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2009 UPDATE FROM THE BOARD OF ALIEN LABOR CERTIFICATION APPEALS (BALCA)

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by
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BALCA has been busy in 2009, and has issued many decisions that have had an impact on how labor certifications under PERM are prepared and filed. Here is a round up of what I believe are some of the more relevant decisions, which I prepared for my presentation at the AILA Fall 2009 Texas/ New Mexico/Oklahoma Chapter Conference in Puerto Vallarta, Mexico, November 6&7, 2009 . A useful digest of these decisions can be found on the DOL web site at **http://tiny.cc/saJ0k**.

Alternative Requirements

AGMA Systems LLC, 2009-PER-00132 – A job requirement of MS plus 3 years of experience or the alternative requirement of BS plus 5 years of experience were substantially equivalent, and thus the language set forth in *Francis Kellogg*, 1994-INA-465 as not required. *Kellogg*, along with 20 C.F.R. §656.17(h), requires that an alternative requirement must be substantially equivalent to the primary requirement of the job opportunity. If the alien does not meet the primary job requirement, and while already employed by the sponsoring employer, only meets the alternative requirement, certification will be denied unless the application states that *any suitable combination of education, training or experience is acceptable* (emphasis added). In *AGMA Systems*, BALCA held that since an MS plus 3 years of experience or an MS plus 5 years had the same lapsed time for preparation for the occupation (7 years), they were substantially equivalent and thus the absence of the *Kellogg* magic language on the application was not fatal.

Federal Insurance Co., 2008-PER-00037 – The fact that the *Kellogg* language did not appear on the form was not fatal as there is no space on the form for such language; and the *Kellogg* language also does not need to appear in recruitment materials. A denial would offend fundamental fairness and due process under *HealthAmerica*, 2006-PER-1 (a typographical error of the advertisement date on the application is not fatal if the employer possessed evidence of the correct advertisement that is required as part of the PERM compliance and thus was constructively submitted by the employer).

Moreta & Assocates, Int, 2009-PER-0008 - Job for an accountant required QB, but whether the alien gained QB skills was not listed in Column K. Employer presented affidavit, but that was not accepted under *HealthAmerica*. BALCA extended *Federal Insurance Co*. holding that Column K did not have any space for skills, and it offends fundamental due process to deny an application for absence of such information without first giving the employer an opportunity to address the alien's qualifications for the special skill requirement.

Errors on PERM Form

Pa'Lante, 2008-PER-00209 – Failure to list prior experience in Section K, and not consider evidence of such experience in audit response, was not fatal to the application, as the employer is constructively considered to have kept and submitted such evidence under PERM's recordkeeping provisions pursuant to *HealthAmerica*. While this was not a typographical error as in *HealthAmerica,* it was similar to that case since the documentation needed to prove that the application actually complied with the regulations was documentation constructively considered to have been submitted by the Employer under PERM's recordkeeping provisions.

Cf. Geoffrey Allen Corporation, 2008 PER-00234 – Employer's failure to list prior experience was fatal. Unlike the facts in *Pa'Lante*, Employer appeared to submit extrinsic evidence, which was not part of the PERM record keeping requirements, such as an H-1B petition, LCA and an old ETA 750.

Southern Occasions Catering LLC, 2009-PER-00011 – Where CO alleged that employer did not advertise on Sunday, and instead of rebutting, employer re-advertises in a Sunday edition, *HealthAmerica* is inapplicable as the new recruitment did not previously exist in the PERM record keeping file.

Hawai'i Pacific University, 2009-PER-00127 – Even though the Notice of Filing

listed the CO's address in San Francisco rather than the National Processing Center's address, given the lack of assistance provided to practitioners and the system being far from friendly, the erroneous address was not fatal. *See also Brooklyn Amity School*, 2007-PER-64 (listing of NY DOL address was not fatal since this office was still open even after PERM, and only 120 days passed since the establishment of the National Processing Centers).

Recruitment

Skin Cancer & Cosmetic Dermatology Center P.C 2009-PER-00072 – Even though the employer did not require a bachelor's degree for a Dietician and Nutritionist, if the occupation is found on Appendix A, it must recruit under the additional steps criteria for professional positions.

Dunkin Donuts, 2008- PER- 00135 – Employer's name must appear on the advertisements; fax number does not suffice.

Stone Tech Fabrication, 2008-PER-00187 – If Notice of Filing lacks employer's name, employer must demonstrate that the Notice applied to the sponsoring employer, which it did not do here. BALCA recognized that notions of fundamental fairness are applicable to PERM processing. *Cf. HealthAmerica*.

Matter of Big Apple Compactor Co., Inc. d/b/a Big Apple Fire Sprinkler Co., 2008 INA 00009 -Rejection of an applicant solely on the resume not listing recent experience, when it was not clear if applicant qualified, was not lawful rejection.

Prevailing Wage and Wage Range

Thomas L. Brown Associates, P.C., 2009-PER-00347 - The Notice of Filing, pursuant to 656.17(f)(5) states that an advertisement must "not contain a wage rate lower than the prevailing wage rate." But this section does not mean that if the actual wage offer is higher, the Notice of Filing may only list the lower prevailing wage. Here the prevailing wage for the position was $78,478 but the actual salary offer was $90,000. The employer's internal posting notice (Notice of Filing) only listed $79,000, which was lower than the offered wage of $90,000. Query whether BALCA would have the same objection to a wage range, where the lower end equals the prevailing wage and the higher end reflects the wage offered or a wage even higher than the offered wage. This practice appears to be risky after *Thomas L. Brown Associates* even though it was approved by BALCA in *Sterling Mgt Systems*, 89-INA-216 (BALCA 1991). Even under the holding in *Thomas L. Brown Associates*, the employer can argue that it need only state

the wage when the alien was initially hired and not what s/he is currently paid. *See University of North Carolina*, 90-INA-422 (BALCA 1992). Of course, an employer should not rely on *University of North Carolina* if it is relying on "on the job" experience under the theory that the duties of the sponsored position are 50% different from the duties of the earlier position with the same employer under 20 C.F.R. §656.17(i)(5)(ii).

Reed Elsevier Inc., 2008-PER-00201 – SWA erroneously combined the educational and experiential components of the position together to determine whether they were within the SVP range for the position, in contravention of the May 9, 2005 Guidance, to determine the wage level.

Business Necessity

Roberto's Mexican Food, Inc., 2009-PER-00187 – Cannot argue business necessity based on prior labor certification approval.

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