Employer also stated, however, that "[t]he first time [it] came to know of the fact that DOL has issued a NOIR on the Certified Labor Certification (C-06032-81728) was upon receipt of the denial of the appeal by [USCIS] on 23 Oct 12."[19]

Moreover, Employer stated that its ETA 9089 was prepared by Mr. Harry Patel, who was sentenced to six months in prison and $165,000 in fines for violating an Agreed Permanent Injunction against practicing law entered into on August 19, 2002. Employer argued that its new representative, George R. Willy P.C.,[20] sent correspondence to the DOL on August 31, 2012 to correct the mistaken priority date and that the DOL had knowledge that Mr. Patel was engaged in the unauthorized practice of law when he filed the ETA Form 9089.[21] Employer's position is that it did not have an opportunity to respond to the NOIR as per 20 C.F.R. Section 656.32, which contravenes both the regulations and its due process rights. Employer seeks an order vacating the revocation and directing the CO to issue a fresh NOIR.

The CO urges BALCA to dismiss Employer's appeal as untimely because it failed to respond to the NOIR within 30 days (which the CO argues precludes it from filing an appeal) and also failed to file an appeal within 30 days of the date of the revocation, October 9, 2012. Though the DOL received notice from the USPS that it was unable to deliver the mail, the CO noted that the application file did not contain a change of address notification and the CO also sent the revocation notice to a new address for Employer suggested by the USPS. The CO claims the DOL received email notice that Employer was represented by new counsel on November 7, 2012, after the issuance of the NOIR.[22]

Substantively, the CO argues that the regulations permit an employer to re-file an application filed under the regulations in effect prior to March 28, 2005, under the PERM program and retain the filing date of the Form ETA 750, but only if the Form ETA 750 is still in process, a job order has not been placed, and the applications' job opportunities are identical. Employer used the filing date for a different application in which the job opportunities were not identical, and which was not in process because it had been withdrawn in 2002. The CO notes that per 20 C.F.R.

[18] AF 27-86.
[19] Employer's brief at p. 4. The record suggests Employer should have known its application was in jeopardy before DOL before that date. On November 16, 2011, The USCIS sent a letter to Employer stating that its Form I-140 was denied. (AF 108-113). The letter referenced Employer's ETA 9089, and stated that Employer should have immediately requested to correct the incorrect priority date with DOL, prior to filing any I-140 petition with USCIS. Employer appealed the USCIS determination on December 19, 2011, and on February 2, 2012, the USCIS notified Employer that the proceedings would be held in abeyance until the DOL weighed in on the validity of the labor certification. (AF 102-107; 98-99).
[20] Later known as Willy, Nanayakkara, Rivera, and Goins.
[21] AF 31.
[22] CO's Brief at p. 3.

Section 656.10(b), Employer takes responsibility for the accuracy of any representations made by the attorney or agent.

Finally, the CO notes that the burden is on Employer to show that it has complied with the regulations and requirements of the Act. He requests the appeal be dismissed as untimely or that the revocation be affirmed upon substantive review of the record.

LAW

Revocation

The BALCA engages in de novo review of the record upon which the CO denied or revoked permanent alien labor certification, together with the request for review and any statements of position or legal briefs.[23] The BALCA must then either affirm or overrule the revocation of certification, or direct that a hearing on the case be held.[24]

After issuance, a labor certification may be revoked by ETA using the procedures described in 20 C.F.R. Section 656.32. A labor certification is subject to invalidation by the Department of Homeland Security or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.[25]

Section 656.32 provides that the CO may revoke an approved labor certification if he or she finds the certification was not justified, upon providing individualized written notice to an employer. The procedures are, in pertinent part:

> (b)(1) The Certifying Officer sends to the employer a *Notice of Intent to Revoke* an approved labor certification which contains a detailed statement of the grounds for the revocation and the time period allowed for the employer's rebuttal. The employer may submit evidence in rebuttal within 30 days of receipt of the notice. The Certifying Officer must consider all relevant evidence presented in deciding whether to revoke the labor certification.
>
> (2) If rebuttal evidence is not filed by the employer, the *Notice of Intent to Revoke* becomes the final decision of the Secretary.
>
> (3) If the employer files rebuttal evidence and the Certifying Officer determines the certification should be revoked, the employer may file an appeal under § 656.26….[26]

Section 655.26 provides in pertinent part that:

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[23] 20 C.F.R. § 656.26(a)(4)(ii); *In the Matter of Albert Einstein Medical Center*, BALCA Case No. 2009-PER-00379 et al. (Nov. 21, 2011).
[24] 20 C.F.R. § 656.26(c)(1)-(3).
[25] 20 C.F.R. §656.30(d).
[26] 20 C.F.R. § 656.32(b)(1)-(3).

(a)(1) If a labor certification is denied, if a labor certification is revoked pursuant to § 656.32, or if a debarment is issued under § 656.31(f), a request for review of the denial, revocation, or debarment may be made to the Board of Alien Labor Certification Appeals by the employer or debarred person or entity making a request for such an administrative review in accordance with the procedures provided in paragraph (a) of this section. In the case of a finding of debarment, receipt by the Department of a request for review, if made in accordance with this section, shall stay the debarment until such time as the review has been completed and a decision rendered thereon.

(2) A request for review of a denial or revocation:

(i) Must be sent within 30 days of the date of the determination to the Certifying Officer who denied the application or revoked the certification….[27]

In the notice of intent to revoke (NOIR), the CO stated that

[s]hould the employer choose to rebut these findings, it must submit evidence within 30 days of the receipt of this notice….If the Certifying Officer makes a final determination to uphold the revocation, the employer may file a request for review of the determination to the Board of Alien Certification Appeals (BALCA) per 20 C.F.R. §656.26. However, the employer may only file an appeal to BALCA if it previously submitted rebuttal evidence to the Department in response to this notice.[28]

Notice Requirements

Cases filed prior to the effective date of the current PERM regulations set forth a standard we find applicable to the questions presented by this case.[29] In *Madeleine S. Bloom*, the BALCA held that regulatory deadlines would only be tolled in the rare instances in which failure to do so would result in manifest injustice.[30] This holding was narrowed in *Park Woodworking, Inc.*, in which the Board found that mere inadvertence or negligence of an employer or its counsel was insufficient to excuse an untimely rebuttal.[31]

In *In the Matter of Claritas, Inc.*, the CO issued a Notice of Findings (NOF), noting that the attorney representing the employer had been suspended from practicing and inquiring if the employer wanted to withdraw the application, continue without representation, or identify new

[27] 20 C.F.R. §656.26(a)(1)-(2)(i).

[28] AF 91.
[29] *See* Fed. Reg. 77326 (Dec. 27, 2004); 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004).
[30] 88-INA-152 (Oct. 13, 1989).
[31] 90-INA-93 (Jan. 29, 1992).

representation and continue processing the application.[32] The NOF was addressed to the employer's chief financial officer. The CO did not receive a response to the NOF within 35 days of issuance and therefore considered the application denied by operation of law. The BALCA considered the chief question to be whether the employer ever got notice of the NOF, and found the preponderance of the evidence supported the employer's contention that it did not receive the NOF when it was mailed, and thus could not be found to have timely responded.

In *In the Matter of Vincheer Fashion, Inc.*, the employer failed to timely rebut a NOF and its counsel argued that he never received it as it was mailed to an old address, and requested the time limitation for filing the rebuttal be tolled.[33] The sole issue before the BALCA was whether it would be a manifest injustice to not toll the regulatory deadline for filing rebuttal, and the panel found it turned on whether or not counsel timely notified the CO of his change of address such that the CO erred in mailing the NOF to his old address. The panel noted that it was immaterial that the CO had mailed the NOF and final determination to the employer and the alien, stating that "it would be unreasonable…to impute knowledge of Employer or Alien onto counsel where the CO failed to effect service on the representative as required by the regulations. In our system of justice, a client relies on his or her representative to respond to all pleadings….It is not expected, nor is it the job of the client to call the representative each time s/he receives a paper relevant to the proceeding."[34] The BALCA found that though there was "confusion in the record" about when employer's counsel informed the CO of his change of address, the employer was deprived of the opportunity to respond to the NOF and ordered the CO to issue a new NOF to counsel and provide them a new period in which to rebut the findings.

On the other hand, in *In the Matter of Valle Verde Retirement Homes*, the CO's denial was affirmed because the panel found that "superseding oversights" on the part of the employer's counsel regarding providing the proper service address to the CO were the direct cause of her failure to file a timely rebuttal.[35] Additionally, it was not clear that labor certification would have been granted if the rebuttal had been timely filed, nor was it a clear case of an employer being misled by its own counsel. "Therefore, [it was] not one of those rare instances in which failure to waive the deadline for the filing of Employer's rebuttal would result in manifest injustice."[36]

DISCUSSION

The BALCA has jurisdiction to decide if Employer was properly notified of the issuance of the NOIR, since the regulations provide that a failure to rebut the NOIR can preclude an

[32] 2008-INA-00164 (April 1, 2009).
[33] 98-INA-00024 (Sept. 23, 1998).
[34] *Id*. at *2.
[35] 89-INA-00356 (Feb. 8, 1991).
[36] *Id*. at *5.

appeal to the panel. Otherwise, an employer would have no recourse if its failure to provide rebuttal evidence was due to a mistake on the part of the CO.

The record before the panel establishes the following:

1. Employer's 2006 ETA Form 9089 listed an Employer Contact Address c/o Shaukat Ali at 1800 Austin Parkway, Apt. #213, Sugarland, TX 77479. Employer's address was listed at 3402 Chimney Rock Road, Houston, TX 77056. Employer's Agent or Attorney was listed as Harry Patel at 6065 Hillcroft Ave. Suite 502, Houston, TX 77081. (AF 134).
2. On November 16, 2011, the U.S. Citizenship and Immigration Services denied Employer's Form I-140 Immigrant Petition for Alien Worker in a letter that was mailed to Employer c/o Shaukat Ali at a different address than that on the ETA Form 9089, 5615 Richmond Ave., Ste. 230, Houston TX 77057. (AF 108-113).
3. On December 6, 2011, Employer's new counsel submitted a Form G-28 Notice of Appearance to the Department of Homeland Security in regard to immigration matters before the USCIS. (AF 9).
4. Employer did not file anything with the DOL to indicate a change in its mailing address or that it was represented by new counsel.
5. On December 19, 2011, a receipt for Employer's I-290B Notice of Appeal of the USCIS denial was sent to Employer's new counsel at 1200 Soldiers Field Dr. Ste. 100, Sugarland, TX 77479. (AF 102).
6. On February 2, 2012, USCIS requested DOL expedite its determination of whether or not Employer's labor certification was valid. (AF 100-101). The letter noted "there are some anomalies in the petitioner's claimed address and location throughout the record…which raises issues related to the veracity of the petitioner's representative's claims, and the legitimacy of the petitioner based on other evidence in the record."
7. On February 2, 2012, the USCIS Administrative Appeals Office wrote to Shaukat Ali at 3402 Chimney Rock Road, Houston, TX 77056 (the address provided for Employer in its 2006 ETA Form 9089), stating that proceedings before it would be held in abeyance while it consulted with DOL about the validity of the labor certification. (AF 98-99). A copy of the letter was sent to Employer's new counsel at 1200 Soldiers Field Drive, Ste. 100, Sugarland, TX 77479.
8. On February 27, 2012, William Carlson, Administrator of the Office of Foreign Labor Certification, wrote a letter to USCIS' Administrative Appeals Office stating that the Department intended to revoke certification of Employer's PERM application. (AF 96-96).
9. On May 11, 2012, the CO mailed a NOIR to Employer c/o Shaukat Ali at 1800 Austin Parkway, Apt. #213, Sugarland TX 77479, and to Harry Patel at 6065 Hillcroft Ave., Ste. 502, Houston, TX 77081, the addresses provided in the 2006 ETA Form 9089. (AF 89-91).

10. On May 17, 2012, the United States Postal Service (USPS) provided the DOL an address for Employer's point of contact, Shaukat Ali, at 2710 Grants Lake Blvd., Unit M4, Sugarland, TX 77479, in lieu of the Austin Parkway address. There was no indication Mr. Patel's address was invalid. (AF 94-95). There is no evidence the CO mailed another copy of the NOIR to this suggested address.
11. On August 31, 2012, Employer's new attorney sent an email to the Certifying Officer at PLC.Atlanta@dol.gov requesting an amendment to the ETA Form 9089 priority date from 30 Mar 01 to 1 Feb 06. The email was signed by Zaheer Zaidi, "Senior Associate Attorney for Petitioner" at 1200 Soldiers Field, Suite 100, Sugarland, TX 77479.
12. On October 9, 2012, the CO mailed a Revocation Notice to Employer c/o Shaukat Ali at 5615 Richmond Ave., Ste. 130, Houston, TX 77057 (see No. 2, *supra*), and to Harry Patel at the Hillcroft Ave. address. The letter noted that though the Department had not received any indication Employer's address had changed, the USPS suggested a different address (Grants Lake Blvd.) and it had, as a courtesy, provided a copy of this letter to that address. It also stated that the copy of the NOIR to Mr. Patel had been returned to sender but an online search revealed the attorney's address matched that on the ETA Form 9089. It did not indicate that the DOL had sent the NOIR to any other addresses besides those on the 2006 ETA Form 9089.
13. On November 7, 2012, Employer's new attorney sent an email to the Certifying Officer at PLC.Atlanta@dol.gov requesting a duplicate NOIR with a fresh date to respond. (AF 79). This email appears to contain an attached affidavit from Shaukat Ali (AF 74-75) and a Form G-28 Notice of Appearance to the Department of Homeland Security (see No. 3, *supra*). The affidavit states that Employer did not receive the NOIR. The email lists 1200 Soldiers Field Dr., Suite 100, Sugarland, TX 77479, as counsel's address.

The regulations provide that an employer has thirty days from the date of *receipt* of a NOIR to file its rebuttal evidence. They go on to state that only if rebuttal evidence is filed may an employer appeal a subsequent revocation to the BALCA.[37] This is because the PERM regulations favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program.[38]

Regulatory and due process requirements do not require extraordinary measures on the part of the Agency to ensure its correspondence reaches an employer. The evidence shows, however, that both Employer and the DOL were remiss in ensuring that proper notice could be given. Employer did not specifically provide updated contact information to the DOL until its email on August 31, 2012, but the DOL was on notice as early as February 2, 2012 that the contact information it had on file may not have been accurate.[39]

[37] 20 C.F.R. § 656.32(b).
[38] *HealthAmerica*, 2006-PER-1, slip op. at 19 (July 18, 2006) (en banc).
[39] See numbers 6 and 10, above.

As evidenced by its active correspondence with USCIS, Employer was on notice that there were some problems with its ETA Form 9089, and it was trying to correct those before USCIS as early as December 23, 2009, when its new lawyer wrote that an inadvertent error on the form led to a mistaken priority date. It was provided further notice that this issue would be relevant before the DOL on February 2, 2012, when the USCIS told Employer that it would be holding its appeal of the denial of the I-140 in abeyance until the DOL weighed in. The records shows Employer did not announce that it was no longer represented by Mr. Patel or provide the DOL with a formal notice of appearance from its new attorneys until November 7, 2012.

Nevertheless, Employer was deprived of the opportunity of timely submitting rebuttal evidence to the NOIR, and the CO was on notice that its contact information was out of date. Employer stated that it became aware the CO had sent a NOIR on October 23, 2012, and submitted a request to the CO for the re-issuance of the NOIR and a fresh date to respond on November 7, 2012, to the attorney's return address.[40] There is no evidence in the record that the CO responded to this request, and Employer avers that it did not receive copies of the NOIR or the Revocation until the DOL responded to its Freedom of Information Act Request on March 4, 2013. The record supports Employer's contention that it did not receive the NOIR until that date, and it filed its request for BALCA review within 30 days.

We find that though the PERM regulations require strict interpretation to facilitate quick resolution, an employer's right to respond to a CO's preliminary findings is also enshrined in them. In this case, Employer's counsel did not receive a copy of the NOIR within a period of time that would have allowed him to timely submit rebuttal evidence, a condition that results in manifest injustice and renders the CO's revocation an abuse of discretion.

Therefore, we overrule the revocation of certification and remand the case to the CO to re-issue the NOIR to Employer and its counsel at the proper addresses. Within 30 days of receipt, Employer must submit rebuttal evidence or the NOIR will become the final decision of the Secretary and it will be precluded from filing an appeal of the revocation with the BALCA, in accordance with 20 C.F.R. Section 656.32.

[40] AF 79.

Accordingly, **IT IS ORDERED** that the revocation of labor certification in this matter is **OVERRULED** and the case is remanded to the CO for further processing in accordance with this order.

For the panel:

Larry W. Price
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 29 July 2013

BALCA Case No.: 2011-PER-02614
ETA Case No.: A-08246-83442

In the Matter of:

CHABAD LUBAVITCH CENTER,
Employer

on behalf of

NORMAN J. FRANK,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Roni P. Deutsch
Law Office of Roni P. Deutsch
Encino, CA
For the Employer

Gary M. Buff, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **McGrath, Geraghty, Calianos**
Administrative Law Judges

TIMOTHY J. McGRATH
Administrative Law Judge

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of

Federal Regulations ("C.F.R."). For the reasons set forth below, we reverse the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On September 3, 2008, the CO accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Translator." (AF 58).[1] On September 17, 2008, the CO denied certification stating "Section I of ETA Form 9089 indicates the occupation is non-professional. However the SOC[2] for occupation listed on the application is found on the list of Professional Occupations from Appendix A of the Preamble to 20 C.F.R. 656. Because the required recruitment process was not conducted, the application is denied." (AF 70).

The Employer requested reconsideration on September 25, 2008 arguing the offered position of "Translator" is not found on the list of professional occupations and therefore the employer's response that the application was for a non-professional position is correct, and the recruitment was appropriate. (AF 52-67). Having apparently accepted the Employer's arguments on reconsideration, the CO sent the Employer a Request For Information on April 4, 2011, and the Employer provided the requested information on May 26, 2011. (AF 44-51). On June 1, 2011, the CO sent the Employer an audit notification requesting documentation in accordance with 20 C.F.R. § 656.20. (AF 40-43). The Employer submitted the requested documentation on June 29, 2011, including its job order placed with the State Workforce Agency ("SWA"). (AF 11-39).

On July 11, 2011, the CO issued a second denial letter, stating that the job order contained job requirements which exceeded the job requirements listed on the Employer's ETA Form 9089 in violation of 20 C.F.R. § 656.17(f)(6) of the regulations. (AF 9-10). Specifically, the job order posted at the New York State work force agency[3] contains an experience requirement of "Mid Career (2-15 years)" whereas the ETA Form 9089 only required 24 months experience. (AF 10).

[1] In this decision, AF is an abbreviation for Appeal File.
[2] SOC stands for Standard Occupational Classification.
[3] The job order was posted at www.americasjobexchange.com.

On August 4, 2011, the Employer requested reconsideration. (AF 2-8). The Employer argued that the regulatory authority relied on by the CO for the denial of labor certification applies only to advertisements and not job orders placed with the SWA. (AF 2). The Employer argued that the regulation section pertaining to job orders does not contain the same content requirements as those for advertisements. (AF 2). The Employer additionally argued that the SWA job order form has the following experience options: Intern, Entry Level (0-2 years), Mid-Career (2-15 years), or Senior (15+ years). (AF 2). The Employer explained: "given that the offered position requires not less than two years of experience, it was automatically listed under Mid-Career (2-15 years)" and the Employer had no control over the automatic listing. (AF 3).

On August 26, 2011, the CO forwarded the case to BALCA. (AF 1). The CO upheld his denial on the basis that "the job order is one part of the recruitment effort used by the employer to test the labor market and must therefore contain the same information required of advertisements set forth in . . . 20 C.F.R. §[] 656.17(f)." (AF 1). The CO acknowledged the Employer's argument that the experience field of the job order only allowed pre-determined experience levels, but the CO countered that the job order form also contained a "free form field in which the employer had the opportunity to specify its actual minimum requirements." (AF 1).

BALCA issued a Notice of Docketing on December 6, 2011, and the Employer filed a Statement of Intent to Proceed on December 20, 2011. Neither the Employer nor the CO filed appellate briefs in this matter. On September 6, 2012, the Employer certified via e-mail that the job identified in the PERM application was still open and available and that the alien identified in the PERM application remains ready, willing and able to fill the position.

DISCUSSION

An employer filing an application for permanent labor certification is required to conduct certain recruitment steps prior to filing its application. One of the mandatory recruitment steps is the placement of a job order with the SWA serving the area of intended employment for a period of 30 days. 20 C.F.R. §§ 656.17(e)(1)(A),(2)(i). The start and end dates of the job order entered on the application serve as documentation of this step. *Id.*

The regulations further provide content requirements at 20 C.F.R. § 656.17(f) for "advertisements placed in newspapers of general circulation or in professional journals." Under this section, such advertisements must "not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089." 20 C.F.R. § 656.17(f)(6).

The CO denied the Employer's application because its SWA job order contained job requirements which exceeded the job requirements listed in its ETA Form 9089 in violation of Section 656.17(f)(6). Section H.6 of the Employer's ETA Form 9089 indicated that it requires 24 months of experience in the position offered. (AF 73). In comparison, the Employer's SWA job order submitted with its audit materials stated that the position requires "Mid Career (2-15 years)" experience. (AF 31). The CO's denial is appropriate if subsection 6 of Section 656.17(f) applies to job orders, as the requirements in the job order exceeded the requirements in the ETA Form 9089. *See CCG Metamedia, Inc.*, 2010-PER-00236 (Mar. 2, 2011) ("Stating a range of experience in the recruiting materials that goes above the minimum experience requirements stated in the application inflates the job requirements in the job advertisements, and does not accurately reflect the Employer's attestations on the ETA Form 9089. Moreover, it is in violation of the regulations.").

However, as argued by the Employer, Section 656.17(f), "Advertising Requirements" does not refer to job orders. While job orders are clearly part of the overall recruitment process and are a form of advertisement, the Employment and Training Administration ("ETA") expressly limited Section 656.17(f) to "advertisements placed in *newspapers of general circulation or in professional journals*." Job orders do not fall within these two enumerated categories of advertisements. Furthermore, when looking at the overall structure of the PERM regulations, it appears the ETA purposely omitted language stating that the requirements of Section 656.17(f) apply to job orders. For example, under Section 656.10(d) requiring employers to post a Notice of Filing, the ETA added subsection 4 which explicitly states "the notice must contain the information required for advertisements by § 656.17(f)." 20 C.F.R. § 656.10(d)(4). Thus, although notice of filings would not normally be categorized as "newspaper" or "professional journal" advertisements, the ETA expressly stated it intended

Section 656.17(f) to apply to notice of filings as well. The ETA did not include such language in the section addressing job orders.

Looking at Section 656.17(e)(2) of the regulations provides further insight into the ETA's intent. This section addresses the two mandatory recruitment steps employers must conduct for nonprofessional occupations: a job order and two advertisements in a Sunday edition of a newspaper. The structure of this section is significant:

> (2) *Nonprofessional occupations.* If the application is for a nonprofessional occupation, the employer must at a minimum, place a job order and two newspaper advertisements within 6 months of filing the application. The steps must be conducted at least 30 days but no more than 180 days before the filing of the application.
>
> > (i) *Job Order.* Placing a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application serve as documentation of this step.
> >
> > (ii) *Newspaper advertisements.*
> >
> > > (A) Placing an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity.
> > >
> > > . . .
> > >
> > > (D) The advertisements must satisfy the requirements of paragraph (f) of this section.[4]
>
> (f) *Advertising requirements.*
>
> . . .

Clearly subsection (D) requires the advertisements discussed in the prior subsection to comply with the advertising requirements of Section 656.17(f). Job orders are contained within the same regulation, yet the ETA chose not to require job orders to comply with Section 656.17(f) as it did with newspaper advertisements. If the ETA intended the advertising

[4] The mandatory requirement steps for professional occupations under Section 656.17(e)(1) are structured the same as for non-professional occupations, in that a subsection specifically applies Section 656.17(f) to newspaper advertisements, but there is no complementing subsection applying Section 656.17(f) to job orders.

requirement of Section 656.17(f) to apply to job orders, it could have easily stated so in subsection (i). We are unwilling to write such a requirement into the regulation.

BALCA, in a recent en banc decision, *A Cut Above Ceramic Tile*, 2010-PER-00224 (Mar. 8, 2012), held that based on a reading of the plain language of the PERM regulations, an employer is not required to submit a copy of its job order as proof of the recruitment step, because the regulations state "the start and end dates of the job order entered on the application serve as documentation of this step." In its analysis, the Board contrasted the regulatory language used for job orders in Section 656.17(e)(2)(i) with the language used for newspaper advertisements in Section 656.17(e)(2)(ii). The Board stated "unlike SWA job order regulations, the regulations governing placement of a newspaper advertisement provide that 'documentation of this step can be satisfied by furnishing copies of the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper.'" *Id.* at 6. The Board went on to state "this distinction is one of relevance. While the PERM regulations clearly require an employer to be able to provide proof of publication of its newspaper advertisement, the regulations do not require an employer to be able to provide proof of publication of SWA job order." *Id.* at 6.

In support of its regulatory interpretation, the Board in *A Cut Above Ceramic Tile* quoted the Supreme Court, stating where Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion o[r] exclusion." *Id.* at 7 (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983)). The same analysis from *A Cut Above Ceramic Tile* regarding documentation of job orders, is equally applicable here. The ETA included language in Sections 656.17(e)(2)(ii)(D), 656.17(e)(1)(i)(B)(3), and 656.10(d)(4) applying the content requirements of Section 656.17(f) to newspaper advertisements and notice of filings, but omitted such language in Section 656.17(e)(2)(i) addressing job orders. It can only be reasoned that the omission with regard to job orders was intentional as the ETA obviously knew how to incorporate the advertising requirements of Section 656.17(f) when it so desired as demonstrated

by the three occasions where the requirements were specifically made applicable.[5] There is nothing in the regulatory history which suggests that the ETA intended Section 656.17(f) to apply to job orders despite the omission of such a requirement in the regulations. Lastly, we acknowledge that the outcome of this decision causes some concern as job orders play an important role in the recruitment of U.S. workers, and the process would certainly be enhanced if the advertising requirements of Section 656.17(f) applied to job orders. However, given that the regulations contain many specific requirements of employers filing Applications for Permanent Employment Certification, and almost strict liability for failure to comply with the delineated regulatory obligations, we are unwilling to add an additional, unwritten mandate for applicants. That power rests solely with the ETA to amend the regulations to ensure a result that more effectively aligns with the purpose of the regulations.

Thus, we hold based on the plain and unambiguous language of the regulations that the content requirements of 20 C.F.R. § 656.17(f) do not apply to job orders placed with the applicable SWA.[6] Therefore, because the CO denied labor certification because the Employer's

[5] We acknowledge that in a footnote in *A Cut Above Ceramic Tile* the Board indicated that if an employer chooses to submit documentation of its job order, such documentation must comply with 20 C.F.R. § 656.17(f). *Id.* at 12 n.5. However, the Board did not analyze the issue in any depth and the conclusory statement found in the footnote is non-binding dicta.

[6] We further find that applying the plain language of the regulations does not produce an absurd result--there are rational explanations why the ETA chose to treat job orders differently from other forms of recruitment. For example, as pointed out by the Employer in this matter, the SWA's job order form consisted of drop-down selections, limiting an employer's ability to control the content of the job order. (AF 3). Because job orders are under the control of the various states, the job order and its content is not entirely within an employer's control. Such a limitation on an employer's ability to dictate the content of job orders would be a legitimate and rational reason for the ETA to distinguish job orders from other recruitment steps. We also note that the ETA distinguished job orders from other recruitment steps in other ways. For instance, although all other forms of advertisements are required to be documented by providing copies of such advertisements to the CO, copies of job orders are not required--merely stating the start and end dates of the job order on the ETA Form 9089 is sufficient to document this step. *Compare* 20 C.F.R. § 656.17(e)(1)(i)(A), *with* 20 C.F.R. § 656.17(e)(1)(i)(B)(4), (ii)(A)-(J).

job order did not meet the content requirements found in Section 656.17(f), we must reverse the CO's denial.[7]

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **REVERSED** and the CO is directed to **GRANT** certification.

For the Board:

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, MA

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges

[7] We acknowledge that this decision is contrary to several other panel decisions applying Section 656.17(f) to job orders. *See e.g.*, *East Tennessee State University*, 2010-PER-00038, PDF at 8 n.7 (Apr. 18, 2011) (*citing Jesus Covenant Church*, 2008-PER-00200 (Sept. 14, 2009)) (noting the attestation requirement that a job be clearly open to U.S. workers requires an employer to comply with the advertising content requirements); *see also Acrison, Inc.*, 2009-PER-00399, PDF at 5-6 (Oct. 27, 2010); *Xceed Technologies*, 2010-PER-00080 (July 27, 2010); *N.A.F.A. Consultants and Employment Agency, Corp.*, 2010-PER-00690 (Aug. 19, 2010). We reviewed those decisions and do not find the reasoning set forth in the respective discussions to be persuasive. As there has been no en banc decision on this issue, we are not bound by those decisions, and respectfully disagree with their holdings. Although this Panel has previously affirmed denials based on the content of job orders violating the requirements of Section 656.17(f), in those past cases we stated in a footnote that it was not necessary to consider in depth the issue of whether the requirements of Section 656.17(f) apply to job orders; the employer failed to raise the issue, thereby effectively waiving any objection to the regulation's application. *See, e.g.*, KPMG, LLP, 2011-PER-02673/02695, PDF at 3 n.2 (Jan. 23, 2013); *Systems Management Services*, 2011-PER-00862, PDF at 3, n.2 (June 7, 2012).

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800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 26 July 2013

In the Matters of:

SEVEN OAKS LANDSCAPES-HARDSCAPES, INC.,
Employer,

on behalf of

HECTOR Z. GUZMAN,	**BALCA Case No.:**	**2011-PER-02628**
	ETA Case No.:	A-08165-61120
ARMANDO HERNANDEZ PEREZ,	**BALCA Case No.:**	**2011-PER-02471**
	ETA Case No.:	A-08165-61128

Aliens.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Christine Lockhart Poarch, Esq.
Poarch Law
Salem, VA 24153
For the Employer

Gary M. Buff, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Calianos, Geraghty, McGrath**
Administrative Law Judges

JONATHAN C. CALIANOS
Administrative Law Judge

DECISION AND ORDER
REVERSING DENIALS OF CERTIFICATION

These matters arise under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of

Federal Regulations ("C.F.R."). The above captioned cases have been consolidated because they present the common issue of whether the Certifying Officer ("CO") of the Employment and Training Administration ("ETA"), Office of Foreign Labor Certification ("OFLC") correctly denied labor certification in two applications on grounds that the Employer had not complied with 20 C.F.R. § 656.10(d)(1)(ii) and § 656.10(d)(3)(iv), as its Notice of Filing ("NOF") failed to indicate the specific dates the NOF was posted. For the reasons set forth below, we reverse the denial of the Employer's Applications for Permanent Employment Certification.

BACKGROUND

On June 18, 2008, the CO accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Landscape Tech." (AF 81).[1] On January 23, 2009, the CO issued an Audit Notification, instructing the Employer to file, among other things, documentation of the notice of filing as outlined in 20 C.F.R. § 656.10(d). (AF 75). On February 17, 2009, the Employer responded to the Audit Notification.[2] (AF 68). On June 24, 2010 the CO denied the Employer's application on the ground that the Employer failed to "confirm the NOF was posted for ten (10) consecutive business days between 30 and 180 days before filing its ETA Form 9089." (AF 1). On July 6, 2010, the Employer requested reconsideration.[3] (AF 64).

[1] For purposes of this Decision and Order, we are citing to a representative appeal file, 2011-PER-02628, which will be referenced to as "AF" followed by the page number.

[2] The Employer's Response to the CO's Audit Notification is not found in the Appeal File. In its place is a typewritten note indicating that the Employer's response "was received by the… [OFLC] on 02/17/2009 [but] is not available for inclusion in the administrative file." (AF 68). There is no indication as to why the response documentation is missing from the appeal file. The typewritten note includes an additional self-serving statement that the Employer's response "is not necessary to render an accurate determination on the Employer's request for reconsideration as outlined in the Transmittal Letter." (AF 68). As this appeal turns on the NOF documentation supplied by the Employer in its Response, we disagree with the CO's self-serving notation contained in the file. We further note that the Employer's Response to the Audit Notification is absent in both appeal files, and the content of the Employer's Response is only discernible by reviewing the documentation provided in the Employer's Second Request for Reconsideration. How documents the OFLC acknowledged it received go missing from the appeal file without explanation is concerning to the Panel. Attempting to minimize the inadequate preservation of records by suggesting their content is worthless to these appeals, provides no measure of comfort.

[3] Again there are problems with missing documents in these appeal files. In place of the Employer's Response to the CO's Denial Letter in the Appeal File is a typewritten note indicating that the OFLC received the Employer's Response "on 07/06/2010" but the document "is not available for inclusion in the administrative file." (AF 64). There is also the same self-serving statement that the document "is not necessary to render an accurate determination on the Employer's request for reconsideration as outlined in the Transmittal Letter." (AF 64). We note that the Employer's Response to the CO's Denial Letter is absent in both appeal files.

On May 5, 2011, the CO sent a Five Year Documentation Request, noting it had received a request for reconsideration and asked the Employer to resubmit within thirty days a complete copy of ETA Form 9089, a complete copy of the Request for Reconsideration, and a complete copy of the audit documentation previously submitted by the Employer. (AF 63). The Employer filed its response to the Documentation Request on May 20, 2011.[4] (AF 4). On July 7, 2011, the CO denied Employer's Application for failing to timely respond to the Documentation Request. (AF 60).

On July 27, 2011, the Employer filed its Second Request for Reconsideration, claiming administrative error on the part of the Department of Labor, appending a copy of the entire original filing, audit materials, and correspondence with the CO.[5] (AF 3-59). On August 24, 2011, the CO determined the Employer had not overcome all of the deficiencies stated in the determination letter because the Employer failed to disclose the posting dates of the NOF and as a result "failed to confirm the NOF was posted for ten (10) consecutive business days between 30 and 180 days before filing its ETA Form 9089." (AF 1). Furthermore, the CO acknowledged that the Employer also submitted a new affidavit with its reconsideration request, affirming the specific dates of posting, but declined to admit such evidence because a request for reconsideration may include only documentation the employer did not have an opportunity to present to the CO, but which existed at the time the application was filed. (AF 1). The CO found that the newly submitted affidavit, sworn July 1, 2010, (AF 27), was created after the Application was filed and therefore inadmissible in a request for reconsideration.[6] (AF 1).

The CO forwarded the case to BALCA on July 27, 2011, and BALCA issued a Notice of Docketing on December 13, 2011. The Employer received an oral extension of time and filed a

[4] Although the CO alleged the Employer failed to respond to the Five Year Documentation Request, the Employer, in its Second Request for Reconsideration, provided copies of certified mail receipts indicating its Response was received by the Atlanta National Processing Center ("ANPC") on May 20, 2011. (AF 4). Again, the Employer's Response to the CO's Document request is absent from the appeal files of both cases.

[5] The administrative record in this case is almost entirely compiled of the documentation provided by the Employer in its Second Request for Reconsideration. Given the substantial shortcoming contained in the administrative record in both of these consolidated appeals as discussed *supra* in footnotes 2-4, in all instances where there is a conflict between what the Employer states it sent to the OFLC and what the CO claims it received, we resolve all such conflicts against the CO.

[6] Because we find that the Employer's original filing was sufficient, we do not address whether the Employer's new affidavit is admissible.

Statement of Intent to Proceed and Notification of Alien's Change of Address on January 4, 2012. The Employer filed its Memorandum of Law in Support of Appeal on January 27, 2012. On December 27, 2012, BALCA issued an Order Requiring Certification on Mootness, and on January 10, 2013, the Employer certified that the jobs identified in the PERM application were still open and available on the same terms as set forth in the application, and that the aliens identified in the PERM applications remain ready, willing and able to fill the positions.

DISCUSSION

Under the PERM regulations, when an employer files an application for permanent labor certification, it must provide notice of the filing of the application ("NOF") to its employees. 20 C.F.R. § 656.10(d)(1). This is done by posted notice, for at least 10 consecutive business days, at the facility or location of the employment. 20 C.F.R. § 656.10(d)(1)(ii). The regulations further state the NOF must be "provided between 30 and 180 days before filing the application." 20 C.F.R. § 656.10(d)(3)(iv). Section 10(d) contains specific requirements as to the content of the NOF, but nowhere does it specifically require the Employer to document or identify the precise dates the NOF was posted. As in the instant case where the Employer has no bargaining representative for the employees, Section 10(d) requires the notice to be posted "in conspicuous places" and must be "clearly visible and unobstructed." 20 C.F.R. §656.10(d)(ii). The regulation goes on to state that when an employer is asked to document its compliance with this section, the documentation requirement can be "satisfied by providing a copy of the posted notice and stating where it was posted…" *Id*. There is no requirement that the specific dates of posting be supplied as part of the documentation requirement.

The question of whether an employer must document the precise dates of the NOF posting has been addressed by other BALCA Panels,[7] however, we have found only one such decision in which the Panel performed any analysis of the content and construction of Section 10(d).[8] In *Sonora Desert Diary*, the Panel determined:

[7] *See Big Dog Homes, LLC.*, 2011-PER-01421 (Dec. 27, 2012) (affirming CO's denial); *VIP Tours of California*, 2011-PER-00540 (March 19, 2012) (affirming CO's denial); *Future Quest USA, Inc.*, 2010-PER-01516 (March 6, 2012) (affirming CO's denial); *Salem Village Nursing and Rehabilitation Center, LLC.*, 2022-PER-00587 (Jan 27, 2012) (affirming CO's denial).

[8] *See Sonora Desert Diary, LLC.*, 2011-PER-00066 (April 13, 2012) (affirming CO's denial).

> [a]lthough 20 C.F.R. § 656.10(d)(1)(ii) pertaining to how the NOF may be documented does not specifically state that an Employer must give the dates the notice was posted, we agree with other BALCA panels that have found such a requirement to be implicit. If the Employer does not provide the dates, the CO cannot independently verify either that the notice was posted for ten days or was posted between 30 and 180 days before filing ETA Form 9089.

2011-PER-00066 PDF at 4-5 (citations omitted). We agree with the Panel's observation that Section 10(d) does not require employers to document the dates the NOF was posted, but respectfully disagree with the conclusion that such a requirement is implicit.

The golden rule of statutory construction provides that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). Furthermore, other canons of construction advocate caution against implying provisions not included in the regulations. The Supreme Court has specifically noted that "to supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 250 (1926). To expand the regulations to cure a presumed inadvertent omission amounts to judicial overreaching, especially when confronting a regulation crafted with such painstaking attention to detail as the PERM regulations. *See id.* Here, the clear language of the regulation creates no requirement for Employers to document the NOF's posting dates. Absent such a requirement, we would be remiss to read one into the regulations.

The PERM regulations are rife with minutia, requiring an applicant's exacting adherence the first time around. There are no second bites at the apple, and when an applicant omits information required by the regulations, denial is the certain consequence. *See* 20 C.F.R. § 565.11(b) ("requests for modifications to an application will not be accepted for applications submitted after July 16, 2007."). Here the regulations set forth a minimum standard for documenting compliance with the posting requirements, and those standards do not include specifying the precise dates the NOF was posted. It is presumed the absence of such particularity in documenting the specific dates the NOF was posted, was intentional by the drafters. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute, but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983)).

We note that Section 10(d)(1)(ii) is not rendered superfluous or ineffective by our ruling. ETA Form 9089 Section I.e.25, requires the employer to affirm whether "notice of this filing [was] posted for 10 business days in a conspicuous location at the place of employment, ending at least 30 days before but not more than 180 days before the date the application is filed." (AF 77). Therefore, although nothing in ETA Form 9089 requires the Employer to document the specific dates the NOF was posted, the Employer must still affirm, under oath, that the NOF complies with the regulations set forth in Section 10(d). Here, the Employer properly affirmed that the notice was posted for ten consecutive business days within the specified period, and therefore met its obligations under Sections 10(d)(1)(ii) and 10(d)(3)(iv).

While almost complete, we think one more point requires brief discussion. An argument can be made that section 656.10(d)(4) requires some indication within the NOF that it was posted between 30 and 180 days before the PERM application was filed. The NOFs at issue in these appeals do not contain such a notification, and presumably, if such a requirement was found to exist in the regulations, it could be met by either including a general statement within the NOF that the notice was posted between 30 and 180 days before filing the application, or include the actual posting dates within the NOF. We find no such requirement exists in the regulations.

Section (d)(4) states that: "If an application is filed under § 656.17, the notice must contain the information required for advertisements by § 656.17(f)… and must contain the information required by paragraph (d)(3) of this section." 20 C.F.R. § 656.10(d)(4). Paragraph (d)(3) provides:

> (3) The notice of the filing of an Application for Permanent Employment Certification must:
>
> > (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
> >
> > (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
> >
> > (iii) Provide the address of the appropriate Certifying Officer; and
> >
> > (iv) Be provided between 30 and 180 days before filing the application.

20 C.F.R. § 656.10(d)(3). While we read paragraphs (i) – (iii) as requiring specific content within the NOF, we do not read paragraph (iv) in the same manner. Paragraphs (i) and (ii) each start with the verb "[s]tate" and clearly require specific content within the NOF. Similarly, paragraph (iii) commences with "[p]rovide" and dictates the inclusion of the address of the Certifying Officer within the NOF. Conversely, paragraph (iv) states that the notice must: "Be provided," and requires the applicant to post the NOF within the specified time periods. Had the drafters intended paragraph (iv) to include a content requirement, they would have written it similar to paragraph (ii) along the lines of "State the notice was provided between . . ." To read paragraph (iv) as containing a content requirement, necessarily ignores the specific variation in word choice selected by the drafters. Such a reading is at odds with the teachings of statutory construction and we have seen no cases where the CO has denied a PERM application solely because the applicant failed to include such information within the NOF itself. While no party has specifically invited us to traverse this path, we wanted to be sure that we considered all possibilities.

ORDER

For the foregoing reasons, it is **ORDERED** that the denials of labor certification in these consolidated appeals are hereby **REVERSED,** and we direct the Certifying Officer to **GRANT** labor certification in these cases.

For the Board:

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, MA

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 12 April 2013

BALCA Case No.: 2011-PER-00789
ETA Case No.: A-08212-74534

In the Matter of:

MICROSOFT CORPORATION,
Employer

on behalf of

HERNANDEZ, DIANA MARI,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Mark S. Cross, Esquire
Berry Appleman & Leiden LLP
Houston, Texas
For the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson and Reilly**
Administrative Law Judges

DECISION AND ORDER
GRANTING CERTIFICATION

PER CURIAM. This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the PERM regulations at 20 C.F.R. Part 656.

BACKGROUND

On July 30, 2008, the Certifying Officer ("CO") accepted for filing the Employer's ETA Form 9089 for the position of "Support Engineer." (AF 80-90).[1] The Employer stated that the job opportunity requires a Bachelor's degree in Computer Science, Engineering, Physics, Math, Information Systems, Business or a related subject. (AF 81).

On March 20, 2009, the CO issued an Audit Notification, instructing the Employer to submit copies of its recruitment documentation. (AF 77-79). The Employer submitted its audit response materials on April 16, 2009. (AF 23-76). The Employer's Notice of Filing ("NOF") states the position "Requires a BA/BS or MA/MS degree or equivalent in Computer Science, Engineering, Physics, Math, Information Systems, Business or related field," and that "Team Manager positions are available." (AF 43-47). The Employer's audit response materials also included a copy of the job order that the Employer placed with the Washington State Workforce Agency ("SWA"). (AF 67-69). The SWA job order stated in pertinent part, "Qualifications may include a MA/MS or equivalent or BA/BS deg or equivalent in Comp Science, Engineering, Math, Physics, Info Systems, Business or related field…Multiple positions available." *Id.*

On August 9, 2010, the CO denied the Employer's application. (AF 20-22). The CO found that the Employer's NOF and SWA job order include a Master's degree as a requirement for the position, which does not appear on the ETA Form 9089. (AF 20-22). The CO found that this additional language was a job requirement that exceeds the job requirements provided on the ETA Form 9089 in violation of 20 C.F.R. § 656.17(f)(6).

The Employer filed a motion for reconsideration in which it argued that neither the NOF nor the SWA job order stated a Master's degree was a requirement for the job opportunity being sponsored on the ETA Form 9089. Rather, the phrases "Requires a BA/BS or MA/MS degree" and "Qualifications may include a MA/MS or equivalent or BA/BS deg" were meant to explain that, among the many job openings listed in the same advertisement, some positions may require a Master's degree.

DISCUSSION

The facts of this case are analogous to those of *Microsoft Corp.*, 2011-PER-324 (Feb. 29, 2012) ("lead decision").[2] In the lead decision, this panel found that the Employer's advertisement

[1] Citations to the appeal file will be abbreviated "AF" followed by the page number.

[2] The decision in *Microsoft Corp*., 2011-PER-324 was rendered following an oral argument that had the express purpose of assisting the Board's resolution of pending appeals involving the same issue. The panel requested the parties to stipulate to the other pending appeals which could be disposed of consistent with this lead decision.

for multiple positions with varying job requirements did not violate the applicable regulations, and reversed the Certifying Officer's denial of permanent alien employment certification.

The lead decision involved an NOF, newspaper and web advertisements, and a job order advertising the position of "Marketing and Product Managers." The position listed the following responsibilities: "Responsible for computer software product or technology strategy, definition, promotion, pricing, and/or position, and/or for planning, implementing and managing marketing strategies and campaigns." The job required a BA/BS, MA/MS, or MBA degree or equivalent in Business, Marketing, Engineering, Computer Science, Design, or a related field, and contained a further list of extensive experience requirements. *Microsoft Corp.*, 2011-PER-324, slip op. at 3, 4.

From these facts, the panel concluded that, when the advertisements were viewed as a whole, the phrase "may require employer-reimbursed travel" is indistinguishable from the DOL-endorsed phrase "some positions may require travel." The panel reasoned that the numerous education and experience requirements described in the job description were listed both in the plural and in the alternative, which conveyed to a reader that not all requirements applied to every Marketing and Product Manager position available. Instead, the numerous requirements were written in the disjunctive to show the contrast between the various job openings and the differing duties of each job. Furthermore, since the advertisement was for multiple job opportunities, and the requirements were written in a passive voice, it was understood that the subject of each sentence is "some positions" as it relates to the content between each "or" in the requirements listed. *Id.* at 14, 15.

Although this panel concluded that the phrase "may require employer-reimbursed travel" was indistinguishable from the DOL-endorsed phrase "some positions may require travel" in the context of the Marketing and Product Manager positions, this panel also indicated that, "If an employer does not use the DOL-endorsed language, a fact-specific inquiry will be necessary to determine whether any potential applicants could have been confused or misled into believing that all positions advertised require travel." *Id.* at n. 11.

Accordingly, we must make a fact-specific inquiry to determine whether potential applicants could have been confused into believing that all positions required a master's degree.[3] The language at issue is "Qualifications may include a MA/MS or equivalent or BA/BS deg," and "Requires a BA/BS or MA/MS degree." Both the NOF and SWA job make clear that several Support Engineer positions are available. The degree requirements are phrased in the alternate. This suggests to a reader that there are multiple Support Engineer positions open that apply to

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Although the parties did not stipulate that the instant case's disposition could be stipulated to, it presents issues highly analogous to those decided in Case No. 2011-PER-324, and we will refer to it in the discussion below as the "lead decision" for purposes of convenience.

[3] An employer may use a single advertisement to recruit for multiple open positions, even if the positions have differing requirements. The Employer' Form 9089 allows a Certifying Officer to determine which requirements are a position's actual requirements. In the instant case, the Employer is recruiting for multiple support engineer positions, some of which require a BA/BS, and others of which require an MA/MS. Because the Employer's Form 9089 does not require an MA/MS, it is clear that the job before us is not one with that educational requirement.

various stages in the technical support process depending on the applicant's level of education. Additionally, the NOF indicates that Team Manager positions are also available.

In the lead decision, the Board identified plural phrasing as an important factor to weigh when determining the clarity of an advertisement. In the instant case, the Employer's job description is written in plural terms. Additionally, it is clear from the inclusion of team manager positions in the ad that the various positions had differing educational requirements.

Based on the foregoing, we find that the Employer's NOF and SWA job order do not contain a job requirement that exceeds that which is on the ETA Form 9089, because it is clear within the overall context of the advertisements that not all of the Support Engineer positions require a Master's degree. We find that the Employer's advertisements were not misleading, nor did they cause any confusion that could have prevented a potential U.S. applicant from applying for the job opportunity. As such, we reverse the CO's determination.

ORDER

Accordingly, **IT IS HEREBY ORDERED** that this matter is **REMANDED** to the Certifying Officer for the purpose of **GRANTING** certification.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

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Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
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Issue Date: 13 September 2013

BALCA Case No.: 2010-PER-01433
ETA Case No.: A-08025-17223

In the Matter of:

APT-ADVANCED POLYMER TECHNOLOGY,
Employer

on behalf of

LUCARELLI, FRANK MARIO,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Laleh Sharifi, Esquire
Smith, Gambrell & Russell, LLP
Atlanta, Georgia
For the Employer

Gary M. Buff, Associate Solicitor
Louisa M. Reynolds, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson and Reilly**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the PERM regulations at 20 C.F.R. Part 656.

BACKGROUND

On January 25, 2008, the Certifying Officer ("CO") accepted for filing the Employer's ETA Form 9089 for the professional position of "R&D Manager/Chemist." (AF 154-167).[1] The Employer indicated in box I.d that it advertised the position through its employee referral program, a job search website, and its own website. (AF 162). Box I.d. of the ETA Form 9089 indicates that employee referral program announcement ran from November 21, 2007 to December 5, 2007. *Id*. The CO issued an audit notification on March 27, 2008. (AF 155-157).

The Employer responded on April 25, 2008 with documentation of its recruitment efforts as well as a summary chart. (AF 40-154). The Employer's audit materials did not contain any documentation of use of an employee referral program. The summary chart did not mention the employee referral program. (AF 113). Instead, the employer had placed an advertisement with e-campusrecruiter.com sponsored by the University of Pittsburgh from November 14, 2007 to November 29, 2007. (AF 108-111). Printouts of the university advertisement were included in the audit response. *Id*. In its audit response, the employer did not include any discussion of the discrepancy between the ETA Form 9089 and the summary chart.

The CO denied certification of the Employer's application on March 5, 2010. (AF 37-39). Among other denial reasons, the CO found that the Employer had failed to include documentation of the recruitment conducted through its employee referral program although Section I.d.19 of the ETA Form 9089 stated that the employee referral program was one of the three additional recruitment methods used for this professional position pursuant to 20 C.F.R. § 656.17(e)(1)(ii). The Employer submitted a Motion for Reconsideration and/or Request for Review on March 25, 2010. (AF 3-36). In its motion, the Employer indicated it had completed the box for employee referral program recruitment due to a clerical error. The employer requested review, arguing the error was de minimis and immaterial to the substance of the application because, in fact, the Employer had run an additional advertisement with the University of Pittsburgh, which constituted a third professional recruitment action, in addition to the job search website and the Employer's own website. Additionally, the Employer submitted with the Request for Reconsideration a corrected ETA Form 9089 with box I.d.20 filled to indicate advertising ran with a campus placement office from November 14, 2007 to November 29, 2007. (AF 18).

The CO reconsidered, but upheld his denial and rejected the amended application on the basis that a request for reconsideration may only include documentation submitted in response to a request from the CO, or documentation the employer did not have an opportunity to present to

[1] Citations to the appeal file will be abbreviated "AF" followed by the page number.

the CO, but existed at the time the application was filed. The CO forwarded the file for review to the Board of Alien Labor Certification Appeals (BALCA).

In its brief on appeal, the Employer argued it had conducted its recruitment in compliance with the regulations but merely filled out the wrong section of the form. The Employer argued its clerical error was harmless in nature and did not represent a failure to recruit in good faith. The Employer cited *Yasmeena Corp.*, 2008-PER-73 (Nov. 14, 2008) and *Ben Pumo*, 2009-PER-40 (Oct. 29, 2009) to support its claim that errors made on the ETA Form 9089 by employers should be forgiven when they are not material. The Employer also argued on appeal that the Board recognized in *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc) that simple typographic or clerical errors in applications may be corrected through a motion for reconsideration. The CO's appellate brief did not address these issues.[2]

DISCUSSION

The regulations at 20 C.F.R. § 656.17(a) provide that an "employer who desires to apply for a labor certification on behalf on an alien must file a completed Department of Labor Application for Permanent Employment Certification form (ETA Form 9089)." The regulations go on to say that "[i]ncomplete applications will be denied." 20 C.F.R. § 656.17(a).

In the present case, the Employer cites *Yasmeena Corp.*, 2008-PER-73 (Nov. 14, 2008), *Ben Pumo*, 2009-PER-40 (Oct. 29, 2009), and *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc) in support of its argument that certain errors on the ETA Form 9089 are not material to the CO's review of the application, and therefore should not serve as a basis for denial. We do not accept the Employer's argument for several reasons.

New Final Regulations Published. At the time that the *HealthAmerica* decision cited by the Employer was issued, ETA had already published a Proposed Rule, Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, Permanent Labor Certification Program, 71 Fed. Reg. 7655 (Feb. 13, 2006) (hereinafter, "NPRM"). In the preamble to NPRM, the agency explains the intent of the rule to eliminate the time-consuming process of allowing employers to amend their applications: "Nothing in the streamlined regulation contemplates allowing or permits employers to make changes to applications after filing. The re-engineered program is designed to streamline the process and an open amendment process that freely allows changes to applications or results in continual back and forth exchange between the employer and the Department regarding amendment requests is inconsistent with the goal."

The Final Rule was issued effective July 17, 2007. The preamble to the Final Rule reiterated the Department's position that the PERM program was not designed to permit exchanges between an employer and the CO for the purpose of modifying an application and that

[2] The CO's decision on reconsideration included additional reasons for denial, which we do not reach in this decision.

the burden to submit an accurate application rests solely on a petitioning employer. 72 Fed. Reg. at 27915-16.

The regulations discuss the impact of the new rules on the Board's findings in *HealthAmerica*. "[The Board's decision] allowed the employer [in *HealthAmerica*] to modify its application to correct a mistake. To the extent the BALCA favored allowing the employer in *HealthAmerica* to present evidence that effectively changed the response to a question on the application, the BALCA's approach is inconsistent with the Department's objective and the NPRM proposal that applications cannot be changed or modified after submission." 72 Fed. Reg. at 27916. The regulatory history explains that ETA considered the costs associated with permitting employers the opportunity to modify their applications and determined that it would be a significant and costly resource drain on the PERM case management system and staff. 72 Fed. Reg. at 27918. Additionally, ETA rejected the argument that typographical errors were immaterial, noting that "typographical or similar errors are not immaterial if they cause an application to be denied based on regulatory requirements." 72 Fed. Reg. at 27917.

New Regulations Limit Evidence that can be offered in a Motion for Reconsideration. In the Federal Register publication of the Final Rule, one commenter favored allowing employers to provide new information in the request for reconsideration. In response, the drafters of the regulation stated that the pre-PERM practice did not contemplate consideration of "new evidence" in requests for reconsideration and that they were codifying that practice in the Final Rule. The regulatory history indicates ETA's intention to shore up the regulations to require, in effect, the submission of "letterperfect" applications that cannot be modified once filed, even to correct small errors, 20 C.F.R. § 656.11(b); and to impose evidentiary limitations on the type of documentation that can be used to support a motion for reconsideration. 20 C.F.R. § 656.24(g)(2). The regulatory history indicates that the amendments would cause the employer in *HealthAmerica* not to be able to cure the typographical error on the Form 9089.

In *Denzil Gunnels*, 2010-PER-628 (Nov. 16, 2010), the Board discusses how the new regulations limit the impact of *HealthAmerica*. "Recognizing that the NRPM would have prohibited the type of evidence allowed on reconsideration based on the criteria in *HealthAmerica*, the Final Rule effectively codified a modified version of *HealthAmerica* criteria for documentation held in the recordkeeping file in the form of a rule on reconsideration. This rule was intended to be an exception to the "no modification" rule, thereby "continuing to prohibit application modification but recognizing the appropriateness of an opportunity to present and consider evidence that was generated to comply with the record retention requirements of the PERM program" 72 Fed. Reg. at 27916. The rule governing reconsideration now provides, in relevant part:

> (g)(1) The employer may request reconsideration within 30 days from the date of issuance of the denial.
>
> (2) For applications submitted after July 16, 2007, a request for reconsideration may include only:

(i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or

(ii) Documentation that the employer did not have the opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of § 656.10(f).

(3) Paragraphs (g)(1) and (2) of this section notwithstanding, the Certifying Officer will not grant any request for reconsideration where the deficiency that caused denial resulted from the applicant's disregard of a system prompt or other direct instruction.

20 C.F.R. § 656.24(g) (2007). Thus, if the employer had the opportunity to submit clarifying information with the audit response, but failed to do so, that information could not be submitted with a request for reconsideration, because it would constitute "new evidence". The CO in the present case was under no obligation to consider the "new evidence" in the revised ETA Form 9089 submitted with the Employer's request for reconsideration.

Cases Cited by Employer Preceded the 2007 Regulatory Changes. *Yasmeena Corp.* and *Ben Pumo*, the two BALCA cases cited by the Employer to support the argument that immaterial mistakes and omissions on the ETA Form 9089 can be corrected through a Motion for Reconsideration, involved applications filed before July 16, 2007, and in fact the three reconsideration requests also pre-dated the 2007 amendments to PERM. Therefore the new more stringent procedures did not cover those cases. However, the present application was accepted for filing January 25, 2008, after the effective date of the 2007 amendments to the PERM regulations, and was covered by the more stringent procedures.[3]

Audit Response Failed to Explain the Inconsistency. In the case at hand, there was erroneous information provided on the ETA Form 9089 which was more than just a slight typographical error. The professional recruitment stated on the form was never carried out. During the review of audit response materials, the CO would look for the employee placement program materials and not finding it, would naturally consider the audit response to be incomplete. There was no mention on the ETA Form 9089 of advertisement in the University of Pittsburgh newspaper. Not only was the type of recruitment listed incorrectly, the dates of recruitment were also listed incorrectly. The submitted audit response materials contained inconsistent information and the Employer had an opportunity within the audit response to provide an explanation for the inconsistency, to point out the erroneous information and to explain what actually happened. Without this explanation, the CO would not be able to resolve

[3] Additionally, the facts in these two cases are distinguishable from the case at bar. In the cases cited by the Employer, documentation was in existence at the time the application was filed which clearly showed that the employer had satisfied the requirements of the application for permanent alien labor certification. In *Yasmeena Corp*. the absence of a date beside the employer's signature was not seen as material to any fact to be considered by the CO in determining whether to grant certification. Likewise in *Ben Pumo*, all of the information contained in the ETA Form 9089 supported the application. The few boxes which were not filled out were answers to questions which were answered elsewhere on the form and there was never any doubt about that information. By contrast, the present case presents a situation where there is a factual inconsistency in the documentation. The CO could not readily know which recruitment methods were undertaken without additional explanation from the Employer.

the discrepancy based solely on information provided in the application and the audit response. While the Employer argues that it was in functional compliance with the regulations, we have consistently noted that "PERM is an exacting process, and unforgiving of mistakes in filling out the application or misunderstandings about the regulatory requirements." *Richard M. Robinson*, 2007-PER-84 (Oct. 15, 2007).

In the instant case, the Employer's failure on the Form 9089 to correctly specify which form of recruitment it used was a material omission because it directly related to the substance of the application. A failure to accurately specify the types of recruitment used and the dates the recruitment ran deprives the CO of information necessary to make a determination. Incorrectly completing section I.d in such a way that confuses which recruitment methods an Employer used is a material omission.

The CO did not abuse his discretion in denying the application. Accordingly, we affirm the CO's denial.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED.**

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

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800 K Street, NW Suite 400

Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 27 August 2013

BALCA Case No.: 2011-PER-00465
ETA Case No.: A-08128-49473

In the Matter of:

IBM CORPORATION,
Employer

on behalf of

NAGENDRA VEEDHALURI,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Tina Niedzwiecki, Esquire
New York, New York 10022
For the Employer

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **Avery, Romero, and Price**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations (C.F.R.).

BACKGROUND

On May 16, 2008, the Certifying Officer (CO) accepted for processing Employer's Application for Permanent Employment Certification (ETA Form 9089) for the position of "Senior Managing Consultant." (AF 87-96). Because the application was for a professional position, Employer listed three types of professional recruitment, one of which was posting the job opportunity on Employer's website. Employer indicated on the Form 9089 that this posting occurred from February 14, 2008 to February 27, 2008. (AF 50).

On July 24, 2008, and December 12, 2008, Employer was notified that its ETA Form 9089 was selected for audit. (AF 80-86). Among other documentation, the CO directed Employer to submit its recruitment documentation. (AF 80-86). Employer responded to the audit on January 12, 2009. (AF 39-79). As supporting documentation of Employer's recruitment steps, Employer submitted a letter signed by Employer's Immigration Coordinator certifying that an advertisement for the position of "Senior Managing Consultant" was posted on Employer's website from February 14, 2008 until February 27, 2008. (AF 69-70). On May 28, 2010, the CO denied certification of Employer's application on two grounds, one being that Employer failed to provide adequate documentation to show that it advertised the job opportunity on its website as required by 20 C.F.R. § 656.17(e)(1)(ii)(B). (AF 37-38). Secondly, the CO denied certification because Employer's job order placed with the State Workforce Agency (SWA) contains job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089 in violation of 20 C.F.R. § 656.17(f)(6). (AF 37-38). Specifically, the SWA job order does not state the work will be performed at "various client sites throughout the U.S." which is included on the ETA Form 9089. (AF 37-38).

Employer filed a request for reconsideration on June 15, 2010, arguing that the ETA Form 9089 includes information that exceeds the job requirements or duties stated on the SWA job order, as opposed to the SWA job order containing duties which exceed those listed on the Form 9089. (AF 3-36). On January 28, 2011, the CO determined Employer's request did not overcome the deficiency stated in the determination letter because the SWA job order contained job requirements or duties which exceed the duties listed on the ETA Form 9089. (AF 1). Specifically, the CO found the SWA job order failed to state the work would be performed at "various client sites throughout the U.S." (AF 1). Therefore, the CO found that denial under Section 656.17(f)(6) was valid, and forwarded the case to BALCA. (AF 1).

BALCA issued a Notice of Docketing on March 18, 2011. Employer filed a statement of intent to proceed on April 1, 2011, but did not file an appellate brief. On April 29, 2011, the CO filed a statement of position. The CO acknowledged that Employer was correct that in denying certification the CO incorrectly cited to 20 C.F.R. § 656.17(f)(6); however, the CO argued denial on reconsideration was proper based on the fact that the SWA job order did not accurately reflect the requirements of the position as required under 20 C.F.R. § 656.17(f)(4).

DISCUSSION

The PERM regulations require that an employer filing an application for permanent alien labor certification for a professional position conduct two mandatory recruitment steps. One such step an employer must undertake in order to inform U.S. workers about the job opportunity is to place a job order with the SWA serving the area of intended employment for 30 days. 20 C.F.R. § 656.17(e)(1)(i)(A). The BALCA has held that all advertisements placed by employers in fulfillment of the additional recruitment steps must comply with the content requirements listed in Section 656.17(f). *Chemical Abstracts Service – a Division of the ACS*, 2010-PER-1164 (Sep. 23, 2011); *Credit Suisse Securities*, 2010-PER-103. The BALCA has also found that SWA job orders fall under this regulation and must meet the requirements of Section 656.17(f).

In *David Dill*, the BALCA upheld a CO's denial determination when the SWA job order listed a wage that was less than the prevailing wage determination. 2009-PER-191 (June 5, 2009). In doing so, the BALCA applied the requirements of Section 656.17(f) to SWA job orders. In *A Cut Above Ceramic Tile*, an *en banc* panel of the BALCA noted that "the CO is not barred from denying certification based on a deficiency in the content of the SWA job order" and cited *Chemical Abstracts Service* and *Vila and Son Landscaping*. 2010-PER-224 at 12 n. 5 (Mar. 8, 2012). Though "this regulation is a bit ambiguous because it is titled 'Advertising requirements' but then only refers to criteria for advertisements placed in newspapers of general circulation or in professional journals," the BALCA has interpreted it to apply to all advertisements, including SWA job orders. *David Dill*, 2009-PER-191 at 3 n. 3. Section 656.17(f)(4) requires that advertisements, including SWA job orders, must indicate the following:

> (4) Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity.

In the present case, the geographic area of employment contained in the SWA job order does not match the geographic area of employment described in the ETA Form 9089 Section H. (AF 20, 47). Specifically, the job order describes the geographic area as Somers, New York. (AF 20). In contrast, Form 9089 describes the geographic area as Somers, New York, and Section H.2 adds the language "and various client sites throughout the U.S.", which is omitted from the job order. (AF 47). A travel requirement or alternative employment location can be a significant factor in a prospective applicant's job-seeking process. Without such accurate information the basic requirements of 20 C.F.R. § 656.17(f)(4) are not met. In the instant case, the geographic area of employment was not described on the Employer's SWA job order in accordance with Section 656.17(f)(4). Therefore, denial of certification on this ground is proper.

We recognize that the CO's denial of the application for permanent employment certification cited 20 C.F.R. § 656.17(f)(6), which is technically inapplicable here, as Employer pointed out, the ETA Form 9089 lists the additional requirement rather than the SWA job order. (AF 38). Under Section 656.17 (f)(6), advertisements (including job orders) must "not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089." Indeed, it would not be fair to deny certification based on a new statutory provision

regarding a deficiency not previously presented to Employer who did not have prior opportunity to defend against this deficiency. However, whether the CO initially denied the certification under Section 656.17(f)(6) or under 656.17(f)(4), the factual basis for denial remains unchanged: the Employer failed to include the language "and various client sites throughout the U.S." in the SWA job order. In the motion for reconsideration, Employer alleges that there was not enough space to include the language "and various client sites throughout the U.S." in the appropriate section of the ETA 9089. There are not any remedial steps that Employer could have taken or supplemental information Employer could have provided on reconsideration to defend against this deficiency even under citation to the proper regulation. Employer does not have additional opportunity to revise the job order or the ETA Form 9089 after submission.

Additionally, we acknowledge that although Employer is permitted to request reconsideration of a denied certification, such request may include only (i) documentation that the Department actually received from Employer in response to the request from the CO to the Employer, or (ii) documentation that Employer did not have an opportunity to present previously to the CO, but that existed at the time the Application was filed, and was maintained by Employer to support the application for permanent labor certification. 20 C.F.R. §§ 656.24(g)(2)(i), (ii). As a result, BALCA has held that the CO will consider additional documentation submitted with an Employer's request for reconsideration only if Employer did not have the opportunity to submit it previously and if it was maintained to support the application for labor certification. *Denzil Gunnels d/b/a Gunnels Arabians*, 2010-PER-00628 (Nov. 16, 2008); 20 C.F.R. §§ 656.24(g)(2)(i), (ii). Thus, in the instant case, Employer could not present new evidence on reconsideration because Employer had the opportunity to provide the evidence requested in response to the audit notification.

Therefore, Employer's substantive rights are not deprived by now affirming the denial of certification under C.F.R. § 656.17(f)(4). *Kay Mays*, 2008-PER-00011 (Aug. 27, 2008). Consequently, we find that denial of certification of the application was supported by the regulations. Based on the foregoing, we affirm the CO's denial of labor certification.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

C. Richard Avery
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

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U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 08 August 2013

BALCA Case No.: 2011-PER-02738
ETA Case No.: A-08325-08073

In the Matter of:

REDYK TRAVEL, INC.,
Employer

on behalf of

KUPS, KATARZYNA EWA,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Christopher Kurczaba, Esquire
Chicago, Illinois
For the Employer

Gary M. Buff, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Sarno, Bergstrom and Krantz**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at 20 C.F.R. Part 656. The Employer filed an Application for Permanent Employment Certification for the position of "Travel Agent." (AF 76-85).[1] On January 28, 2010, the Certifying Officer ("CO") selected the application for

[1] In this decision, AF is an abbreviation for Appeal File.

audit. (AF 73-75). The CO directed Employer to provide the "[n]otice of filing documentation as outlined in 656.10(d)." (AF 73). Employer responded to the audit on March 1, 2010. (AF 16-72). With its response, Employer submitted a copy of the Notice of Filing ("NOF"). (AF 30). The NOF did not state where it had been posted. On March 4, 2011, the CO denied the application. (AF 13-15). The CO gave three reasons for denial. One of the reasons for denial was that the NOF did not specify where it was posted. The CO noted that, pursuant to 20 CFR § 656.10(d)(1)(ii), the NOF must be posted at employer's facility or location "in conspicuous places where the U.S. workers can readily read the posted notice on their way to or from their place of employment."

On April 4, 2011, Employer submitted a request for reconsideration. (AF 3-12). Employer argued that 20 CFR 656.10(d)(3)(i)-(iv) and 656.10(d)(4) enumerate the required posting requirements and do not list the location of the posting as a requirement. On September 7, 2011, the CO stated that Employer's request did not overcome the deficiencies stated in the determination letter. The CO explained that 20 CFR § 656.10(d)(1)(ii) requires that the NOF be clearly visible and unobstructed while posted and must be posted in conspicuous places where employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. The CO forwarded the case to the Board of Alien Labor Certification Appeals ("BALCA").

BALCA issued a Notice of Docketing on December 20, 2011. Employer filed a Statement of Intent to Proceed on January 5, 2012. On February 3, 3012, Employer filed a Statement of Position. Employer argued that the regulations simply give an employer the option to inform the CO of the location where the NOF was posted.

DISCUSSION

The regulations require that an employer filing an application for permanent labor certification must provide notice to the employer's employees at the facility or location of employment. 20 CFR § 656.10(d)(1)(ii). Pursuant to 20 CFR § 656.10(d)(1)(ii):

> The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. . .

The regulations also provide that "the documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted. . ." 20 CFR § 656.10(d)(1)(ii).

In this case, there was no deficiency in the content of the NOF, but Employer did not provide documentation that the NOF was posted in the proper place. In response to the Audit Notification, Employer submitted the NOF, which did not indicate the location in which it was posted. (AF 30). The only evidence presented that the NOF was posted in the proper place was Employer's attestation in Section I.e.25 of the ETA Form 9089 that the NOF was posted for 10 business days in a conspicuous location at the place of employment. (AF 80). Because it is not administratively feasible for the CO to investigate the circumstances of each applicant's

business, the employer must state in its response to the audit notification that the NOF was posted at the proper location. *See In Matter of Fairplay Farm*, 2010-PER-00966 (August 4, 2011)(denial appropriate where neither employer's NOF nor other audit response materials contained information stating where the NOF was posted).

The regulations state that "[t]he documentation required may be satisfied by providing a copy of the posted notice and stating where it was posted." 20 CFR § 656.10(d)(1)(ii). Although Employer is not required to satisfy the regulation in this manner, Employer has not offered another method by which the CO could verify that the NOF was posted in an area where it was clearly visible and unobstructed and where the U.S. workers could readily read it.

The NOF is not a mere technicality, but is an implementation of a statutory notice requirement designed to assist interested persons in providing information to the CO about an employer's certification application. It is not a regulation to be lightly dismissed under a harmless error finding. *See Riya Chutney Manor, LLC*, 2010-PER-00177 & 191 (Apr. 7, 2010); *Voodoo Contracting Corp.*, 2007-PER-00001 (May 21, 2007).

Accordingly, **IT IS ORDERED** that the denial of labor certification in this matter is **AFFIRMED**.[2]

For the panel:

DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR./ECD/jcb
Newport News, Virginia

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

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800 K Street, NW Suite 400
Washington, DC 20001-8002

[2] Because we affirm on this ground, we need not reach the CO's other grounds for denial.

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 23 July 2013

BALCA Case No.: 2011-PER-00955
ETA Case No.: A-08129-49929

In the Matter of:

SIEMENS WATER TECHNOLOGIES CORP.,
Employer

on behalf of

MARTIN ARNOLD SMITH,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Timothy M. Nelson, Esq.
Fragomen, Del Rey, Bernsen & Loewy LLP
Matawan, NJ
For the Employer

Gary M. Buff, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **McGrath, Geraghty, Calianos**
Administrative Law Judges

TIMOTHY J. MCGRATH
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). For the reasons set forth below, we affirm the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On August 8, 2008, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Field Service Engineer." (AF 1, 110).[1] On March 17, 2009, the CO sent the Employer an Audit Notification Letter requesting that the Employer provide certain information in accordance with 20 C.F.R. § 656.20. (AF 105-08). On April 17, 2009, the Employer responded to the Audit, providing explanations to the CO's specific audit reasons and attaching documentation of its various recruitment steps. (AF 12-104).

On September 2, 2010, the CO denied the application. (AF 10-11). The Employer's response to the audit request explained the primary worksite address in the ETA Form 9089 is the same as the foreign worker's address because the job opportunity affords the Field Service Engineer to work from home and travel to various client sites as needed. (AF 10). The CO concluded, after reviewing the documentation, the employer did not offer the condition to work from home to U.S. workers. (AF 10). As a result, the CO denied the application pursuant to 20 C.F.R. § 656.17(f)(7), which states that advertisements must not "contain wages or terms and conditions of employment that are less favorable than those offered to the alien," and 20 C.F.R. § 656.10(c)(8), which requires employers to attest "[t]he job opportunity has been and is clearly open to any U.S. worker." (AF 10).

On September 29, 2010, the Employer filed a Request for Reconsideration. (AF 2-9). The Employer argued there is no regulation that requires advertisements to indicate that the geographic location is a home office. (AF 4). The Employer relied on the minutes from the Department of Labor's ("DOL's") March 15, 2007 Stakeholders Liaison Meeting to support its position that the recruitment was properly conducted based on the worksite address indicated on the ETA Form 9089. (AF 4). Additionally, the Employer stated it complied with 20 C.F.R. § 656.17(f) because the ad "did not contain terms and conditions of employment that are less favorable than those offered to the alien." (AF 5) (emphasis in original). It concluded "there is no regulatory prohibition from using a home address in recruitment efforts." (AF 5).

On March 25, 2011, the CO denied reconsideration and forwarded the case to the Board of Alien Labor Certification Appeals ("BALCA") for administrative review. (AF 1). The CO

[1] In this decision, AF is an abbreviation for Appeal File.

upheld his denial under 20 C.F.R. §§ 656.10 and 656.17(f)(7), stating: "Not informing U.S. workers they would work from home, rather than from employer's headquarters or offices, artificially excludes potentially qualified U.S. applicants from applying for the job opportunity." (AF 1).

On May 25, 2011, BALCA filed a Notice of Docketing, and on June 8, 2011, the Employer submitted its Statement of Intent to Proceed and its Statement of Position. Its Statement of Position reiterated its arguments made on reconsideration. On March 26, 2013, this Panel issued an Order Requiring Certification on Mootness. On April 12, 2013, in response to the Order, the Employer certified that the job identified in the application is still open and available on the same terms and that the alien identified in the application remains ready, willing, and able to fill the position.

DISCUSSION

PERM is an attestation-based program. 20 C.F.R. § 656.10(c). Among other attestations, an employer must attest that the job opportunity listed in the application for permanent employment certification has been and is clearly open to U.S. workers. 20 C.F.R. § 656.10(c)(8). Accordingly, an employer filing an application for permanent alien labor certification is required to conduct certain recruitment steps and make a good-faith effort to recruit U.S. workers prior to filing its application. Advertisements placed as part of the recruitment process must meet certain content requirements as outlined in 20 C.F.R. § 656.17(f). For instance, the advertisements must "[n]ot contain wages or terms and conditions of employment that are less favorable than those offered to the alien." 20 C.F.R. § 656.17(f)(7). Additionally, advertisements must "indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity." 20 C.F.R. § 656.17(f)(4).

The following response to a Frequently Asked Question ("FAQ") on the Office of Foreign Labor Certification's website clarifies what geographic information needs to be included in advertisements:

> **Does the job location address need to be included in the advertisement?**
>
> No, the address does not need to be included. However, advertisements must indicate the geographic area of employment with enough specificity to apprise

> applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity. Employers are not required to specify the job site, unless the job site is unclear; for example, if applicants must respond to a location other than the job site (e.g., company headquarters in another state) or if the employer has multiple job sites.

OFLC Frequently Asked Questions and Answers, http://www.foreignlaborcert.doleta.gov /faqsanswers.cfm (last visited June 26, 2013).

In the Employer's ETA Form 9089, Section H.1-2, the primary worksite for the job opportunity was in The Woodlands, Texas. (AF 110). The Alien's street address in Section J was the same as that listed for the primary worksite. (AF 113). In the Audit Request, the CO required a detailed explanation indicating the reason the foreign worker currently resides with the employer. (AF 107). In response, the Employer explained the address listed in Section H.1-2 (primary worksite) is the alien's private residence and the applicant works from his residence and travels to various client sites as needed. (AF 12). The Employer also submitted its recruitment materials with its audit response, all of which listed Houston, Texas as the location for the job opportunity. (*See* AF 62-102).

The Employer argues that it was not required to indicate in its advertisements the location was a home office. In support of its position, the Employer provided a copy of the minutes from the DOL's March 15, 2007 Stakeholders Liaison Meeting, which state in relevant part:

> 19. If an employer requires an employee to work from home in a region of intended employment that is different from the location of the employer's headquarters (i.e. work is required to be performed in a designated county or state that differs from the employer's headquarters), please confirm that the prevailing wage determination and recruitment can take place in the location of the employee's region of intended employment. Please confirm that the notice of posting under this circumstance should be posted at the company's headquarters.
>
> *If the 9089 form shows the worksite at a designated location other than headquarters, the PWD and recruitment would be for the worksite. AILA note: this issue essentially requires a strategy decision. The PERM form can state that the worksite is the home office, in which case the PWD and recruitment can be for the area of the home office, but the fact that the worksite is the same as the foreign national's home address will be picked up by the PERM system and the case will likely be audited. This can then be addressed in the audit response and should not be a problem, if the case is otherwise approvable. Alternatively, the PERM form can state that the worksite is the headquarters office, but then the PWD and recruitment must be done for that location.*

. . . .

21. For purposes of completing ETA-9089, if an employee works from home, what address should be identified in H.1 and H.2 –the actual home address of the employee or the address of the employer's headquarters or office from which the employee is based/paid?

Please see answer to number 19 above.

(AF 21-22). The Employer's reliance on these minutes is misplaced. The minutes demonstrate that the Employer did not err in conducting its recruitment in the area where the alien resides or by listing the alien's address as the primary worksite in Section H.1-2 of the ETA Form 9089. However, the meeting minutes are silent as to what geographic location should be included in advertisements where the applicant would work from home. These minutes provide no guidance on the content of the advertisements.

We find that the geographic location listed on the advertisements, "Houston, TX," represents a condition of employment that is less favorable than that offered to the alien. An applicant reading the advertisements would be under the impression that he or she was restricted to working in Houston, Texas. In contrast, the alien was given the option to work from his residence, which did not necessarily have to be in Houston, and which greatly expanded the potential geographic location of employment. Listing the location as Houston, Texas suggested to potential U.S. applicants that the job location was less flexible than it actually was. *See JDA Software, Inc.*, 2011-PER-02661, PDF at 2 (Sept. 27, 2012). There is no indication that the job has to be performed specifically in Houston. In fact, the Employer indicated that it has customers throughout North America and the position requires both domestic and international travel. (AF 40-41, 52-53). This suggests that the geographic location of the job opportunity was not as restrictive as the Employer led potential applicants to believe. *Juniper Networks*, 2011-PER-00841, PDF at 3 (Sept. 20, 2012). It appears that the only reason Houston, Texas was advertised as the geographic location is because that is where the alien was currently residing. *Id.* We find that the Employer's advertisement was unduly restrictive, misleading, and could have prevented potential U.S. applicants from applying for the job opportunity. *Id.*; *JDA Software, Inc.*, 2011-PER-02661 at 2.[2]

[2] Although not cited by the CO, we note the geographic location in the advertisements also violates Section 656.17(f)(3) and (4), as it is not specific enough to apprise applicants of where they would have to reside to perform

Based on the foregoing, we affirm the CO's denial of certification pursuant to 20 C.F.R. §§ 656.10(c) and 656.17(f)(7), because the location, Houston, Texas, in the Employer's advertisements represented a condition of employment that was less favorable than that offered to the alien.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED.**

For the Panel:

TIMOTHY J. MCGRATH
Administrative Law Judge

Boston, MA

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the job. Applicants do not appear to be required to reside in or around Houston, as suggested by the advertisements, and they can work from wherever their residence is located. Stating that the location is Houston, Texas is not specific enough to apprise applicants of where they could reside. Furthermore, the Employer's recruitment documentation did not indicate to potential applicants that the job requires travel which, as indicated in the Employer's audit response, is an important component of the job. The Employer's failure to include its travel requirements in its advertisements also violates Section 656.17(f)(3) and (4).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 28 May 2013

BALCA Case No.: **2011-PER-02677**
ETA Case No.: A-08329-08931

In the Matter of:

SUSHI SHOGUN,
Employer,

on behalf of

RAMOS, MARIA,
Alien.

Certifying Officer: Atlanta National Processing Center Certifying Officer

Appearance: Sonia S. Amin, Esquire
Encino, California
For the Employer

Before: **Almanza, Colwell, and Johnson**
Administrative Law Judges

PAUL R. ALMANZA
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and the "PERM" regulations found at 20 C.F.R. Part 656.

BACKGROUND

The Employer filed an Application for Permanent Employment Certification ("Application") for the position of "Cook Assistant, Japanese Cuisine." (AF 31-42).[1] The Certifying Officer ("CO") audited the Application, and denied certification (AF 22-23) on the following ground:

[1] References to the 71 page Appeal File are abbreviated as "AF."

> The information listed in ETA Form 9089 [the Application] for section F does not match the information contained in the Prevailing Wage Determination (PWD) submitted by the employer. Specifically, the prevailing wage of $10.14 per hour listed on the PWD does not match the ETA Form 9089, which lists the prevailing wage as $10.04 per hour.

(AF 23).

The Application lists the prevailing wage, as well as the offered wage, as "$10.04" per hour. (AF 32). The Prevailing Wage Determination submitted by the Employer lists the prevailing wage as "$10.14" per hour. (AF 54).

The Employer requested reconsideration of the denial of certification, arguing that the discrepancy which was the basis for the denial was a "**minor typographical error**" (AF 2, emphasis in original) and "a **clerical mistake of minor importance**." (AF 3, emphasis in original). In support of its position, Employer noted that the Notice of Filing contained the proper wage and cited *HealthAmerica*, 2006-PER-1 (July18, 2006) (*en banc*) for the proposition "that a Certifying Officer abuses his discretion in denying a PERM application simply for typographical errors." (AF 3.) The Employer also pointed out that to correct the Application and refile it, it would have to "start the [time-consuming] recruitment process all over again" and "in this case, *the consequences to the employer are out of proportion to the mistake*, warranting an approval." (AF 3, emphasis and omission of cite to *HealthAmerica*, slip. op. at 23, in original).

The CO reconsidered but continued to find the ground for denial valid. Of particular note, the CO pointed out that under the PERM regulations employers must "present an application that is complete and accurate to ensure the integrity of the PERM process," the Employer twice typed "10.04" on the Application, and that requests for modifications to applications submitted after July 16, 2007, will not be accepted pursuant to 20 C.F.R. § 656.11(b). (AF 1). The CO also stated that the ground for denial was valid under 20 C.F.R. § 656.10(c)(1) (requiring employers to certify in applications for permanent employment certification that the "offered wage equals or exceeds the prevailing wage"). (AF 1).

Upon denial of the request for reconsideration, the matter was then forwarded to the Board of Alien Labor Certification Appeals for administrative review. (AF 1). On January 12 2012, the Office of Administrative Law Judges received a letter brief dated January 6, 2012, from the Employer ("Employer's Brief"). Employer's Brief generally restated Employer's argument in its request for reconsideration, and pointed out that "[n]o potential applicant was exposed to the clerical error" because the Notice of Filing ("NOF") contained the proper wage, $10.14 per hour, while the newspaper advertisements and State Workforce Agency ("SWA") posting did not list the prevailing wage. Employer's Brief, at 2.

DISCUSSION

The error in this case is that the Application listed $10.04 per hour as the prevailing wage and as the offered wage rather than $10.14 per hour. Because the NOF provided the proper wage and the newspaper advertisements and SWA posting did not provide wage information, no potential job applicant could possibly have been misled by this error.

Upon review of the Appeal file, we find it is likely that whoever filled out the Application simply mistyped "$10.04" per hour as the prevailing wage and as the offered wage when in fact the prevailing wage and offered wage was $10.14 per hour. This ten-cent difference, approximately one percent of the prevailing wage and offered wage, was the result of typographical errors.

Were we considering this case prior to the promulgation of 20 C.F.R. § 656.11(b), we would follow the reasoning of *HealthAmerica.* Specifically, we would find that "[t]he CO's denial of the application based on the typographical error[s] in the Form 9089 elevates form over substance," *HealthAmerica*, slip op. at 19, and would reverse the denial of certification.

Unfortunately for the Employer, however, *HealthAmerica* has effectively been overruled by the promulgation of 20 C.F.R. § 656.11(b). In short, correcting the typographical errors in the Form 9089 would constitute a modification to the application, and the regulation clearly states that "[r]equests for modifications to an application will not be accepted for applications submitted after July 16, 2007." Accordingly, the plain text of 20 C.F.R. § 656.11(b) dictates the outcome of this matter.

We recognize that in a case not involving an amendment to an application, a divided BALCA panel found that even though there was a slight variance between the wage advertised on the SWA job order and the wage offered to the alien, the job was "clearly open to any U.S. worker" and thus that divided panel declined to affirm the denial of certification. *See Jesus Covenant Church*, 2008-PER-200, slip op. at 4-5 (Sept. 14, 2009). While we respect the majority opinion in that case, we also recognize that the Secretary promulgated a regulation that categorically disallows modifications to applications filed after July 16, 2007. We are reluctant to second-guess the Secretary's policy determination requiring applications filed after July 16, 2007, to be error-free. As a result, like the panel in *Saini Medical, Inc.*, 2011-PER-1001, slip op. at 2 (Sept. 27, 2012), "we reject the approach of the majority in *Jesus Covenant Church* judicially creating a 'close enough' exception."

ORDER

Accordingly, **IT IS ORDERED** that the denial of labor certification in this matter is **AFFIRMED**.

For the panel:

PAUL R. ALMANZA
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless, within twenty (20) days from the date of service, a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed at the following address:

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Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400N
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 24 April 2013

BALCA Case No.: 2011-PER-00963
ETA Case No.: A-08196-69784

In the Matter of:

ORACLE AMERICA, INC.,
Employer,

on behalf of

YOGARAJA THYAGARAJAN,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Grace Hoppin, Esq.
Berry Appleman & Leiden LLP
San Francisco, CA
For the Employer

Gary M. Buff, Associate Solicitor
Stephen Jones, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Geraghty, Calianos, McGrath**
Administrative Law Judges

COLLEEN A. GERAGHTY
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of

Federal Regulations ("C.F.R."). For the reasons set forth below, we affirm the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On July 14, 2008, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Software Engineer." (AF 1, 112).[1] On March 12, 2009, the CO sent the Employer an Audit Notification Letter requesting that the Employer provide certain information in accordance with 20 C.F.R. § 656.20. (AF 108-10). On March 27, 2009, the Employer responded to the Audit, and on August 10, 2009 it amended its response. (AF 37-107).

On August 20, 2010, the CO denied the application for several reasons, including that the geographic area of employment contained in the Employer's Notice of Filing ("NOF") does not match the geographic area of employment described in the ETA Form 9089. (AF 34-36). Specifically, the CO found that the "NOF describes the geographic area as 'San Mateo County, including Redwood Shores, California; and/or other locations in the San Francisco Bay Area. May be assigned to various, unanticipated sites throughout the United States' but the ETA Form 9089 describes the geographic area of employment as Redwood Shores, CA." (AF 35). As authority for his denial, the CO cited to 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(4), which state that NOFs must indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity. (AF 35).

On September 20, 2010, the Employer filed a request for reconsideration, arguing that 20 C.F.R. § 656.17(f)(4) does not require the NOF to "match" the ETA Form 9089, as suggested by the CO in the denial letter. (AF 3-33). The Employer said that the regulations only require that the NOF indicate the geographic area of employment with enough specificity to apprise U.S. workers of any travel requirements and where applicants will likely have to reside to perform the job, and the NOF in this case did that. (AF 9).

The Employer also stated on reconsideration that the CO's denial letter indicated that the NOF contained a travel requirement not found in the ETA Form 9089. (AF 10). In response, the Employer explained that its NOF recruited multiple positions, and it followed DOL's guidance in recruiting multiple positions in one advertisement. (AF 9). The Employer asserted that the job opportunity subject to this application does not require travel and the phrase"[m]ay be assigned to various unanticipated sites throughout the United States" in the NOF is not a mandatory travel requirement for all the positions in the NOF. (AF 9). The Employer stated that although the NOF states that some of the multiple open positions may involve travel, the NOF specifically uses the term "may" instead of "shall." (AF 10). The Employer asserted that "may" is a permissive term, meaning that travel might or might not be part of the job. (AF 10). It stated that since the NOF covers multiple positions, "if some of the positions 'may' involve travel, then it follows that some of the positions 'may not' involve travel." (AF 10). The Employer lastly

[1] In this decision, AF is an abbreviation for Appeal File.

argued that the language in the NOF would not in any way have a deterrent effect on applicants deciding to apply for an open position with the Employer. (AF 10).

On March 30, 2011, the CO denied reconsideration and forwarded the case to BALCA for administrative review. (AF 1-2). In the transmittal letter, the CO stated that "open ended terms or conditions of employment like 'may' require travel could, in fact, be considered a necessary requirement by interested individuals attempting to determine whether to act on the NOF and could have a chilling effect on applicants, artificially excluding potentially qualified U.S. workers." (AF 1). The CO concluded that the NOF violated subsection 4 and 6 of Section 656.17(f) because it included a travel requirement not listed on the ETA Form 9089.

On June 1, 2011, BALCA issued a Notice of Docketing, and on June 16, 2011, the Employer submitted a Statement of Intent to Proceed. On July 15, 2011, the Employer filed an appellate brief. The Employer stated in its brief that the position identified in the application does not contain a travel requirement and "[i]f travel had been a specifically required condition of the job offer, a travel requirement would have been reflected on the ETA Form 9089." The Employer argued that the NOF "simply explain[s] that among the multiple job openings to which [it] pertain[s], *some* of those positions may involve travel from time to time." The Employer stated that the term "may" expresses a possibility, not a required term or condition, and the use of "may" enabled the NOF to apply to multiple positions, as allowed by Department of Labor ("DOL") guidance. The Employer asserted that the DOL endorsed the use of the phrase "some positions may require travel" in advertisements covering multiple positions and the phrase "may be assigned to various, unanticipated sites throughout the United States" bears no logical or material distinction from the DOL-endorsed language. The Employer argued that neither phrase expresses a mandatory travel requirement for all positions and neither has a deterrent effect on applicants.

The Employer additionally argued in its brief that the NOF merely identified potential "incidental travel," which did not create a job requirement changing the nature of the position. The Employer asserted that incidental travel, such as attending an industry conference, visiting a client or attending a training seminar, is neither a term nor a condition of employment as it does not change the requirements or the day-to-day duties for the position, and therefore it does not need to be included on the ETA Form 9089. The Employer added, even if it was required to reference incidental travel in the application, there is no space on the application for including such incidental travel, and thus the CO cannot deny certification on this basis. Lastly, the Employer argued that if the ETA Form 9089 "must contain an exact match of the travel language in the recruitment, due process and fundamental fairness require" that the Employer be allowed to amend its application.

The CO did not file a Statement of Position, but on July 21, 2011, requested that BALCA affirm the denial as supported by the record. On January 9, 2013, in response to this Panel's Order Requiring Certification on Mootness, the Employer certified that the job identified on the PERM application is still open and available on the same terms set forth in the application and that the alien identified in the PERM application remains ready, willing, and able to fill the position should the decision below be overturned.

DISCUSSION

1. Due Process Issue

Although not raised by the Employer, we find it necessary to address the issue of due process in this matter. In the CO's denial letter, he denied the application in part because the NOF violated Section 656.17(f)(4). This is not a valid reason for denial. All that is required by this section is that the NOF indicate any travel requirements for the position. The Employer's NOF did indicate a possible travel requirement—"[m]ay be assigned to various unanticipated sites throughout the United States." (AF 70). Nothing in Section 656.17(f)(4) requires the NOF to "match" the ETA Form 9089, as suggested by the CO. Under Section 656.17(f)(6), the NOF cannot include travel requirements which exceed those found in the ETA Form 9089, however, the CO did not cite to this section in his denial letter. The first time the CO mentioned a violation of Section 656.17(f)(6) was in his transmittal letter to BALCA. The CO cited to Section 656.17(f)(6) and concluded that "[s]ince the NOF includes a travel requirement not listed on the ETA Form 9089," the denial was valid.[2]

This new reason provided by the CO in the transmittal letter typically should not be considered upon appeal, as it is far too late in the process to reveal the underlying rationale for such a decision. An employer must be provided with adequate notice of the regulatory violations found. *Medical Care Professionals, Inc.*, 2008-PER-00247, PDF at 6 (July 17, 2009). "An employer needs to know the basis for a denial in order to file a meaningful motion for reconsideration [and] [t]hus . . . the CO must identify the section or subsection allegedly violated and the nature of the violation, when notifying the applicant of a denial." *Kay Mays*, 2008-PER-00011, PDF at 5 (Aug. 27, 2008). Fundamental fairness requires that an employer has an opportunity to rebut the reasons for denial provided by the CO. *See Ornelas, Inc.*, 2009-PER-00246, PDF at 4 (June 23, 2009); *Marathon Hosiery*, 1988-INA-00218, PDF at 2 (May 4, 1989) (en banc).

Although the CO's original denial letter was deficient, we find that the CO's failure to fully describe the nature of the violation did not deprive the Employer of an opportunity to rebut the reasons for denial, and did not prevent the Employer from obtaining a labor certification that should have been granted. *See Kay Mays*, 2008-PER-00011, PDF at 6 (Aug. 27, 2008). Although the CO did not mention Section 656.17(f)(6) in his denial letter, the Employer on reconsideration put forth arguments for why the NOF did not contain a travel requirement exceeding the requirements in the ETA Form 9089. Thus, the CO's deficiency did not deprive the Employer of an opportunity to address the denial based on Section 656.17(f)(6). Additionally, as laid out below, even considering the Employer's arguments regarding Section 656.17(f)(6) in its request for reconsideration and in its appellate brief, we find that Employer has failed to meet its burden of establishing compliance with Section 656.17(f)(6). Accordingly, the Employer was not deprived of its due process rights.

[2] In the transmittal letter, the CO upheld two other reasons for denial—namely, that the job search website advertisement and the job order contained travel requirements not listed on the Form 9089. Again, the CO did not reference Section 656.17(f)(6) for these denial reasons until the transmittal letter. Instead, he incorrectly relied on Section 656.17(f)(3), which requires a description of the job specific enough to apprise U.S. workers of the job opportunity.

2. Merits of Appeal

The PERM regulations require an employer who files an application for Permanent Labor Certification to provide notice of the filing of the application to the employer's employees. 20 C.F.R. § 656.10(d)(1). This is done by posted notice, for at least ten consecutive business days, at the facility or location of the employment. 20 C.F.R. § 656.10(d)(1)(ii). The regulations further provide that the notice must contain the information required for advertisements pursuant to 20 C.F.R. § 656.17(f). 20 C.F.R. § 656.10(d)(4). In pertinent part, Section 656.17(f)(6) requires that the notice "not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089." 20 C.F.R. § 656.17(f)(6).

BALCA has consistently held that an employer cannot include a travel requirement in an advertisement for a single position, where none is listed on the application, as it violates 20 C.F.R. § 656.17(f)(6). *Microsoft Corporation*, 2011-PER-00324, PDF at 9 (Feb. 29, 2012) (*citing JPP Eurosecurities*, 2010-PER-00160 (Feb. 25, 2011); *Xpedite Technologies, Inc.*, 2010-PER-00100 (Apr. 7, 2010)). However, establishing compliance with Section 656.17(f)(6) in an advertisement for multiple job opportunities with differing travel requirements is not as clear. *Id.*

The Office of Foreign Labor Certification ("OFLC") has issued some guidance on the use of multi-position advertisements and NOFs, through the following responses to Frequently Asked Questions ("FAQs") on its website:

> **Can one advertisement be used for multiple positions?**
>
> Yes, an advertisement for multiple positions may be used as long as all provisions in § 656.17(f), advertising requirements, have been met.
> NOTE: While employers have the option to place broadly written advertisements with few details regarding job duties and requirements, employers must prepare a recruitment report that addresses all minimally qualified applicants for the job opportunity. If an employer places a generic advertisement, the employer may receive a large volume of applicants, all of whom must be addressed in the recruitment report. Employers placing general advertisements may wish to include a job identification code or other information to assist the employer in tracking applicants to the job opportunity.
>
> **I have multiple positions available for the same occupation and job classifications and at the same rate of pay. May I post a Notice of Filing for the same occupation and job classifications with a single posting?**
>
> Yes, an employer can satisfy Notice of Filing requirements with respect to several positions in each of these job classifications with a single Notice of Filing posting, as long as the single posting complies with the Department of Labor's regulation for each application (e.g. contains the appropriate prevailing wage information and the Notice of Filing must be posted for 10 consecutive business days during the 30 to 180 day time window prior to filing the application). For instance, separate notices would have to be

> posted for an attending nurse and a supervisory nurse (e.g. nurses containing different job duties).

OFLC Frequently Asked Questions and Answers, http://www.foreignlaborcert.doleta.gov /faqsanswers.cfm (last visited April 17, 2013). The Employer is allowed to recruit for multiple positions in one NOF, according to these guidelines. However, as noted in the FAQs, if an employer decides to utilize a multi-position NOF, the employer must still meet the requirements of Section 656.17(f) for each individual application.

The Employer's ETA Form 9089 in this matter did not include the language "may be assigned to various unanticipated sites throughout the United States" or list any form of a travel requirement. Despite this lack of a travel requirement in the application, the Employer's Notice of Filing stated the following:

> **Notice of Position Availability at Oracle USA, Inc.**
>
> POSITION: Software Engineers
>
> WORKSITE: San Mateo County, including Redwood Shores, California; and/or other locations in the San Francisco Bay Area. May be assigned to various, unanticipated sites throughout the United States.
>
> SALARY: $83,138 - $97,987/year

(AF 70). At issue in this matter is whether the phrase "[m]ay be assigned to various, unanticipated sites throughout the United States" on a multi-position NOF constitutes a travel requirement that exceeded the requirements listed on the Employer's application.

Stating that travel "may" be required is analogous to an employer preference identified on an advertisement, in that both could have a chilling effect on recruitment; thus like preferences, a possible requirement should be treated as an actual requirement. *Yahoo! Inc.*, 2011-PER-02067 (Oct. 3, 2012) (*citing East Tenn. State University*, 2010-PER-00338 (Jan. 12, 2011) (en banc) (holding that a preference constitutes a requirement)). A travel requirement, even if only a possibility rather than a certainty, "presents a difference in a material aspect of the job." *Yahoo! Inc.*, 2012-PER-00150, PDF at 4 (May 7, 2012). As worded, the NOF could lead a potential applicant to believe that travel may be a part of all of the Software Engineer positions, and thus could dissuade a potential applicant from applying who does not want a position involving business travel. *See id.*

In a recent decision, *Microsoft Corporation*, 2011-PER-00324 (Feb. 20, 2012), a BALCA panel reversed a CO's denial based on similar facts to the cases presently before us. In *Microsoft Corp.*, the employer did not list a travel requirement on its ETA Form 9089, but included the phrase "may require employer-reimbursed travel" in its NOF listing multiple position openings. In reversing the denial, the panel focused on the fact that the description of duties and requirements in the NOF were written in the disjunctive, demonstrating a contrast between the different job openings. *Id.* at 14. The panel stated that "the requirements in th[e] advertisement

are all described as alternatives or as possibilities, which conveys that some of the requirements apply to some of the positions, while other requirements apply to other positions" and "[t]here is nothing in this advertisement to indicate that some of the requirements apply to all of the positions." *Id.* at 5. The panel also reasoned that "given the variety of job descriptions, education, and experience requirements, anyone reading the advertisement would understand that the education and experience requirements do not apply to each and every position." *Id.* at 15. Lastly, the panel found that because the NOF was for multiple positions and the requirements were written in a passive voice, it was understood that the subject of each sentence was "some positions." *Id.*

The *Microsoft* panel concluded that it was "clear within the overall context of the advertisements that not all of the Marketing and Product Manager positions require travel." *Id.* at 16. As such, the panel found that "in the context of this advertisement," the phrase "may require employer-reimbursed travel" is indistinguishable from the language "some positions may require travel" approved by the DOL in the June 22, 2010 Stakeholders Telephone Conference. *Id.* at 15-16 (emphasis added). The panel in *Microsoft* noted the limited scope of its holding, based on the specific facts of the case. In a footnote, the panel warned that "if an employer does not use the DOL-endorsed language, a fact-specific inquiry will be necessary to determine whether any potential applicant could have been confused or misled into believing that all positions advertised required travel." *Id.* at 16.

We find that on the facts of the case before us, a potential job applicant could be confused in thinking that all the Software Engineer positions had the potential requirement of travel. In *Microsoft*, the panel relied on the fact the employer's NOF listed a "myriad" of job requirements and duties, all listed in the disjunctive, signifying that not all the requirements applied to all of the positions. In contrast, the NOF in the appeal before us did not list any job duties or requirements other than the possible travel requirement.[3] Although it is clear that the NOF was for multiple positions as it states "Software Engineers" in the plural, the NOF did not contain multiple requirements, listed in the disjunctive, for the various positions listed on the NOF. Thus, there are no contextual cues in the NOF that would signify to a reader that the travel requirement only applied to some of the positions. The Employer in no way differentiated between the various software engineer positions. Additionally, unlike the *Microsoft* case, the travel requirement in the NOF is not in the passive voice, "making it understood that the subject of [the] sentence is 'some positions.'" Thus based on the "overall context" of the NOF in this case, it is not clear that an applicant would know that the potential travel requirement does not apply to all the positions. As such, the phrase "may be assigned to various unanticipated sites" constituted a travel requirement that exceeded the requirements listed in the ETA Form 9089.

[3] The Employer is correct in its assertion that employers are not required to enumerate every job duty, requirement or condition of employment in the NOF. However, in the instant matter, without these additional requirements and job duties in the NOF, it cannot be said that the overall context of the NOF established that the potential travel requirement does not apply to all the positions. Further, the DOL has made clear that if the Employer choses to put such information in its advertisement, it must also be found in the ETA Form 9089. ETA, Final Rule, *Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 69 Fed. Reg. 77326, 77347 (Dec. 27, 2004).

We find no merit to the Employer's argument that language in the NOF referred only to "incidental" travel. There is nothing in the NOF that suggests that the possible travel was "incidental" in nature. Further, although the Employer argues otherwise, its request to amend the application to add the travel requirement would constitute a modification prohibited under 20 C.F.R. § 656.11(b), and therefore is not allowed.[4]

Based on the foregoing, we affirm the CO's denial of certification based on a violation of 20 C.F.R. § 656.10(d)(4) and 20 C.F.R. § 656.17(f)(6).

ORDER

It is **ORDERED** that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, MA

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

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Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

[4] *See* ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives for Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27916 (May 17, 2007) ("To the extent the BALCA favored allowing the employer . . . to present evidence that effectively changed the response to a question on the application, the BALCA's approach is inconsistent with the Department's objective and the NPRM proposal that applications cannot be changed or modified after submission.").

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

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(202) 693-7365 (FAX)

Issue Date: 24 April 2013

BALCA Case No.: 2011-PER-02707
ETA Case No.: A-09023-23250

In the Matter of:

ORACLE AMERICA, INC.,
Employer

on behalf of

RAHUL KUMAR MEHTA,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Grace Hoppin, Esq.
Berry Appleman & Leiden LLP
San Francisco, CA
For the Employer

Gary M. Buff, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Calianos, Geraghty, McGrath**
Administrative Law Judges

JONATHAN C. CALIANOS
Administrative Law Judge

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

This matter arises under section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). For the reasons set forth below, we reverse the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On February 12, 2009, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Product Manager." (AF 1, 118).[1] On December 16, 2009, the CO sent the Employer an Audit Notification Letter requesting that the Employer provide certain information in accordance with 20 C.F.R. § 656.20. (AF 114-16). On January 4, 2010, the Employer responded to the audit, attaching documentation of its recruitment steps. (AF 46-113).

On February 24, 2011, the CO denied the application because the Employer's additional professional recruitment steps and the State Workforce Agency job order contained job requirements or duties which exceeded the job requirements or duties listed on the ETA Form 9089, in violation of 20 C.F.R. § 656.17(f)(6). (AF 44-45). Specifically, the CO found that the Employer's job order and advertisements placed on its own website and on a job search website contained an education requirement, a Master's degree, not listed on the ETA Form 9089. (AF 45).

On March 28, 2011, the Employer requested reconsideration. (AF 3-43). The Employer argued that its advertisements were for multiple positions, some requiring a Bachelor's degree and some requiring a Master's degree. (AF 6). The Employer asserted that the use of the term "may" in the advertisements means that the various job opportunities listed in the advertisement *might* require a Bachelor's degree, or a Master's degree, depending on the job opportunity being recruited. (AF 6). The Employer concluded that based on the plain language of the advertisements, applicants could "clearly understand that the company was recruiting for multiple Product Manager opportunities with a range of degrees required." (AF 8).

On September 1, 2011, the CO denied reconsideration and forwarded the case to BALCA. (AF 1). In the transmittal letter, the CO stated that "terms and conditions of employment that 'may' be required could be considered necessary requirements by interested individuals . . . and could have a chilling effect on applicants, artificially excluding potentially qualified U.S. workers who would otherwise minimally qualify for the position listed on the ETA Form 9089." (AF 1).

BALCA issued a Notice of Docketing on December 19, 2011. The Employer submitted a Statement of Intent to Proceed on December 30, 2011. The Employer and the CO were allowed 45 days from the date of the Notice of Docketing to submit appellate briefs, but neither party chose to do so. On January 9, 2013, in response to this Panel's Order Requiring Certification on Mootness, the Employer certified that the job identified on the PERM application is still open and available and that the alien identified in the PERM application remains ready, willing, and able to fill the position.

[1] In this decision, AF is an abbreviation for Appeal File.

DISCUSSION

The PERM regulations require an employer filing an application for permanent alien labor certification for a professional position to conduct certain recruitment steps, including placing a job order, advertising in a newspaper or professional journal, and conducting three additional recruitment steps. 20 C.F.R. § 656.17(e). Two of the additional recruitment steps an employer can utilize to advertise a professional position is to advertise the position on its own website or on another job search website. 20 C.F.R. § 656.17(e)(1)(ii)(B)-(C). The advertisements must "not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089." 20 C.F.R. § 656.17(f)(6); *Credit Suisse Securities (USA), LLC*, 2010-PER-00103 (Oct. 19, 2010).

The Office of Foreign Labor Certification ("OFLC") has indicated through responses to Frequently Asked Questions ("FAQs") on its website that employers may use multi-position advertisements when recruiting for a job opportunity. The FAQs state:

Can one advertisement be used for multiple positions?

Yes, an advertisement for multiple positions may be used as long as all provisions in § 656.17(f), advertising requirements, have been met.
NOTE: While employers have the option to place broadly written advertisements with few details regarding job duties and requirements, employers must prepare a recruitment report that addresses all minimally qualified applicants for the job opportunity. If an employer places a generic advertisement, the employer may receive a large volume of applicants, all of whom must be addressed in the recruitment report. Employers placing general advertisements may wish to include a job identification code or other information to assist the employer in tracking applicants to the job opportunity.

I have multiple positions available for the same occupation and job classifications and at the same rate of pay. May I post a Notice of Filing for the same occupation and job classifications with a single posting?

Yes, an employer can satisfy Notice of Filing requirements with respect to several positions in each of these job classifications with a single Notice of Filing posting, as long as the single posting complies with the Department of Labor's regulation for each application (e.g. contains the appropriate prevailing wage information and the Notice of Filing must be posted for 10 consecutive business days during the 30 to 180 day time window prior to filing the application). For instance, separate notices would have to be posted for an attending nurse and a supervisory nurse (e.g. nurses containing different job duties).

OFLC Frequently Asked Questions and Answers, http://www.foreignlaborcert.doleta.gov /faqsanswers.cfm (last visited March 8, 2013). According to these FAQs, an employer is allowed to recruit for multiple positions in one advertisement, provided that the employer still meets the requirements of Section 656.17(f) for each individual application.

The Employer's ETA Form 9089 requires only a Bachelor's degree for the job opportunity; it does not require a Master's degree. (AF 118). The Employer's job search website advertisement and job order listed the job title as "Product Managers" and stated "Positions may require Bachelor's or Master's degree; and related work experience." (AF 97, 103). The Employer's advertisement on its own website listed the job title as "Product Manager(s)" and stated "positions may requir [sic] Bachelor's or Master's degree; and related work experience." (AF 101).

The Employer argues that the advertisements and job order were for multiple Product Manager positions and some of the positions require a Master's degree, and some, including the job opportunity in this appeal, do not. It argues that it complied with the DOL's instructions on multi-position advertisements, and did not violate Section 656.17(f)(6) because the advertisements did not state that all positions require a Master's degree.

In a recent decision, *Microsoft Corporation*, 2011-PER-00324 (Feb. 20, 2012), a BALCA panel reversed a CO's denial based on similar facts to the case presently before us. In *Microsoft Corp.*, the employer did not list a travel requirement on its ETA Form 9089, but included the phrase "may require employer-reimbursed travel" in its NOF listing multiple position openings. In reversing the denial, the panel focused on the fact that the description of duties and requirements in the NOF were written in the disjunctive, demonstrating a contrast between the different job openings. *Id.* at 14. The panel stated that "the requirements in th[e] advertisement are all described as alternatives or as possibilities, which conveys that some of the requirements apply to some of the positions, while other requirements apply to other positions" and "[t]here is nothing in this advertisement to indicate that some of the requirements apply to all of the positions." *Id.* at 5. The panel also reasoned that "given the variety of job descriptions, education, and experience requirements, anyone reading the advertisement would understand that the education and experience requirements do not apply to each and every position." *Id.* at 15. Lastly, the panel found that because the NOF was for multiple positions and the requirements were written in a passive voice, it was understood that the subject of each sentence was "some positions." *Id.*

The *Microsoft* panel concluded that it was "clear within the overall context of the advertisements that not all of the Marketing and Product Manager positions require travel." *Id.* at 16. The panel in *Microsoft* noted the limited scope of its holding, based on the specific facts of the case. In a footnote, the panel warned that in other cases "a fact-specific inquiry will be necessary to determine whether any potential applicant could have been confused or misled into believing that all positions advertised required travel." *Id.* at 16.

We find that on the facts of the case before us, a potential job applicant would not be confused in thinking that all the Product Manager positions have the requirement of a Master's degree. There are sufficient contextual cues in the advertisements that would signify to a reader that the Master's degree requirement only applied to some of the positions advertised. The plain language of the advertisements establishes that the Employer is recruiting for multiple positions, as they refer to "Product Managers" and "positions" in the plural. Additionally, the education requirements are written in the disjunctive, demonstrating alternatives or possibilities, depending on the different job openings. *See Microsoft Corporation*, 2011-PER-00324 at 14. The use of the word "or" in combination with the word "may" denote that some positions may require a

Bachelor's Degree, some positions may require a Master's degree, and some positions may require neither a Bachelor's degree nor a Master's degree. There is no reasonable interpretation of the sentence "positions may require Bachelor's or Master's degree" that would include a requirement of a Master's degree for all positions.[2] Thus based on the "overall context" of the advertisements, it is clear that an applicant would know that the potential Master's requirement does not apply to all the positions. As such, the reference to a Master's degree in the multi-position postings did not constitute a requirement that exceeded the requirements listed in the ETA Form 9089, and we accordingly reverse the CO's denial of certification.

ORDER

It is **ORDERED** that the denial of labor certification in this matter is hereby **REVERSED** and we direct the Certifying Officer to **GRANT** labor certification in this case.

For the Panel:

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, MA

[2] In dicta in the *Microsoft Corp.* case, the Board stated that the language regarding the education requirement in the advertisement—"[r]equires a BA/BS, MA/MS, or MBA degree"—was "clear that some of the positions require a bachelor's degree, while some of the positions require a master's degree." *Microsoft Corporation*, 2011-PER-00324 at 14 (emphasis added). If anything, the language in this case is even clearer because it states "positions *may* require" whereas the advertisements in *Microsoft* simply stated "requires."

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