FAX Transmittal

Date: Tuesday, May 23, 2006

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Subject: HealthAmerica, Case No. 2006-PER-1

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Comments:

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UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, DC

MATTER OF HEALTHAMERICA.	)	BALCA Case No. 2006-PER-1
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CERTIFYING OFFICER'S REPLY BRIEF

The Certifying Officer ("CO") files its Reply Brief pursuant to the Board of Alien Labor Certification Appeals' ("BALCA") order of May 16, 2006.

I.

INTRODUCTION

There are three general problems that permeate amici and HealthAmerica's briefs. First, as Thomas Wolfe said, "*You Can't Go Home Again.*" Amici and HealthAmerica yearn for the regulatory world as it existed prior to March 28, 2005. Those desires cannot be satisfied. Under the old regulations, an applicant would file its application with supporting documentation. The CO would then have two choices; to grant the application, or issue a Notice of Findings ("NOF") explaining the reasons the CO intended to deny the application. The NOF invited the applicant to rebut the CO's conclusions or cure the deficiency through argument or evidence not previously submitted. The CO would then make a final decision.

The current regulations, adopted over the objection of the American Immigration Lawyers Association ("AILA"), one of the amici, do away with the NOF procedures.

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

MAY 23 2006

BY FACSIMILE

The Honorable John M. Vittone
Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

Re: HealthAmerica, Case No. 2006-PER- 1

Dear Judge Vittone:

Please find enclosed the Certifying Officer's Reply Brief in the above referenced case. Copies have been served on Petitioner and Amici.

Thank you for your attention to this matter.

Sincerely,

GARY M. BUFF
Associate Solicitor for
Employment and Training
Legal Services

By: _____
R. PETER NESSEN
Attorney

Enclosure

cc: Shirin Egodage, Esq. (by facsimile) (w/ encl.)
Josie Gonzalez, Esq. (by facsimile) (w/ encl.)

Instead, the applicant files the application and the CO either grants or denies the application (with the possibility of an audit before the decision is made). The applicant can then file a motion for reconsideration, with no evidence not previously submitted. The CO then grants or denies the request for reconsideration. If it is a denial, the request is immediately sent to the BALCA for treatment as an appeal.

Amici seek to achieve through litigation what they failed to achieve in the rule making. If the BALCA were to adopt the procedures now advocated by amici and HealthAmerica, the new regulations are no different than the old regulations. The only difference would be the labels. What is now called a "final determination" would, in fact, be a NOF; what is now called a "request for reconsideration" would, in fact, be a rebuttal to the NOF; and what is now called a denial of the request for reconsideration would be a denial of the application.

In its comments to the proposed rule, AILA argued that the NOF process was still needed. AILA noted that the NOF "allows the CO to provide basic notice to the parties that s/he has found deficiencies in the filing and an opportunity to cure those deficiencies." AILA Comments at 52 (pages 1 and 52 attached hereto). Unconvinced by AILA's arguments, the DOL eliminated the NOF in the new regulations. 69 Fed. Reg. 77326, 77358-59. Amici and HealthAmerica might wish they lived in a pre-PERM regulatory universe, but to their dismay they are bound to the actual universe that includes the PERM regulations. Their proposed procedure was explicitly rejected in the regulations, and cannot be revived by judicial fiat. Under PERM, the DOL has strictly limited the ability of applicants to revive their applications after denial. If the CO made a mistake, an applicant is permitted to have the CO correct it. If the CO made no mistake,

as is undeniably the situation in the present case, the DOL will not allow a correction after denial.

The briefs of amici and HealthAmerica also make a number of arguments that apply only to the procedure prior to a denial by the CO. A situation that is not relevant to the instant proceeding. For example, amici claim it is "ultra vires" for the CO to deny an application without allowing an applicant to correct typographical errors. Amici Br. at 21. But this case is not about what the CO or the applicant may or may not do prior to a denial. This case regards what the CO or the applicant may or may not do after a proper denial of the application.

Finally, it is very important to remain focused on the fact that the CO in this case correctly denied the application in the first instance. There is no argument, and can be no argument, that the CO erred in that denial. HealthAmerica and amici are simply arguing that reconsideration should be a method for an applicant to correct its own errors. As noted in the CO's original brief, use of the reconsideration process for this purpose appears to be unprecedented. Reconsideration is meant to correct errors by the decisionmaker or to supply evidence not previously available to the decisionmaker. Here, there was no error by the CO and evidence not previously submitted is explicitly barred – so reconsideration is an inappropriate remedy.

II.

ARGUMENT

A. The CO Correctly Did Not Consider Evidence HealthAmerica Submitted With Request For Reconsideration

1. Documents retained in case of audit are not part of the Administrative Record

Amici's first argument is that the supporting documents that the regulations require an applicant to retain are part of the administrative record. Amici Br. at 9-12. The essence of the argument is that because DOL requires an applicant to retain some documentation, and because DOL allowed applicants to submit the documentation under the previous regulations, the CO is required to consider it now. Id. at 10-12. This contention is simply wrong.

The argument that the material DOL requires applicants to retain is part of the administrative record ignores the plain meaning and purpose of the new regulations. The regulations bar an applicant from filing supporting documentation and require the retention of records in case there is an audit. 20 C.F.R. § 656.17(a)(3). Amici point out that the records an applicant must retain are "comparable to what employers used to submit up front with the application under the pre-PERM regulations or in response to an Assessment Notice or a Notice of Findings." Amici Br. at 10. As discussed above, amici then request, in essence, that the BALCA return the DOL to the pre-PERM world by deeming the documents to be part of the administrative record and requiring the CO to consider them upon reconsideration. Such a requirement would change the denial of an application into a NOF, permitting an applicant to provide evidence rebutting any decision by the CO. See pages 1-2 supra.

Instead of the procedures imagined by amici, the DOL explicitly intended the audit process to replace the NOF process. 69 Fed. Reg. 77326, 77358-59. The DOL stated that the retained documents were for the purpose of responding to an audit. Id. Because, the CO is not required to audit every case that is deniable on its face, there was clearly no expectation that the CO would consider all supporting documentation in every denied case. Therefore, it is unreasonable to consider the retained documentation as evidence "previously submitted" to the CO unless there was an audit and the CO requested the evidence. Thus, 20 C.F.R. § 656.24(g)(2) does not permit the retained evidence to be filed with a request for reconsideration.

Also, the regulations clearly demonstrate what "submitted" means. The preamble states that the employer "will not be required to submit any documentation with its application." 69 Fed. Reg. 77326, 77327. If the term "submitted" in 20 C.F.R. § 656.24(g)(2) means "constructive submittal," as amici and HealthAmerica are actually arguing, then the sentence from the preamble would be meaningless. The employer would "submit" documentation with its application simply by filing the application.

HealthAmerica and Amici both cite Harry Tancredi, 88-INA-441 (BALCA Dec. 1, 1988), to support their contention that the CO must consider evidence not previously submitted upon reconsideration because HealthAmerica did not had a chance to submit the evidence at an earlier stage in the procedure. HealthAmerica Br. at 5; Amici Br. at 13. Not only would this render 20 C.F.R. § 656.24(g)(2) a nullity, it entirely misreads Tancredi. The key holding of Tancredi is that when a request for reconsideration "is grounded in allegations of oversight, omission or inadvertence by the CO which, if credible, would cast doubt upon the correctness of the Final Determination, and the

Employer had no previous opportunity to argue its position or present evidence in support of its position, the CO should reconsider his or her decision." Tancredi, 88-INA-441 (emphasis added). The present case does not fall under the Tancredi rule. Tancredi requires, before any other analysis, an allegation of "oversight, omission or inadvertence by the CO . . ." No such allegation exists in this case. The CO correctly denied the application in the first instance. Therefore, Tancredi does not apply.

As noted, the plain language, structure, and purpose of the regulations refute the contention that the retained documents are part of the administrative record. Nonetheless, the amici claim the BALCA should look to another agency for guidance. They claim the regulations should be read, as "[o]ne author" suggests, like IRS regulations, where, according to amici, the summary of information in a federal tax return is inseparable from the supporting documentation. Amici Br. at 9. Amici offers no support for this view save for that "[o]ne author's" contention. Who is the author upon whom Amici's attorney, Ms. Josie Gonzalez, places such dispositive weight? It is Ms. Gonzalez herself. Id. at 10, n.14. Therefore, amici has cited to no actual independent authority for its contention.

2. DOL's interpretation of regulations does not frustrate administrative review

Amici also claim that all retained evidence is part of the administrative record because otherwise there cannot be adequate "administrative review." Id. at 12-13. It is unclear what amici mean by "administrative review." Obviously, HealthAmerica had an opportunity to correctly fill out the application, but failed to do so. The CO's "administrative review" of the application was clearly correct. It must be, therefore, that amici are upset with the "administrative review" available on reconsideration. The CO's

review of his decision, however, was complete. The CO got its initial decision right. Amici claim that HealthAmerica's "tear sheet should not be considered new evidence simply because the DOL opted to ignore it." Amici Br. at 13. The CO did not choose to "ignore" the tear sheets. The regulations instruct the CO not to accept evidence not previously submitted. Obviously, the tear sheets were not previously submitted, so the CO was bound to reject them. Amici's argument is again an attempt to change the reconsideration process into a NOF process. Amici wants applicants who file faulty applications to be able to explain the errors on reconsideration– exactly what a NOF was meant to do in the prior regulations.

Amici and HealthAmerica also quote the preamble to the regulation where it says that "practice under the current regulations does not contemplate consideration of new evidence in requests for reconsideration. This final rule merely codifies the current practice." Amici Br. at 13 (quoting 69 Fed. Reg. 77326, 77362); HealthAmerica Br. at 4 (same). This plain language of the preamble clearly means that the CO will continue the then-"current practice" of not considering new evidence on reconsideration. Amici creatively interpret the sentence to mean exactly the opposite. They argue that the "current practice" mentioned in the preamble is not the practice actually mentioned – not considering new evidence – but the practice of allowing the applicant to file any and all information it wants. Given this interpretation, it is entirely unclear what amici and HealthAmerica would consider "evidence not previously submitted" to be. In fact, it is unclear what they understand "submitted" to mean.

3. The CO considered all relevant factors

Amici next argue that by failing to consider HealthAmerica's tear sheets, the CO has failed to consider all relevant factors. Amici Br. at 14-17. Amici are wrong. They argue that the CO must conduct "a minimum level of fact finding" to determine whether there are U.S. workers able, willing, and qualified to fill the position. The CO agrees. The DOL has concluded, and no one disputes, that one task an employer must undertake in order to guarantee that there is no U.S. worker able, willing, and qualified to fill a position is to advertise in two consecutive Sunday newspapers. It is not true, as HealthAmerica suggests, that the CO denied the application on "purely technical grounds" or due to "harmless error." See HealthAmerica Br. at 4, 7-8. Failing to advertise correctly is a condition precedent to a determination that no U.S. worker was available. It is common sense that the simplest method for determining whether an employer has advertised correctly is to ask the employer for the dates it advertised. The CO did so, and HealthAmerica told the CO it advertised incorrectly. Therefore, the CO reached the proper conclusion that HealthAmerica had failed to satisfy the relevant factor amici raises.

Moreover, as HealthAmerica itself quotes, the regulations state the determination will still be based, inter alia, on "whether the employer has met the procedural requirements." HealthAmerica Br. at 3 (quoting 69 Fed. Reg. 77326, 77327). Amici's "relevant factor" argument, however, would not allow any procedural requirements, let alone procedural requirements necessary to make a judgment regarding a relevant factor, such as advertising on two consecutive Sundays. The end result of amici's claim is that if a "procedural requirement" is all that stands between an employer and an accepted

application, the procedural requirement must be ignored. Not only does that render meaningless the language mentioned above, and quoted by HealthAmerica, requiring an employer to follow procedural requirements, it also would lead to chaos in the program.

According to amici, for the CO to consider all relevant factors the employer must have an opportunity "to correct or augment [incorrect] information with relevant supporting documentation." Amici Br. at 14. Otherwise, according to amici, the BALCA will not allow for judicial review of the agency's reasoning process." Id. at 15. But in the present case, the agency's reasoning process is crystal clear: The applicant stated it failed to advertise as the regulations require, so the CO must deny the application.

4. There is no requirement for the CO to conduct an audit

Amici misinterpret the regulation's preamble in order to argue that the CO should have conducted an audit. Id. at 17-18. The regulations state that after an "initial review of an application has determined that it is acceptable for processing, a computer system will review the application based upon various selection criteria that will allow problematic applications to be identified for audit." 69 Fed. Reg. 77326, 77328. Under amici's interpretation of this section any denied application is "problematic" and must be audited. Again, this would result in a NOF process, with an automatic audit instead of an automatic NOF.

The proper interpretation of the preamble is that the computer first does the "initial review." In a case such as the present case, the computer will determine that the application is not "acceptable for processing" because it is deniable on its face. The computer never gets to the determination of whether the application is "problematic."

Even if the BALCA concludes the application should have been found to be "acceptable for processing" the quoted language of the preamble does not require an audit. HealthAmerica's application was not "problematic." It was deniable on its face – no problem. Amici claim that because HealthAmerica admitted there was a Sunday newspaper and provided one Sunday date and one Monday date there was as "inconsistency" that rendered the application "problematic." Amici Br. at 17-18. Amici apparently do not understand the meaning of an "inconsistency." Nothing HealthAmerica stated in its application regarding the dates of advertising conflicted with any other part of the application. Therefore, no audit was warranted.

5. The CO's treatment of prevailing wage determinations is irrelevant to this case

Amici point to the new regulations' treatment of State Workforce Agency ("SWA") prevailing wage determinations ("PWD") as evidence that the CO is irrationally interpreting the regulation regarding reconsideration. Prior to applying for permanent labor certification, an employer must ask a SWA for a PWD. 20 C.F.R. § 656.40(a). If the employer is not satisfied with the PWD, it can ask the CO to review it. In order for the CO to reach a reasonable conclusion regarding the SWA's determination, the regulation requires the employer to provide "all materials pertaining to the PWD submitted to the SWA up to the date of the PWD received from the SWA." 20 C.F.R. § 656.41(a). If the employer does not like the CO's conclusion, it can then appeal to the BALCA for a determination based on "only such evidence that was within the record upon which the [CO's] affirmation of the PWD by the SWA was based." 20 C.F.R. § 656.41(e). In other words, the CO can only use the information that was actually

submitted to the SWA, and the BALCA can only examine the evidence actually considered by the CO.

The procedures for reconsideration of the CO's denial of an application are no different. The CO can only consider evidence that the applicant actually submitted; and the BALCA can only examine the evidence actually considered by the CO. Amici's argument is completely backwards. They claim the regulations treat challenges to a SWA's prevailing wage determination differently than it treats challenges to the CO's denial of an application. In fact, as shown above, the regulations treat them exactly the same way – the CO and the BALCA can only consider evidence actually submitted.

6. 20 C.F.R. § 656.10(e)(1)(i) does not apply after a denial

The relevant portion of 20 C.F.R. § 656.10(e)(1)(i) states that "[a]ny person may submit to the [CO] documentary evidence bearing on an application for permanent labor certification filed under the basic labor certification process . . . ." Section 656.10(e)(1)(ii) requires the CO to consider some of that information. Amici argue these sections require the CO to accept and consider the tear sheets HealthAmerica filed with its request for reconsideration. Amici Br. at 19-20. The quoted regulations, however, can only apply prior to the CO's final decision.[1]

Assume for a moment that the cited regulations permitted HealthAmerica to file any documentary evidence it desires with its request for reconsideration of the CO's denial of HealthAmerica's application. What then remains of the bar on the inclusion with a request for reconsideration of "evidence not previously submitted" to the CO? Section 20 C.F.R. § 656.10(e)(1) does not limit to evidence retained in case of audit the

[1] The CO takes no position on the precise meaning of the quoted regulations. For the purposes of this brief only, the CO assumes it would allow HealthAmerica to have submitted some evidence prior to the CO's denial of HealthAmerica's application.

evidence that "[a]ny person" may submit to the CO. It allows for any evidence "bearing on an application." Therefore, for the bar on "evidence not previously submitted" to mean anything, 20 C.F.R. § 656.10(e)(1) can only apply, whatever it means, prior to the CO's denial of an application. To reach any other interpretation invalidates a portion of the regulations, which the BALCA cannot do.

7. The limitation of reconsideration to the CO's errors is reasonable

Amici and HealthAmerica also contend that it is arbitrary and capricious for the CO only to correct on reconsideration errors of the CO himself. Amici Br. at 20-21. There are two obvious reasons why this argument is incorrect. First, the claim would once again lead to a NOF procedure, which the DOL has already rejected. See pages 1-2 supra. Second, it is undoubtedly reasonable and commonsensical for the regulations to require the party that made a mistake to suffer the consequences of that mistake. Amici and HealthAmerica hope to shift the consequences of an employer error from the employer to the CO. HealthAmerica Br. at 6-7. That might be an acceptable procedure if the DOL ever chooses to adopt it, but the DOL has not done so. Instead, the DOL chose to adopt the commonsense approach.

Moreover, for amici's argument to make sense, pointing out CO errors would have to somehow violate the bar on "evidence not previously submitted." But it does not. For example, if HealthAmerica had correctly filled out the application and the CO had still denied it, HealthAmerica could have filed a valid request for reconsideration that did not include any additional evidence. HealthAmerica would simply have had to point out that the evidence it had previously submitted – the application – was proper. It is hard to

imagine a CO error that could only be demonstrated with the provision of evidence not previously submitted.

3. DOL's policy not to allow corrections prior to a denial is irrelevant

Lastly, amici claim the DOL's decision not to allow corrections or amendments to applications is "ultra vires."[2] Amici Br. at 21-25. DOL's PERM FAQ No. 5 states that "[c]orrections can not be made to an application after the application is submitted under PERM." Clearly, FAQ No. 5 only applies prior to the CO's decision on an application. It makes no sense to speak of a "correction" to an application after the CO has denied it. The present case does not involve an attempted correction to HealthAmerica's application prior to a decision, so FAQ No. 5 is irrelevant.

Amici also argue that the DOL ignored their comments during the rulemaking by not creating a procedure that allows for the correction of applications. Id. at 21. As mentioned above, the present case does not involve a correction to an application. Furthermore, the BALCA is not the appropriate forum for a complaint about a rulemaking and the rulemaking process.

B. If the BALCA Disagrees With the CO, the BALCA Should Allow the CO to Complete His Review

HealthAmerica and amici all argue that, should the BALCA conclude that CO was required to consider the tear sheets HealthAmerica provided, the BALCA should order the CO to certify HealthAmerica's application. HealthAmerica Br. at 8; Amici Br. at 25-27. The CO relies on the arguments made in the CO's initial brief, but stresses on important fact. If the BALCA orders the CO to certify at this point in the process,

[2] It appears that amici have misused the term "ultra vires." According to Black's Law Dictionary, Eighth Edition, "ultra vires" means "[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." The gist of amici's argument is clear, however, so the misuse is not prejudicial to the CO.

HealthAmerica's application will never undergo the complete review required by the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(5)(A), perhaps thereby barring the CO from considering all the "relevant factors" so valued by amici in its brief. It is entirely possible, though not certain, that HealthAmerica's application suffers from further deficiencies for which the computer does not look. If the BALCA orders certification, there can be no guarantee that the DOL will have protected U.S. workers as required by law.

III.

CONCLUSION

For the reasons discussed above, the CO asks BALCA to affirm the CO's decisions in the present case.

Respectfully submitted,

GARY M. BUFF
Associate Solicitor for
Employment and Training Legal Services

HARRY L. SHEINFELD
Counsel for Litigation

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UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, DC

MATTER OF HEALTHAMERICA.	)	BALCA Case No.
	)	2006-PER-1
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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2006, I forwarded a copy of the foregoing "Certifying Officer's Brief" by facsimile, to the following:

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AMERICAN IMMIGRATION LAWYERS ASSOCIATION

July 5, 2002

VIA HAND DELIVERY
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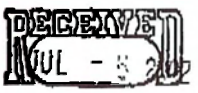

Attn: Dale Ziegler
Chief, Division of Foreign Labor Certification

RE: Comments of the American Immigration Lawyers Association to Proposed Rule, Certification for Permanent Employment of Aliens in the United States; Implementation of New System (67 Federal Register 30466, May 6, 2002)

Dear Assistant Secretary:

The American Immigration Lawyers Association ("AILA") is pleased to present its comments in response to the proposal of the Department of Labor ("DOL") to amend its regulations governing the filing and processing of labor certification for permanent employment of aliens in the United States and to implement a new filing and processing system for such applications.

AILA is a bar association of more than 7,800 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA's members are well acquainted with the labor certification process, having significant experience representing and educating employers who have

experience is used in "virtually all instances" for positions requiring less than two years of training or experience is wholly in error and contrary to established employment practices in most occupations in the United States. While AILA agrees wholeheartedly with the Labor Department's conclusion that U.S. workers must be protected, we emphatically do not agree that the use of alternative job requirements somehow manipulates the process. Rather, alternative experience requirements are a legitimate and necessary part of recruitment, and the regulations should explicitly recognize them as such.

It is puzzling that, on one hand, DOL would insist that an employer hire any worker who looks like he might be able to perform the job, but refuse to allow employers to chart out alternative requirements that could provide objective guidance as to whether an individual *could* perform the job, This proposed rule, in essence, would replace a well-developed, objective standard with an incomprehensible, subjective standard.

VI. AUDITS, REQUESTS FOR REVIEW & REVOCATION

A. Audits and the Elimination of NOFs

Although it is never pleasant to receive one, the NOF has served a highly useful purpose in labor certification practice. The process allows valid cases to be refined and re-focused where that is needed, and it provides a predictable and effective way for DOL and the employer to identify and address issues. Consistent with fundamental fairness and due process, the NOF allows the CO to provide basic notice to the parties that s/he has found deficiencies in the filing and an opportunity to cure those deficiencies.

This is particularly crucial because labor certifications can easily be denied for minor deficiencies, and many U.S. employers filing labor certifications are not represented by counsel. Under the current system, a SWA can assist the uninitiated employer or counsel through the process with a series of "assessments." Under the proposed system, an employer will really only have one opportunity to "get it right." One can easily imagine that an employer who is not well versed in the requirements of the system may satisfy all but one requirement, which under the proposed system, would be fatal as the case would be denied, without an opportunity to address and cure the deficiency.

In contrast the proposed audit system appears aimed solely at preventing or punishing misrepresentation by eliciting from employers the documentation they are required to maintain in support of the attestations on the labor certification form, but not at curing or assisting employers with deficiencies. In the end, employers are left with no reasonable procedure through which they can gain assistance on a deficiency or guidance on what the CO views the deficiency to be. No set of rules is fully reconcilable to the settings in which it will be applied, least of all rules relating to labor certification. There must be a process by which the rules are applied to specific facts and thus more fully understood in that context. The proposed rule would allow no process for this development, and instead abandons decades of developed standards and them with a