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IN THIS ISSUE

IMPORTANT DEVELOPMENTS IN LABOR CERTIFICATION APPLICATIONS

by Alan Lee, Esq.*

Significant issues in labor certification processing were touched upon in recent decisions of the Board of Alien Labor Certification Appeals (BALCA or Board) and the Department of Labor (DOL) Stakeholders Meeting on October 28, 2010. BALCA and the DOL gave answers to what forms of recruitment are considered advertisements and what amount of detail must go into the ads. BALCA in a set of cases gave rigid reading to the regulation that an employer cannot offer U.S. workers less-favorable wages, terms, or conditions of employment than offered to an alien, although the interpretation appears less than logical in many situations where an alien has been working with the employer. In addition, BALCA, in an important case, *Matter of Denzil Gunnels*, 2010-PER-00628, 2010 WL 4920446 (Bd.Alien Lab.Cert.App. 2010),[1] has expanded notions of due process and fundamental fairness that it first addressed in *Matter of HealthAmerica*, 2006-PER-00001, 2006 WL 5040203 (Bd. Alien Lab.Cert.App. 2006) (en banc).[2]

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1. What specificity is required in ads to ward off labor certification application denial?

In the Stakeholders Meeting, attorneys complained that there was an increased pattern of PERM[3] labor certification denials, including ones indicating that ads must match the job description on Form ETA 9089 (labor certification application form) or must include all of the requirements and duties in the job description.[4] The DOL advised stakeholders to look at its frequently asked questions (FAQs) to see the level of detail required in the ads, and the American Immigration Lawyers Association (AILA) advised its members to read the recent BALCA decision, *Matter of Credit Suisse Securities (USA) LLC*, 2010-PER-00103, 2010 WL 4920095 (Bd.Alien Lab.Cert.App. 2010).[5] In *Credit Suisse*, the Board affirmed the certifying officer's denial for a computer software engineer where the employer's website ad stated that it had employment opportunities in a number of fields, including information technology, and, on the same page under the heading "Center of Excellence Opportunities," said that it was seeking employees in the areas of application development, information technology, and operations for its Raleigh-Durham, North Carolina, location. The *Credit Suisse* decision cited the DOL's FAQ on ad specificity, stating:

> The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirements of apprising applicants of the job opportunity. An advertisement that includes a description of the vacancy, the name of the employer, the geographic area of employment, and the means to contact the employer to apply may be sufficient to apprise potentially qualified applicants of the job opportunity.
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> *Id* at 9.

Credit Suisse is interesting in that it did not deal with newspaper ads, but a website posting. The employer argued that the ad content requirements of the regulations did not apply to website advertisements and suggested that the content requirements for ads placed on websites as additional recruitment[6] were less demanding than what was required for ads placed in newspapers or journals as mandatory recruitment.[7] BALCA disagreed, stating that the additional recruitment steps were not intended to be some sort of watered-down or cursory method of advertisement, but were intended to ensure that the greatest number of able, willing, qualified, and available U.S. workers were apprised of the job opportunity. The Board held that all advertisements "placed by employers" in fulfillment of the additional recruitment steps had to comply with the advertisement-content requirements. In doing so, the Board footnoted that it made no determination about the content required for additional recruitment steps other than those that were ads placed by an employer. It then listed recruitment steps to which the *Credit Suisse* ruling would not apply as recruitment at job fairs, on-campus recruiting, use of private employment firms, and use of a campus placement office. By subtraction, the listing leaves as "ads placed by employers" for which the content must definitely be more circumspect the other six available recruitment steps: Internet postings, employer's own website postings, bonus programs, radio and television ads, local and ethnic newspaper ads, and postings at trade or professional organizations.

The upshot is that the more detail that there is in all "ads," the safer the employer will be from having a labor certification application denied for lack of notice to qualified applicants of the job details. Newspapers and other media that charge for advertisements are certain to be happy with this turn of events.

2. BALCA decisions force labor certification employers to offer same wage to U.S. worker applicants as offered to sponsored aliens instead of lower prevailing wage for area as determined by DOL even though the aliens may have been with the employer for years and earned raises–is this logical?

BALCA, in *Matter of O'Brien & Van Stiphout LLC*, 2010-PER-00035, 2011 WL 50138 (Bd.Alien Lab.Cert. App. Jan. 3, 2011), and other recent cases (*Matter of SDE Inc.*, 2010-PER-01122, 2010 WL 4920006 (Bd.Alien Lab. Cert.App. Oct. 27, 2010);[8] *Matter of Alum-A-Lift, Inc.*, 2010-PER-00245, 2011 WL 50131 (Bd.Alien Lab.Cert.App. Jan. 3, 2011); *Matter of IAC Search & Media, Inc.*, 2010-PER-00055, 2010 WL 5464325 (Bd.Alien Lab.Cert.App. Dec. 28, 2010),[9] has given the Board's firm view on what wage–the prevailing wage or the offered wage to the alien–can be used in advertising for U.S. workers in a labor certification application. The controversy arises where the sponsored alien is making more than the prevailing wage for the area as determined by the DOL. It should be noted that an alien may have a higher wage through being with the employer for a long time and garnering raises over the years, or he or she may have demonstrated prized skills or brilliance over a shorter period of time for which an employer would be interested in paying more than the prevailing wage. On the

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other hand, an employer would not want to pay that same enhanced wage to a person just coming onto the job. The twin difficulties are that, in a general labor certification application process that tests the availability of U.S. workers for a job opportunity, the DOL regulations do not allow an employer to reject U.S. workers not equally qualified as the alien, instead, mandating the employer to accept only minimally qualified U.S. workers,[10] and they force the employer to offer U.S. workers no less favorable wages or terms and conditions of employment than those offered to the alien.[11] Lawyers have argued that the employer should be allowed to offer the prevailing wage of the area to U.S. workers instead of a wage above that level as the latter does not reflect what an employer would normally pay to an incoming worker meeting the minimum requirements.

For example, Tire Co., Inc. hires John in 2008 at the wage of $45,000 per year under H-1B status when the prevailing wage for the area as determined by the DOL's OES system is $45,000 per year.[12] Through his job performance, John has received salary increases so that his present pay is $65,000 per year. John asks the company to sponsor him for a green card, and the company agrees, hires an attorney, and begins the labor certification process. The lawyer explains that, under DOL regulations, the company can normally only require U.S. workers to meet the minimal level of education and experience that it required for the job at the time of John's hiring. It also cannot require the U.S. workers in most situations to possess experience or skills that John acquired working for Tire Co., Inc. Looking at John's qualifications at the time of hire, he held a bachelor's degree plus two years of relevant experience. Examination of the company's present pay scale for new hires with those requirements reveals that the company would currently pay $47,500 per year. The attorney then requests a prevailing wage determination from the DOL, which comes back with $46,500 per year with those requirements. The company advertises the job opportunity to U.S workers in its posting notice (notice of filing) and state workforce agency (SWA) job order showing the wage rate of $47,500 per year instead of $65,000 per year only to receive a denial from the DOL.

In the real world outside of labor certification processing, it makes absolute business sense for the employer to only pay the prevailing wage for workers under these conditions. Why should it be forced to pay a premium for a U.S. worker which in most cases would be undeserved just because it is sponsoring an alien for a labor certification? Yet BALCA decided in *O'Brien & Van Stiphout* et al. that the wage to be offered in the job posting must be the offered wage to the alien and not the prevailing wage if the offered wage exceeds the prevailing wage. In *O'Brien & Van Stiphout*, the offered wage to the alien was $70,000 per year and the prevailing wage $41,430. The posting listed the salary as between $50,000 to $65,000 per year, a wage range that met the prevailing wage level but was less than that of the alien.

Hopefully the DOL can recognize the inherent unfairness here and come forth with a regulation providing for exceptions to advertising at the alien's wage when over the prevailing wage where an employer can show by a preponderance of evidence the business related reason(s) for which the alien's salary exceeds the prevailing wage. An example of possible wording would be "The employer will not be seen as offering a wage less favorable to U.S. workers than it offers to the alien where the employer demonstrates that its wage at the time of alien hiring was no more than 5% over the wage it offered to U.S. workers with the same level of education and experience. If there were no such U.S. workers at the time, the employer will not be seen as violating the regulation where it demonstrates that its wage offer to the alien was no more than 5% over the prevailing wage."

3. BALCA huffs and puffs its way to a good conclusion affording more procedural due process in labor certification determinations.

An important BALCA case, *Matter of Denzil Gunnels,* 2010-PER-00628, 2010 WL 4920446 (Bd.Alien Lab.Cert. App. 2010),[13] gives hope that labor certification applications do not have to be 100% perfect when submitted and that there is room on reconsideration after denial for applications to be approved. In *Denzil Gunnels*, BALCA was faced with the twin obstacles of (a) the employer sending in a corrected Form ETA 9089 and legal argument after denial of labor certification when it requested review of the denial, and the certifying officer's forwarding of the case to BALCA without first treating it as a request for reconsideration, and (b) BALCA's limited review authority in that situation. The case was denied by the certifying officer under the regulation stating that incomplete applications will be denied,[14] and BALCA was constrained on review from considering any evidence or argument that was not considered by the certifying officer in the labor certification determination.[15] In this case, the employer did not fill out item M-1 of Form ETA 9089 asking whether the application was completed by the employer, but in which a "no" answer would have required a preparer to complete a declaration in sections M-2 through M-5 certifying that, to the best of his or her knowledge, the information in the application was true and correct and that the preparer understood the penalties for furnishing false information or aiding, abetting, or counseling another to do so. A customer service coordinator completed and signed sections M-2 through M-5, thereby attesting that she and not the employer was the preparer. The application was submitted on June 5, 2009, and denied without audit (DOL request for evidence) on February 23, 2010, leading to the employer's "Request for Review of Denial of Form ETA 9089," which

included a new 9089 form with a filled-in item M-1 and argument that its failure to check the box was inadvertent error. The employer also stated in its papers that it sought reconsideration by the certifying officer and not a formal appeal to BALCA. The certifying officer subsequently filed a letter requesting, without elaboration, that the denial be affirmed and forwarded the matter to BALCA.

The stakes involved are best understood through a look back at labor certification processing over the years. Historically, the DOL has attempted to shut down exchanges between employers and the DOL for the sake of speed after its implementation of the PERM labor certification process in March 2005. PERM succeeded previous programs that were seen as bogged down by constant communications between the DOL and employers. The earliest "traditional" labor certification program consisted of submitting bare ETA 750 forms with all the recruitment to be done later and was followed by the Reduction in Recruitment (RIR) program under which employers preadvertised and recruited in the U.S. job market before submitting the cases and asking for a waiver of further recruitment efforts. PERM is generally an electronic program (mailed-in applications are still accepted but highly disfavored) with the DOL believing that no interchange of communications between the employer and the DOL examiner, and especially submission of additional evidence, should be allowed. Following PERM implementation, the first BALCA case, *HealthAmerica*, supra, successfully challenged the letter-perfect requirement on due process and fundamental fairness grounds. In *HealthAmerica*, the employer had transposed two numbers on the 9089 form when filling out one of the dates that an ad ran in a newspaper but proved the correct date by submitting the tear sheets.[16] *HealthAmerica* stood for the proposition that applications did not need to be letter perfect when submitted, and, because PERM required employers to maintain records in support of the application, those records were constructively part of the administrative record and did not constitute new evidence barred by the PERM rules. The DOL was unhappy with the *HealthAmerica* decision and sought to restrict its effect in a May 2007 regulation, "Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity," 72 Fed. Reg. 28903 (May 17, 2007). The regulation in part sought to eliminate modifications to the applications and sharply limited the bases on which employers could supplement the record by providing in 20 CFR § 656.24(g) (2007) that:

> (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 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 requirements of § 656.10(f).
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> (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.

Denzil Gunnels shows BALCA rejecting the DOL's rule for cases after July 16, 2007, that no additional evidence outside of what was required as part of the employer's record-keeping requirement can be submitted in a request for reconsideration. The new and corrected Form ETA 9089 could certainly not be seen as part of the record-keeping requirement. BALCA began by stating that *HealthAmerica* was a limited ruling and did not apply to bar other types of documentation, such as documentation of extrinsic facts that could defend against some other ground for denial. The Board cited its decision of *Matter of Monnalisa Pastry Shop*, 2008-PER-00072, 2009 WL 1911848 (Bd.Alien Lab.Cert. App. June 30, 2009), slip opinion at 2, that a certified mail receipt could be considered showing when an employer sent documentation that the certifying officer deemed untimely, neither did the limits on the *HealthAmerica* ruling apply to evidence submitted on appeal solely to support a legal argument that was preserved. The Board cited *Matter of CVS Rx Services, Inc.*, 2010-PER-01108, 2010 WL 4920440 (Bd.Alien Lab.Cert.App. Nov. 16, 2010),[17] that evidence in support of a preserved legal argument was not the type of evidence covered by the reconsideration rule because its submission did not modify the content of the application. Besides its own rulings, BALCA pointed out that the DOL, even after July 16, 2007, had contemplated its ability to waive the letter-perfect requirement for applicants who could successfully show on reconsideration that the application represented a recruitment effort that actually complied with the regulations. The Board found further evidence that the amendments were not intended to completely foreclose grants of certification despite errors and ambiguities in the application in the certifying officer's pattern of requests for remands by BALCA for the purpose of additional

processing, referring specifically to *Matter of Jessie's Bake Shop*, 2010-PER-01039, 2010 WL 4920299 (Bd.Alien Lab. Cert.App. 2010), to permit consideration of documentation of the nature of the employer's business; *Matter of Neuroassociates*, 2010-PER-01054, 2010 WL 4920070 (Bd. Alien Lab.Cert.App. 2010), to permit correction of a date; and *Matter of Montessori of Alameda*, LLC, 2010-PER-01167, 2010 WL 4920059 (Bd.Alien Lab.Cert.App. 2010), for accepting the employer's clarification of the job listed in Section K of the 9089. The Board further referred to a DOL statement that it understood that human error occurred in limited circumstances and that the Department believed that it was capable of distinguishing between typographical or inadvertent errors and willful false statements. BALCA then held that the certifying officer's discretion under its amendments could not be exercised to preclude an employer from the opportunity to be heard on meritorious arguments regarding its de facto compliance with the regulations.

BALCA is an administrative body and constrained by regulation to only review legal argument and such evidence that was within the record on which the denial of labor certification was based. Because the certifying officer forwarded the case to the Board without further developing the record, the Board had to find a way to return the case to the certifying officer as there was otherwise no authority to consider the corrected 9089 form or legal argument submitted after the certifying officer's determination. It initially acknowledged the discretionary power of the certifying officer under regulation to reconsider the decision or treat it as a request for review.[18] BALCA then pointed to the confusing instructions of the DOL's FAQ on how to request reconsideration or review, saying that nowhere in the FAQ responses was it stated that an employer's failure to use the magic word "reconsideration" would result in the application being placed in the BALCA queue. The Board referred back to the *HealthAmerica* decision language that, while the regulation gives the certifying officer discretion to treat any request for reconsideration as one for review, to do so with the effect of denying an uninformed employer its sole opportunity to develop the appellate record was an abuse of discretion as well as an inefficient use of administrative resources. The Board outlined the two tracks under which reconsideration is requested, the first with an audit allowing the employer to respond to issues raised by the certifying officer and the reconsideration based on evidence submitted in the audit response and the second without audit and the reconsideration based on evidence of the type that would ordinarily be submitted in an audit response. The Board stated that in the first instance, the certifying officer would not be found to have abused his or her discretion in forwarding the case to the Board on the ground that the certifying officer's action prevented the employer from perfecting the record for review. An exception would be if the circumstances of the audit were not specific enough to put the employer on notice of the potential deficiency with its application where the type of documentation at issue was not the standard documentation submitted in response to an audit. In the second situation, the Board said that analytical and procedural problems arise since forwarding the appeal file immediately to the Board had the effect of depriving the employer of its full opportunity to develop the record for appellate review where the type of evidence offered was the type that could have been considered by the certifying officer on reconsideration. BALCA then held that a certifying officer will be found to have abused his or her discretion when treating what is substantively a request for reconsideration as a request for BALCA review where doing so would have the unsolicited effect of precluding the employer from developing the necessary factual record upon which the denial of certification is properly based under the amended regulations.

Upon remand, the certifying officer's choice of whether or not to accept the employer's corrected ETA 9089 and argument of inadvertent mistake in failing to check the box may not be that simple. BALCA attempted to guide the debate below by stating that the employer's position is primarily a legal argument that inadvertent failure to check question M-1 on the form was remedied by the completion of the remainder of Section M, which clearly advised the DOL that the Form ETA 9089 had been completed by someone other than the employer and that the certifying officer had elevated form over substance. A major question may be whether the evidence and argument is the type that can actually be considered by the certifying officer as 20 CFR § 656.24(g)(3) expressly prohibits a certifying officer from granting any request for reconsideration "where the deficiency that caused denial resulted from the applicant's disregard of a system prompt or other direct instruction." In the issuance of the May 2007 regulation, the DOL had noted that its new online system would "now generate an automated prompt, warning the filer that it may have entered erroneous information that may cause a denial of the application" and that similar manual mechanisms were in place to detect and correct errors on mailed applications and that "applications containing errors in contravention of system alerts are denied." It also cautioned that requests for reconsideration seeking to correct applications containing such errors would not be granted. BALCA itself in *HealthAmerica* had suggested that, if the employer had been provided an immediate feedback warning that its application did not make sense, it might not have found the certifying officer to have abused his discretion. The Board further acknowledged there that it had no authority to invalidate or rewrite the regulation, but that it had the responsibility to interpret the meaning of regulations

and decide whether they had been applied in individual cases consistent with procedural due process.

In perusing the current PERM online system, it is difficult to see how item M-1 could be bypassed as the system does not allow one to continue filling out items M-2 to M-5. An employer can nevertheless fill out the last part, Section N, dealing with the "Employer Declaration," but the system then gives the prompt, "Warning. This application may not be approved for the following reason(s): Section M-1, Was the application completed by the employer is a required entry" and gives the filler an opportunity to continue or go back. So, if the form was filed online, either the present inability to continue with items M-2 to M-5 did not exist at the time of filing where there was a computer prompt or a system glitch allowed the preparer to continue without correction where there was inability to continue or the user was extremely computer literate and found a way around the disabling prompt. The last possibility is far-fetched given the nonimportance of item M-1. If it is concluded that the employer disregarded a system prompt that was in place at the time of filing but still allowed continued completion of items M-2 to M-5 on the online form, will the certifying officer act humanely in approving the labor certification application anyway since the error was inadvertent and of little moment or will he or she again deny the application based squarely on the regulation? The latter result would not be in the best interests of fairness and justice to employers who comply de facto with the regulations nor would the DOL appear in a positive light. In looking at mailed-in applications, it does not appear that there are any "similar manual mechanisms" in place to detect and correct errors–only the paper instructions to the 9089 application, which merely state, "Select *Yes* or *No* to indicate whether the application was completed by the employer. If you select *No*, questions 2-5 must be completed." In case the application was submitted by mail, will the certifying officer argue that the instructions were sufficient notice to the employer? If the certifying officer denies the case on remand for disregard of prompt or direct paper instructions, how will BALCA react if the employer chooses to request review–this time with a full record? Will the Board recognize the fact finding of a disregarded prompt or paper instruction and uphold the regulatory violation as a valid ground for denial, or will it decide the appeal favorably to the employer under the substantial compliance doctrine? BALCA hinted that it might do the latter in its reference to the DOL statement on human error and DOL capability to distinguish between typographical or inadvertent errors and willful false statements. Additionally, while it stated that it might not find a certifying officer abusing discretion where there was a computer prompt, it said nothing about paper instructions insulating him or her. The case may yet have more chapters before the end.

Summing up, the Stakeholders Meeting with the DOL touched upon the need to run ads that sufficiently apprise potentially qualified applicants of the job opportunity, and the Board clarified in *Credit Suisse* that an ad included the additional steps of recruitment and not just newspaper or journal ads; BALCA decided in *O'Brien & Van Stiphout* et al. that an employer must post a job at the offered wage afforded to the alien where the wage exceeds the prevailing wage in the area, an interpretation hopefully capable of regulatory reversal; and in *Denzil Gunnels*, BALCA championed due process in labor certification determinations in holding out the opportunity for employers to submit additional documentation and argument even outside the contemplated scope of DOL regulation through a request for reconsideration with the certifying officer where there was inadequate opportunity to present them before either because an audit request was not sufficiently specific or the certifying officer abused discretion in forwarding a file directly to the Board in a non-audit situation where the employer sought reconsideration.

Notes

[1] *Denzil Gunnels* is discussed in 87 Interpreter Releases 2255 (Nov. 22, 2010).

[2] *HealthAmerica* is discussed in 83 Interpreter Releases 1562 (July 24, 2006).

[3] Program Electronic Review Management (PERM) is the DOL's labor certification system, see Shore, "Labor Certification in the 21st Century: PERM, the Wave of the Future," 05-03 Immigration Briefings 1 (Mar. 2005).

[4] To immigrate through employment, aliens must undergo labor certification processing in most cases, which involves testing the American job market through recruitment of U.S. workers, including placing ads in newspapers to ensure that the alien's immigration does not harm U.S. workers. For practical reasons involving expense in running full job descriptions (since ads are charged by line), employer reluctance to pay for lengthy ads, and DOL's seemingly past appearance of a lax attitude on how expansive an ad should be, many labor certification ads have been truncated in length.

[5] *Credit Suisse* is summarized in 87 Interpreter Releases 2167 (Nov. 8, 2010).

[6] For professional positions, in addition to the requirements of newspaper ads, placement of the job order with the state workforce agency (SWA), and posting of a notice of filing, employers must take three additional recruitment steps that must be completed at least 30 days prior to filing the PERM application with the exception of one step. The DOL allows employers to choose from a list of 10 methods: Internet postings, use of the employer's own Internet site, bonus programs, use of executive search or headhunter firms, job fairs, radio and television ads, local and ethnic newspapers to the extent that they are appropriate to the job opportunity, trade or professional organizations, on-campus recruitment, and notice of job availability at the campus placement office.

[7] 20 CFR § 656.17(f).

[8] *SDE Inc.* is summarized in 87 Interpreter Releases 2167, 2170 (Nov. 8, 2010).

[9] *IAC Search & Media, Inc.* is summarized in 88 Interpreter Releases 127, 129 (Jan. 10, 2011).

[10] 20 CFR § 656.17(h)(1) and (i).

[11] 20 CFR § 656.17(f)(7).

[12] The Department of Labor, Bureau of Labor Statistics (BLS) provides wage data collected under the Occupational Employment Statistics (OES) program for use in the foreign labor certification process. The wage data is available on the Foreign Labor Certification Data Center Online Wage Library (OWL) at http://www.flcdatacenter.com.

[13] Supra, n. 1.

[14] 20 CFR § 656.17(a).

[15] 20 CFR § 656.27(c).

[16] Under PERM rules, employers must normally place ads on two different Sundays (not necessarily consecutive 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. The transposition of numbers in *HealthAmerica* generated a denial as the transposed date fell on a Monday instead of Sunday.

[17] *CVS Rx Services, Inc.* is summarized in 87 Interpreter Releases 2270 (Nov. 22, 2010).

[18] 20 CFR § 656.24(g)(4). ■