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ANALYSIS OF SELECTED RECENT BALCA DECISIONS AS PRACTICE POINTERS TO AVOID PERM DENIALS

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The Board of Alien Labor Certification Appeals (BALCA) has been incredibly busy issuing a number of decisions. BALCA will be issuing decisions with even greater frequency as it is adding two more panels comprising three administrative law judges each. The current time for BALCA to render a decision is taking about six months, which is a sea change from the recent past when the average time for a BALCA appeal was two years or more. It is important for practitioners to stay abreast of these decisions as they offer interesting insights into how to avoid some of the pitfalls in preparing and filing a Program Electronic Review Management (PERM) application. This advisory highlights some of the recent BALCA decisions in the areas of alternative requirements, recruitment, roving employees, and errors, which in this author's opinion; provide important practice pointers that would improve the odds for obtaining a PERM approval.

Alternative Requirements

BALCA has issued important decisions regarding alternative requirements. As a background, 20 Code of Federal Regulations (CFR) §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, the labor certification will be denied unless the application states that *any suitable combination of education, training or experience is acceptable* (emphasis added). 20 CFR §656.17(h)(4)(ii) essentially adopts the holding of BALCA in *Francis Kellogg*, 1994-INA-00465, although in that case the primary and alternative requirements, namely, experience as a cook or salad maker, were not substantially equivalent, thereby necessitating that the

employer accept any suitable combination of education, training or experience. In contrast to *Kellogg*, 20 CFR §656.17(h) requires consideration of this language even if there is substantial equivalence between the primary and alternative requirement.

Practitioners must therefore be mindful of the "magic language," and in addition to its talismanic invocation on the ETA-9089, must also advise the employer to actually consider candidates with any suitable combination of education, training or experience in the event that these candidates do not meet the exact requirements of the position. The current ETA-9089 does not have a special entry for inserting this language, although the practice has been to insert it in Box H.14. Fortunately, if this language does not appear on the form, it is no longer fatal and practitioners can challenge a denial if the sole reason for the denial was for failure to insert this "magic language" on the application. In *Federal Insurance Co.,* 2008-PER-00037 (BALCA Feb. 20, 2009) the fact that the *Kellogg* language did not appear on the form could not be a ground for denial as there is no space on the ETA-9089 form for such language; and the *Kellogg* language also does not need to appear in recruitment materials. In *Federal Insurance* BALCA held that a denial would offend fundamental fairness and due process under *HealthAmerica*, 2006-PER-0001 (BALCA July 18, 2006). *HealthAmerica* is a seminal BALCA decision, which rejected the certifying officer's (CO) denial of the labor certification based on a typographical error recording a Sunday advertisement on the form, although the employer possessed actual tear sheets of the advertisement. BALCA rejected the CO's position that no new evidence could be submitted as the advertisement tear sheets were part of the PERM compliance recordkeeping requirement and thus was constructively submitted by the employer.

Pursuant to the holding in *Kellogg*, not every situation requires consideration of the "magic language" even when the position has a primary and an alternative requirement, and the alien qualifies only through the alternative requirement. In *AGMA Systems LLC,* 2009-PER-00132 (BALCA Aug. 6, 2009), a job requirement of an M.S. degree plus three years of experience, and in the alternative, a B.S. degree plus five years of experience were substantially equivalent, and thus *Kellogg* "magic language" was not required. The employer successfully argued that 20 CFR §656.17(h), like *Kellogg*, requires that when an alternative requirement is substantially equivalent to the primary requirement of the job opportunity, there is no need to consider U.S. worker job applicants with a

suitable combination of training, education or experience. In *AGMA Systems*, BALCA held that since an M.S. plus three years of experience or a B.S. plus five years had the same specific vocational preparation (SVP) or lapsed time to prepare for the occupation (seven years), they were substantially equivalent, and were not even primary or alternative requirements, and, thus, the absence of the *Kellogg* "magic language" on the application was not fatal.

The most problematic BALCA case on alternative requirements is its most recent, *Globalnet Management*, 2009-PER-00110 (BALCA Aug. 6, 2009). In *Globalnet Management* (BALCA Aug. 6, 2009), BALCA held that a bachelor's degree plus two years of experience was not substantially equivalent to 14 years of experience. BALCA did not accept the argument that the alternative requirement of 14 years of experience comported with the well established formula to determine equivalency under the H-1B visa, three years of experience is equal to one year of education, and held that the primary and alternative requirements were not substantially equivalent. BALCA relied on Field Memorandum No. 48-94 that set forth the years under its SVP levels for different educational attainments (*e.*, B.S. is equal to two years of experience). Therefore, the appropriate alternative for a position requiring a B.S. degree plus two years of experience would have been four years of experience rather than 14 years of experience. While BALCA noted that 8 CFR §214.2(h)(4)(iii)(D)(5) may be persuasive in the absence of other guidance, citing *Syscorp International*, 1989-INA-00212, it nevertheless relied on Field Memo No. 48-94 in affirming the denial of the labor certification. This decision is most troubling because BALCA reaffirmed the denial despite the existence of the *Kellogg* "magic language" on the labor certification.

The reason why practitioners include such an alternative requirement is to ensure that the requirement is consistent with the H-1B visa petition. It is not unusual to qualify an alien for an H-1B visa who may have the equivalent of a three year degree, and then makes up the fourth year through the equivalent of three years of experience. Will this put into jeopardy ETA-9089 applications that define an equivalent degree, as follows: "Employer will accept a three year bachelor's degree and three years of experience as being equivalent to one year of college?" Clearly, if the employer does not include what it means by an equivalent degree on the ETA-9089, the subsequent I-140 petition will fail. If an employer requires a bachelor's degree, and if the alien does not have the equivalent of a four year degree, and the ETA-9089 does not include a

definition with respect to what it means by an equivalent degree, U.S. Citizenship and Immigration Services (USCIS) will assume that the employer required a four year degree and the alien would not be able to qualify for the position by virtue of not possessing such a degree.

On the other hand, in light of *Globalnet* it no longer remains viable to insist on consistency between the H-1B and the labor certification. Hence, if the primary requirement is a bachelor's degree and two years of experience, and the alien does not have a degree whatsoever, the substantially equivalent alternative that would be acceptable to DOL would be four years of experience, as opposed to 14 years of experience. There may be some concern that requiring this formula on the labor certification, which may pass muster for DOL, may still be problematic when the alien has filed an I-140 petition and is also extending the H-1B visa using the "3 for 1" equivalency formula to establish the equivalent degree to qualify for the H-1B occupation. However, if this issue comes up during an H-1B adjudication, it should be argued that the discrepancy lies in the USCIS regulations and USCIS interpretations relating to H-1B and I-140 petitions, not in the beneficiary's job or the beneficiary's qualifications. USCIS ought not to be denying an H-1B solely because a beneficiary who has been classified for an H-1B visa through an equivalent degree, either based on a combination of education and experience, or purely through a requirement of 12 plus years of experience, is classified on an I-140 under the EB-3 skilled worker preference requiring something less than a bachelor's degree. One possible way out of the *Globalnet* trap (and to achieve consistency with the H-1B) is to have only one single requirement, and eliminate the primary and alternative requirement. For example, the employer can require the equivalent of a bachelor's degree as a sole requirement rather than insist on a bachelor's degree or the equivalent of such a degree.

Recruitment

Recruitment lies at the heart of a successful PERM case. It is generally conducted prior to the filing of the application, and the recruitment method differs between professional and non-professional occupations. A review of recent BALCA decisions will provide invaluable insights to the practitioner on how to properly advise the employer on what it can and cannot do with respect to the different recruitment steps as specified in the regulations. If the recruitment is not done correctly, it is often fatal and the employer must start

all over again.

Employee Referral Program

For a professional position, one of the three additional recruitment steps that an employer may rely on is an employee referral program with incentives. 20 CFR §656.17(e)(1)(ii)(G) allows an employer to document this type of recruitment "by providing dated copies of the employer notices or memoranda advertising the program and specifying the incentives offered."

In the March 25, 2010, liaison minutes of the teleconference between DOL and stakeholders followed by PERM FAQ 11, DOL indicated that it requires more from employers who utilize the employee referral program. Specifically, DOL has imposed new requirements as to what is considered "acceptable" evidence to demonstrate the "existence and use" of the employee referral program. Thus far, employers have been able to utilize their existing employee referral programs and to document its use by submitting a description of the program. In response to audits, DOL has previously accepted photocopies of pages from the employer's employee handbook describing the ongoing program.

Now, DOL requires documentation that employees were made aware that they could refer applicants to the specific position sponsored for PERM. DOL wants to see dated copies of correspondence to employees linking the employee referral program to job openings within the company and to the PERM position in particular! The new guidance suggests that employers execute a memo confirming the existence of an ongoing employee referral program and addressing how the company's employees were made aware that they could refer applicants to the PERM position.

While 20 CFR §656.17(e)(1)(ii)(G) does not require documentation that employees were made aware of the specific PERM position, to be on the safe side and prevent a possible PERM denial and then motion/appeal down the road, employers may want to consider adding an "available positions" section at the end of the employee referral program description, including a copy of the specific PERM ad(s) and posting the program in a conspicuous location on the business premises for a specific number of days (and publishing via employer's intranet, if any) as they do with the posting notice.

If an employer is challenged regarding whether it adequately relied on its recruitment referral program, it can rely on *Clearstream Banking*, 2009-

PER-00015 (BALCA Mar. 30, 2010), where BALCA held that an intranet posting was acceptable, and went on to state: "In other words, a generic employee referral program with incentives, the description of which is available to employees may be sufficient to be a step under section 656.17(e)(1)(ii)(G), even if the particular job for which labor certification is being sought is not individually promoted under the program." However, two recent decisions seem to partially affirm the DOL's new position in FAQ 11. In *Matter of Sanmina-Sci Corporation*, 2010-PER-00697 (BALCA Jan. 19. 2011) and *Matter of AQR Capital*, 2010-PER-00323 (BALCA Jan. 26, 2011), BALCA established a three-pronged test for an employer to ensure its compliance with 20 C.F.R. §656.17(e)(1)(ii)(G), namely, that the employer must document that (1) its employee referral program offers incentives to employees for referral; (2) the program was in effect during the PERM recruitment period; and (3) the employees were on notice of the job opening. BALCA, however, rejected the CO's argument that the employee referral program needed to be dated within the 180-day recruitment period, and the only purpose of the establishment of the date of the referral program, according to BALCA, was to demonstrate that it was in effect during the PERM recruitment period.

It is worth reminding readers at this juncture that one should continue to forcefully argue that DOL is violating the Administrative Procedure Act by imposing new requirements without providing stakeholders with the opportunity of notice and comment. Remember what BALCA said about attempts by DOL to make law through promulgating FAQs. In *Matter of HealthAmerica*, it criticized the CO's reliance on PERM FAQ No. 5 and, tracking the standard of deference articulated by the U.S. Supreme Court in *Skidmore v. Swift & Co*., 323 U.S. 134 (1944), held that the FAQ impermissibly imposed substantive rules. In the case of the employee referral program with incentives, DOL has imposed new burdens via a DOL stakeholder teleconference and FAQ. One should argue that the new imposition without notice and comment is an unlawful violation of the Administrative Procedures Act (APA) P.L. 79-404 and is, at most, entitled to *Skidmore*

Employer's Website Advertisement

Under 20 CFR §656.17(e)(1)(ii)(B), one of the additional recruitment steps for a professional occupation is to allow an employer to advertise the position on its own website, which "can be documented by providing dated copies of pages

from the site that advertise the occupation involved in the application."

PERM FAQ Round 10 states that if there is no copy of the website posting, "the employer may provide an affidavit from the official within the employer's organization responsible for the posting of such occupations on the website attesting, under penalty of perjury, to the posting of the job." In *PSI Family Services*, 2010-PER-00097 (BALCA Apr. 16, 2010), while acknowledging that web pages were ephemeral, BALCA held that 1) the attorney's cover letter stating dates of posting, 2) employer's vice president for human resources' (HR) reference in the recruitment report to the dates of posting, and 3) an undated document showing a list of open positions and showing the website address at the bottom of each page were not sufficient documentation to establish proof of a website posting. BALCA specified that the statements of the attorney or the HR vice president were not in affidavit form, nor attested to. Nor did the statements indicate whether the attorney or the HR vice president were the officials within the employer's organization responsible for the posting of such occupation on the website. A subsequently prepared affidavit that was submitted in conjunction with the motion for reconsideration was not accepted pursuant to 20 CFR §656.24(g)(2). Under this regulation, evidence cannot be submitted with a motion for reconsideration unless the employer did not have an opportunity to previously submit it to the CO. In *PSI Family Services*, such an opportunity existed at the time of the audit.

As a practice pointer, it would be best if the employer printed out the advertisement each day with a printing label on each page reflecting the date of printing. While this may not be practical, the next best solution is to print out the text of the website advertisement, and have the person responsible for posting the advertisement within the employer submit an affidavit.

Practitioners must also ensure that the website advertisement, and for that matter, any advertisement, complies with 20 CFR §656.17(f), which requires that advertisements placed in newspapers of general circulation or in professional journals, contain, *inter alia*, the name of the employer, directions on how to contact the employer, a description of the job specific enough to apprise U.S. workers of the job opportunity; and the geographic area of employment. In *Credit Suisse Securities*, 2010-PER-00103 (BALCA Oct. 19, 2010), BALCA held with respect to a website advertisement that a "generalized list of several broad and vague areas of employment" did not "contain the information required under the regulations to apprise U.S. workers of the job opportunity in the labor

application." In *Credit Suisse Securities* the occupation in the labor certification was for "Computer Software Engineer, Applications," but the website under "Center of Excellence" listed career opportunities in a multitude of areas and did not comply with the regulation. BALCA also rejected the employer's argument that 20 CFR §656.17(f) was only applicable to newspaper and professional journal advertisements and not to the additional recruitment steps for professional occupations, holding that the regulation in fact governs all forms of advertisement.

While practitioners must heed the admonition in *Credit Suisse Securities* that all forms of recruitment must comply with §656.17(f), not all the additional recruitment methods for professional positions will readily lend themselves to these requirements (such as recruiting through private employment firms, where it makes no business sense to indicate the name of the employer as an applicant could then apply directly, bypassing the headhunter entirely). Indeed, even in *Credit Suisse Securities,* BALCA acknowledged in note 7 that the requirements of §656.17(f) only applies to advertisements, and that it was not making a determination with respect to job fairs, on-campus recruiting, private employment firms and campus placement offices.

Other Recruitment and Related Issues

The following brief summaries of BALCA decisions on an assortment of recruitment issues also serve as important practice pointers. While the notice of filing (NOF) is not precisely a recruitment step, recetions.nt cases pertaining to the NOF have been included as the requirements of 20 CFR §656.17(f) also apply to a NOF, and it is also worth including an important BALCA case on a NOF and wage issue.

Noll Pallet & Lumber, 2009-PER-00082 (BALCA Dec. 16, 2009)—where advertisement asked for "criminal and background check" but ETA-9089 did not, it was violative of §656.17(f)(7) as the conditions in the advertisements were less favorable than those offered to the alien.

Xpedite Technologies Inc., 2010-PER-00100 (BALCA Apr. 7, 2010)—here too, as in *Noll Pallet & Lumber*, where advertisement had a travel requirement, but the ETA-9089 did not, the conditions in the advertisements were less favorable to U.S. workers than those offered to the alien, as reflected on the ETA-9089.

Dunkin Donuts, 2008-PER-00135 (BALCA Jan. 5, 2009)—Employer's name must

appear on the advertisements; a fax number does not suffice.

Skin Cancer & Cosmetic Dermatology Center P.C., 2009-PER-00072 (BALCA June 23, 2009), *published on* AILA InfoNet at Doc. No. 09081167 (*posted* 11, 2009*)*—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 posi

Robert Venuti Landscaping, Inc., 2009-PER-00453 (BALCA Oct. 27, 2010), *published on* AILA InfoNet at Doc. No. 10102960 (*posted* 29, 2009)—In *Stone Tech Fabrication*, 2008-PER-00187 (BALCA Jan. 5, 2009), if the NOF lacked employer's name, the employer must demonstrate that the NOF applied to the sponsoring employer, which it did not do in that case. BALCA recognized that notions of fundamental fairness are applicable to PERM processing. *Cf. HealthAmerica*. In *Robert Venuti Landscaping, Inc*., BALCA held that there was no longer room for the employer to argue the *Stone Tech* exception and in effect overruled *Stone Tech*.

Il Cortile Restaurant, 2010-PER-00683 (BALCA Oct. 12, 2010)—The 10 business day definition need not be limited to Monday–Friday, and could include weekends provided the employer, such as the restaurant in this case, was open on weekends and employees are on the worksite during the weekend.

Thomas L. Brown Associates, P.C., 2009-PER-00347 (BALCA Sep. 1, 2009)—The NOF, 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 NOF may only list the lower prevailing wage. Here the prevailing wage for the position was $78,478 but the actual salary offer was $90,001. The employer's internal posting notice (NOF) only listed $79,000, which was lower than the offered wage of $90,001. 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*, 1989-INA-00216 (BALCA Mar. 18, 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 he or she is currently paid. *See University of North Carolina*, 1990-INA-00422 (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 percent different from the duties of the earlier position with the same employer under 20 CFR §656.17(i)(5)(ii).

Roving Employees

Filing a labor certification for a roving employee is extremely tricky and fraught with potential pitfalls. There are several types of roving employees. The most common is the IT consultant who is sponsored by an employer, but this worker will never work in the office of the employer and will always be assigned to a client site. This worker may either be assigned to one client site or to several unanticipated client sites. Another variation of the roving employee is one who may not be assigned to a client site, but is able to work from home while frequently visiting clients within a geographical region or the whole country.

The most recent BALCA decision concerning roving employees is *Amsol, Inc*., 2008-INA-00112 (BALCA Sept. 3, 2009), which consolidates several cases based on the same employer and facts. Although it is based on a pre-PERM labor certification, *Amsol* is nevertheless highly instructive as a practice pointer for PERM cases involving similar roving employee situations. The employer filed several labor certifications based out of its office in Caspar, WY, and indicated on the labor certification that the aliens would work in "Caspar, WY and any other unanticipated location in the U.S." Since the statute and regulation are silent on the location from which such labor certification must be filed, BALCA agreed that the guidance in Employment and Training Administration's Field Memorandum No. 48-94 (May 16, 1994) was controlling. Field Memorandum No. 48-94 provides that "pplications involving job opportunities which require the Alien beneficiary to work in various locations throughout the United States that cannot be anticipated should be filed with the local employment service office having jurisdiction over the area in which the employer's main or headquarters office is located." In a prior BALCA case with similar facts, *Paradigm Infotech*, 2007-INA-3,4,5 and 6 (BALCA June 15, 2007), BALCA held that a labor certification filed out of an office in Erie, PA, was not the appropriate place for a labor market test as the wage in Erie, PA, was lower for a job with national scope, and that the area of intended employment covering the employer's headquarters, which was in Columbia, MD, reflected a higher prevailing wage. On the other hand, in *Amsol*, the Caspar, WY, office was the employer's first office and its place of incorporation even though it had an

office in Newark, DE. Importantly, BALCA further found that the offered wage was higher than the prevailing wages in both Caspar, WY and Newark, DE. Moreover, the employer submitted ample evidence of a business premise and even advertised the position in *Computerworld*, a national magazine. BALCA remanded back to the CO to determine whether the reduction in recruitment (RIR) was sufficient or whether supervised recruitment would be required.

Practitioners must ensure that like in *Amsol* there needs to be a sufficient business connection with the office through which the labor certification is filed. Moreover, the client must also be advised that this location is not being selected for the filing in order to obtain a lower prevailing wage or to bypass other locations where there will be a greater chance to attract U.S. workers. Finally, although the mandatory recruitment must occur in a newspaper of general circulation in the area of intended employment, also endeavor to advertise nationally under the three additional recruitment methods.

While there are no reported BALCA cases involving home offices, the following extract from the March 15, 2007, DOL Stakeholder's meeting, *published on* AILA InfoNet at Doc. No. 07041264 (*posted* 12, 2007), is worth repeating here:

Roving and Telecommuting Employees

18. For an employee who is based out of a company's headquarters and is assigned to various work sites around the country (*i.e.*, roaming employee not assigned to a designated region), please confirm that the notice of posting, recruitment, and prevailing wage determination should be based on the location of the company's headquarters.

    - *Correct, if the area of intended employment is certain.*

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.

20. In the case of a telecommuter or an employee whose location is not specific to the job, please confirm that the notice of posting, recruitment, and prevailing wage determination should be based on the location of the employer's headquarters.

    - *Please see answer to number 19 above.*

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.*

FINAL NOTE: When a job is regional, such as an employee working out of a home office but travelling throughout a specific geographic area, the analysis of where to obtain the prevailing wage and recruit can be thorny. Prior to PERM, guidance was that the prevailing wage would be determined where the majority of duties are performed. Best practice under PERM would be to use the highest wage within the region/MSA and recruit in the regional edition of a nationwide paper. This gets complicated as there are few nationwide papers with regional editions or newspapers that could be considered regional.

And here's a final pointer: If the position allows work out of the home office, remember to ensure that the advertisement indicates that a home benefit is available and/or that travel is also required. All of these terms and requirements must be repeated in ETA-9089, H.14.

Errors

This section has been deliberately placed last in this practice advisory because practitioners should be discouraged from making mistakes on ETA-9089 or in relation to any documentation. Moreover, not every mistake can be overcome by invoking *HealthAmerica,* especially mistakes that are clearly in violation of the regulations. It should also be noted that the beneficial impact of *HealthAmerica* has been somewhat negated by 20 CFR §656.24(g)(2)(ii), which limits documents accompanying a motion for reconsideration to "ocumentation that the employer did not have an 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)." Still, we see BALCA continuing to rule in favor of applicants who have made errors based on fundamental fairness and in recognition of the fact that the PERM process is an exacting an unforgiving one. Indeed, even in *Federal Insurance*, which involved a failure to state the *Kellogg* language, BALCA's decision was grounded in the fundamental fairness doctrine enunciated in *HealthAmerica,* especially since there was no place on the ETA-9089 that signaled to an employer to insert this language. However, as noted below, the trend is for BALCA to be far less forgiving and to apply *HealthAmerica* very narrowly.

Recently, BALCA issued an important decision, *Denzil Gunnels*, 2010-PER-00628 (BALCA Nov. 16, 2010) setting forth standards under which the CO must consider an appeal as a request to reconsider rather than treat is as a request for review. 20 CFR 656.24(g)(4) provides that "he Certifying Officer, may, in his or her discretion, reconsider the determination or treat it as a request for review." In *Denzil Gunnels* BALCA found that the CO abused his discretion by failing to consider the employer's request as a motion, and instead, treating it as a request for review. Even though the employer filed a "Request for Review of Denial of Form ETA 9089," it was attempting to submit supplementary evidence, a corrected ETA 9089, after the originally filed ETA 9089 failed to state "yes" or "no" in Section M1. The employer was thus attempting to request a motion for reconsideration, even though it did not say so clearly, and BALCA admonished the DOL indicating that its FAQs did not make clear that if the employer omits the magic word "reconsideration," it will result in the request being placed in the BALCA queue. Note that if the CO sends the file to BALCA,

an employer is unable to correct or supplement the record under *HealthAmerica* as BALCA is unable to consider new evidence.

BALCA in *Denzil Gunnels* concluded by setting forth circumstances under which the CO may exercise his discretion properly and the circumstances under which it will be found to be an abuse of discretion:

Step 1. Where an employer unambiguously requests BALCA review, the employer has made a tactical decision to appeal to BALCA and can no longer supplement the record. BALCA, however, left open the possibility that even where an employer uses the words "request for review," but it is clear that the employer is seeking consideration or where there is ambiguity, BALCA will determine whether the CO abused his discretion by sending the file into the BALCA queue without first treating it as a request for reconsideration and reviewing the supplemental evidence.

Step 2. BALCA recognized that not all supplemental evidence can be accepted, and could be barred under 20 CFR §656.24(g)(2)(ii) where the employer did have a prior opportunity to submit evidence to the CO during an audit. This would be a case, labeled as Situation 1, where "Application is Filed è Audit è Audit Response è Final Determination è Reconsideration based on evidence submitted in audit response." Under Situation 1, BALCA will not find that the CO abused his discretion as the supplemental evidence was squarely barred under § 656.24(g)(2)(ii), and the CO was justified in treating the request for reconsideration as an appeal to BALCA. On the other hand, under Situation 2 - "Application is Filed è Denial of Application è Reconsideration based on evidence that would have been submitted as part of the audit response" - if a PERM application is denied without an audit, and the employer submits supplemental evidence that could be considered as part of the record under *HealthAmerica*, the CO should treat it as a request for reconsideration rather than a request for review.

Step 3. BALCA further recognized that even in cases that fall squarely under Situation 1, the circumstances of an audit may not have been specific enough to put the employer on notice regarding a specific deficiency. Thus, these cases would be treated under Situation 2, even if an employer received an audit, but argues that it did not receive specific notice, the request for review should be treated as a request for reconsideration so that the employer has a fair opportunity to present supplemental evidence to the CO.

Denzil Gunnels, thus, opens the door for an employer to argue that it may not have received adequate notice of the deficiency and appears to provide a way around a strict application of the prohibition to present supplementary evidence that would otherwise be barred by 20 CFR §656.24(g)(2)(ii). Thus, as an example, in its denial CO objected to whether a Sunday newspaper was appropriate or whether a specific US worker was lawfully rejected or not, one can argue that the generic boilerplate audit notice, even if it asked for evidence of the employer's recruitment, did not adequately apprise the employer of these potential deficiencies, and can seek to supplement the record through a motion to reconsider. On the other hand, if an employer inadvertently submits an erroneous copy of an advertisement in response to an audit notification for evidence of recruitment, BALCA has held that this situation is the precise type of evidence barred by § 656.24(g). *SeeTechdemocracy LLC,* 2009-PER-00459, 2011-PER-00058 (BALCA Nov. 16, 2010).

Below is a review of how BALCA has generally treated errors prior to *Denzil Gunnels*.

Regarding not submitting a completed application, BALCA has indicated that some omissions may not be material to the review of the substance of the application. *See Yasmeena Corp.*, 2008-PER-00073 (BALCA Nov. 14, 2008). In *Yasmeena Corp*. the only ground of denial was that the employer failed to indicate the date in the employer's declaration on the ETA-9089, which was filed by mail rather than electronically. Moreover, BALCA has also held that if the CO denies a motion to reconsider without explaining why the omissions are material it would be arbitrary and capricious. *See Ben Pumo*, 2009-PER-00040 (BALCA Oct. 29, 2010). Practitioners should on the other hand not take too much comfort in *Yasmeena Corp* and bear in mind that DOL has clearly indicated that an error resulting from an employer's disregard of the system prompts will result in a denial and will not be considered in a motion for reconsideration.

Here are further summaries of relevant BALCA decisions:

Luigi's Restaurant, 2009-PER-00357 (BALCA Aug. 31, 2009)—Failure to submit the NOF with the audit response when the employer in good faith thought it had submitted the NOF was not a ground for denial in the interest of fundamental fairness, although BALCA stated that its "decision is expressly limited to the precise circumstances of this case, and should not be construed as support for

requiring the CO to reconsider if the employer merely forgot to submit requested documentation." It remains to be seen how viable *Luigi's Restaurant* is in light of *Techdemocracy and Denzil Gunnels,* which hold that such evidence will be barred if the employer had a prior opportunity to submit it at the time of audit, but did not inadvertently submit the correct document.

Pa'Lante, 2008-PER-00209 (BALCA May 7, 2009)—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.

Geoffrey Allen Corporation, 2008 PER-00234 (BALCA May 7, 2009)—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 recordkeeping requirements, such as an H-1B petition, LCA and an old ETA 750.

Southern Occasions Catering LLC, 2009-PER-00011(BALCA Jan. 9, 2009)—In this case the CO alleged that employer did not advertise on Sunday, and instead of rebutting, employer re-advertises in a Sunday edition. BALCA held that *HealthAmerica* is inapplicable as the new recruitment did not previously exist in the PERM recordkeeping file.

Hawai'i Pacific University, 2009-PER-00127 (BALCA Mar. 2, 2010)—In an en banc decision BALCA upheld denial of the labor certification since the NOF listed the CO's address in San Francisco rather than the National Processing Center's address. BALCA reversed its earlier panel decision in the same case, which reasoned that given the lack of assistance provided to practitioners and the system being far from friendly, the erroneous address on the NOF was not fatal and found that the facts in this case similar to an earlier decision. *See Brooklyn Amity School*, 2007-PER-00064 (BALCA Sep. 19, 2007) (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). In its new decision, BALCA held that the facts were no longer similar to *Brooklyn Amity School* since the PERM regulations had been in effect for more than two years

and DOL has provided the public with sufficient notice.

In closing, practitioners should take note of this admonition by BALCA in *Robert Venuti Landscaping*, *supra* as a take home present:

We encourage future applicants to offer thorough documentation of their applications when first directed to do so, to interpret requests for information broadly, and to continually anticipate the documentation that will support each portion of the PERM application. It is the employer's responsibility to build the record in support of the application. The regulations that stipulate the content of the NOF are not unclear or difficult to find. When an employer fails to follow the regulations, it bears the difficult burden of offering sufficient evidence in a procedurally appropriate manner in order to show that the application should otherwise be granted.

Conclusion

This advisory represents only a slice of the decisions that BALCA has been issuing of late, although the author wishes to underscore the importance for practitioners to constantly keep a vigilant eye on decisions in order to gain invaluable insights when representing a client through the labyrinthine PERM process. Reviewing that one single BALCA case can make all the difference between an approval and a denial, or to put it more dramatically from the alien's point of view, between life and death. Also, by ensuring that practitioners have a proper perspective of the latest interpretations through BALCA decisions, the PERM case is more likely to be successful and there will be less of a reason for your case to be taken to BALCA. On the other hand, since DOL is constantly shifting the goal posts in the PERM process, one can never be completely sure and even the most, well prepared and documented PERM cases can result in a denial. It is hoped that this advisory, which discusses many favorable BALCA cases, will encourage practitioners to take meritorious cases to BALCA in the event of unfair and arbitrary denials.

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See AILA Teleconference with Judge Colwell and Todd Smyth at BALCA by Susan Maclean and Josie Gonzales, available on AILA InfoNet at Document No. 10111730 (posted on 11/17/2010).

AILA InfoNet has an exhaustive collection of Board of Alien Labor Certification Appeals (BALCA) cases under "Cases and Decisions," *www.aila.org/content/default.aspx?docid=9511*. A digest of BALCA cases can also be found on the Department of Labor (DOL) website at *http://www.oalj.dol.gov/PUBLIC/INA/REFERENCES/REFERENCE_WORKS/BALCA_PERM_DIGEST.HTM*.

Beware that not all claims of substantial equivalence between the primary and alternative requirements will be accepted. *See Demos Consulting Group, Ltd.*, 2007-PER-00020 (BALCA May 16, 2007) (where position's primary requirement was three years experience in the position of Senior Quantitative Analyst/Developer or, alternatively, three years of experience in a position in software development with distributed multi-tier client server applications. BALCA held that the alternative requirement was not equivalent to the primary and since alien only qualified under the alternative prong it upheld denial as the application lacked *Kellogg* language). While *Demos Consulting* was decided before *Federal Insurance*, it is still instructive as it requires the practitioner to take pains to demonstrate that there is equivalence between the primary and alternative requirement.

See 8 Code of Federal Regulations (CFR) §214.2(h)(4)(iii)(D)(5).

Actually, Field Memorandum No. 48-94 states that a bachelor's degree takes up two years of specific vocational preparation (SVP) time, which is very different from taking up two years of experience. *See* E. Greenfield, "An Examination of Recent PERM Denials," *43rd Annual Immigration & Naturalization Institute Handbook*, Practising Law Institute.

See M. Jaidi, *The Best PERMs in Life Are Simple: The Globalnet Moral*, available *at www.cyrusmehta.com*.

Establishing that an alien has the equivalent of a degree on an I-140 petition is a highly complicated area with its own minefields and pitfalls, and readers will certainly profit if they purchase AILA's *Focus on EB-2 and EB-3 Degree Equivalency* by R. Y. Wada, *available at* http://www.ailapubs.org/eb2andeb3.html.

The Appeals Administrative Office (AAO) recently issued a "Notice of Derogatory Information and Request for Evidence" on an EB-3 I140 petition where the H-1B position for market research analyst required a bachelor's degree but the I-140 petition required a high school education and 24 months of experience, which according to the AAO, "calls into doubt the veracity of the position requirements and the bona fides of the position." *See* R.Y. Wada, *The Nth Degree – Issues And Case Studies In Degree Equivalency: Two Emerging Issues Affecting The EB-3 "Safe Harbor*," 15 Immigr. Bull. 1601, Nov. 15, 2010.

An I-140 petition filed under Immigration and Nationality Act (INA) §203(b)(3) (EB-3) sets forth different equivalency standards from the H-1B. An I-140 petition filed under EB-3, where an alien cannot demonstrate a four year single source bachelor's degree, must be filed under the EB-3 Skilled Worker category pursuant to 8 CFR §204.5(*l*)(3)(ii)(B). Under no circumstances can such an individual who possesses a three year degree and experience be the beneficiary of an I-140 petition filed under the professional category pursuant to 8 CFR §204.5(*l*)(3)(ii)(C), which provides:

"Professionals. If the petition is for a professional, the petition must be accompanies by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions…"

Therefore, to qualify as a professional, USCIS has interpreted 8 CFR §204.5(*l*)(3)(ii)(C) to require the alien to demonstrate that he or she either has a U.S. baccalaureate degree or a foreign equivalent degree, which USCIS has

interpreted to be a four-year single source degree. Any other equivalent degree, even though it may be recognized as a U.S. bachelor's degree for H-1B purposes under 8 CFR §214.2(h)(4)(iii)(D) will not be recognized under the EB-3 Professional category pursuant to 8 CFR §204.5(*l*)(3)(ii)(C). Moreover, even USCIS has asserted that if the beneficiary possesses less than a four year degree and treats it as a professional position, the I-140 will be denied unless the position is listed as requiring a foreign degree or its equivalent (which must properly define the educational equivalence), and then it will be treated as a skilled worker position. *See e.g.*, *Matter of* ___, SRC 07-174-51943 (AAO Dec. 18, 2007) reprinted in 13 Bender's Immigr. Bull. 371, 410–412 (Apr. 1, 2008).

DOL has also confirmed in Program Electronic Review Management (PERM) FAQ 10 that there is no need to indicate the *Kellogg* language when the employer does not require experience in the primary requirement, *www.foreignlaborcert.doleta.gov/pdf/perm_faqs_5-9-07.pdf*.

20 CFR §§656.17(e)(1)–(2).

For an in depth analysis on the role of the lawyer in the recruitment and labor certification process, *see* G. Endelman and C. D. Mehta, "*Walking the High Wire Without a Net—The Lawyer's Role in the Labor Certification Process*," 11th Annual AILA New York Chapter Immigration Law Symposium Handbook (AILA 2008 Ed.); a revised and substantially expanded version of the same article was published in 14 *Bender's Immigr. Bull.* 1387 (Feb. 1, 2009).

See AILA InfoNet Doc. No. 10040533. PERM FAQ 11 is also available at http://www.foreignlaborcert.doleta.gov/pdf/PERM_Faqs_Round_11_08032010.pdf.

For a further analysis of these two decisions, *See* C.V. Pestaina, *BALCA On Employee Referral Programs Under PERM*, The Insightful Immigration Blog, http://cyrusmehta.blogspot.com/2011/02/balca-on-employee-referral-programs.html..

The Board held:

"*hether FAQ No.5 provides persuasive authority depends on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade…We find that FAQ No.5 imposes substantive rules not found in the PERM regulations, nor supported by PERM's regulatory history, nor consistent with notions*

of fundamental fairness and procedural due process." *HealthAmerica* at 14. See also Skidmore, 323 U.S. at 140.

http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_5-9-07.pdf.

In *Dr. Deza's Dental Office*, 2010-PER-00113 (BALCA Feb. 11 2011), BALCA reversed the CO in a case where a job search website's introduction to the position did not contain the name of the employer, but upon a click of the mouse, the viewer would be taken to the actual advertisement, which listed the name of the employer. Interestingly, BALCA distinguished an internet advertisement of this nature to a print advertisement with a blind listing, which requires the reader to contact either a mailbox or a telephone number to reach the employer. Unlike a blind print advertisement, which required more effort to contact and find out the identity of the employer, the name of the employer would appear in an internet advertisement upon the click of the mouse.

HealthAmerica, 2006-PER-00001 (BALCA July 18, 2006).

The latest Minutes from DOL Stakeholders Meeting, October 28, 2010, published on AILA InfoNet at Doc. No. 10111762 (posted 11/17/2010) do not shed any more significant light on roving employees. DOL advised: "When there is more than one worksite and more than one prevailing wage, list the wage of the primary work location where recruitment will take place on the Eta 9089."*Id.* at page 15. DOL has indicated that it is preparing a FAQ on this issue, given the numerous complicated situations examples of scenarios to be considered in the FAQ.

See CVS RX Services, Inc., 2010-PER-01108 (BALCA Nov. 16, 2010) (CO abused his discretion by referring file to BALCA when employer submitted supplemental evidence, after denial without audit, justifying that a professional journal was appropriate even though the position required a bachelor's degree with no experience).

DOL's PERM FAQ Round 2 (Mar. 31, 2008), *published on* AILA InfoNet at Doc. No. 08040234 (*posted* Apr. 2, 2008).

But in *Hawthorne Suites Golf Resorts, LLC*, 2009-PER-00200 (BALCA Jan. 12, 2011), the employer submitted proof of its website advertisement with a wage below the prevailing wage on January 4, 2007, but in its request for reconsideration submitted proof of subsequent website advertising, from January 5, 2007 till February 20, 2007, with the correct prevailing wage. BALCA held that under

HealthAmerica the website advertisements depicting the correct prevailing wage were clearly held by the employer under the PERM record keeping provisions, and because the web pages contained the date during the relevant period, they could not have been fabricated. BALCA ruled against the CO's objection that the additional evidence was barred by 656.24(g)(2), by holding that documentation "submitted" in support of a labor certification application constructively includes the materials held by am employer under the recordkeeping provisions of PERM. It was not clear from the decision, though, whether the employer submitted the website pages with the correct prevailing wage for the first time during reconsideration or whether they were previously submitted in response to the audit notice, but interestingly, BALCA held that they had in any event been constructively submitted under the employer's PERM record keeping requirements.

While *Pa'Lante* is a good decision as it affirmed *HealthAmerica,* BALCA suggested in dicta that the alien's prior experience may have arisen through entities owned by the same employer and may thus be disqualifying experience (*see* note 2). In reaching this conclusion, BALCA relied on a line of cases which was overturned by 20 CFR §656.17(i)(5)(i), (which refers to "employer" as an entity with the same Federal Employer Identification Number). Thus, under current regulation if two entities, even if owned by the same person, or where one is a subsidiary and the other a parent, have two FEINs, then experience with one entity can be used as a job requirement by another entity. For more commentary on this disturbing observation by BALCA, *See* C. D. Mehta, BALCA Disregards Separate Entity in *Matter of Pa'Lante,* The Insightful Immigration Blog, *available at* http://cyrusmehta.blogspot.com/2009/12/balca-disregards-separate-entity-in.html.

Robert Venuti Landscaping, Inc., 2009-PER-00453 (BALCA Oct. 27, 2010), *published on* AILA InfoNet at Doc. No. 10102960 (*posted* Oct. 29, 2009) at 6.

One cannot also help but include *Wissen, Inc*., 2009-PER-00405 (BALCA Apr. 15, 2010) *published on* AILA InfoNet at Doc. No. 10041930 (*posted* Apr. 19, 2010), where BALCA held that the SVP level of "7.0<8" means an SVP of 7 and not 8, which permits a maximum lapsed time of preparation up to and including four years and not more. If an employer is making a business necessity argument to justify allegedly excessive arguments, attacking the opaqueness of "7.0<8", which may justify requirements in excess of an SVP of 7, it will not get you anywhere after *Wissen*. While again, DOL has defined "7.0<8.0" as being equal to

an SVP of 7 without promulgating a regulation, unless a practitioner wishes to challenge this in federal court, it would be unwise to rely on this argument when making a business necessity argument and to instead rely on the traditional two prong test set forth in *Information Industries, Inc*., 1988-INA-00082 (BALCA Feb. 9, 1989).