U.S. Department of Labor
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400N
Washington, D.C. 20001-8002

REPLY BRIEF OF AMICI CURIAE

On appeal from a decision of the U.S. Department of Labor
Employment & Training Administration
Foreign Labor Certification
National Processing Center
Harris Tower
233 Peachtree Street, Suite 410
Atlanta, GA 30303

BALCA Case No.: 2006-PER-1
ETA Case No.: A-05171-08693

American Immigration Lawyers Association
918 F Street, NW
Washington, D.C. 20004-1400

American Council on International Personnel
1212 New York Avenue, NW, Suite 800
Washington, D.C. 20005

In Amici's initial brief, the issue of what is the proper interpretation of 20 CFR 656.24 (g) (2) as it applies to this case was thoroughly briefed. We do not desire to repeat those arguments here. Rather, we will address just a few of the key arguments raised by DOL in its Reply brief related to this topic. Amici will focus more of its attention on the position expressed by DOL in its initial brief on what is the appropriate relief if it is determined that DOL should have granted HealthAmerica's Request to Reconsider.

Indisputably, Amici and DOL disagree on whether the supporting documents that an employer is required to retain for five years can be submitted and be considered by DOL in the employer's Request to Reconsider. Amici argue that the legally mandated documentation and supporting legal arguments must be considered as part of the administrative record. If BALCA agrees with Amici's position, then the employer's tear sheets are not "new evidence."

DOL asserts that the "plain meaning and purpose of the regulations" bars an applicant from filing supporting documentation. DOL argues that reconsideration is meant to correct errors by the decision-maker *or to supply evidence not previously available to the decision-maker*," and employs flawed logic to argue that

> "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 CFR 656.24(g)(2) does not permit the retained evidence to be filed with a request for reconsideration."[1]

[1] DOL Reply Brief at 5.

DOL's expectations, whatever they may have been, are irrelevant here. What is reasonable is to expect that the agency's rules comply with established federal law. Therefore, it is entirely reasonable to consider documentation that is required by regulation and retained by the petitioner to be evidence previously available to the decision-maker and constructively submitted with the Form 9089. Contrary to DOL's argument, constructive submittal does not render meaningless the requirement that a request for reconsideration be based only on evidence previously submitted – it restricts the nature of that evidence to the evidence defined in the PERM regulations that the petitioner was required to obtain and maintain for inspection by DOL.

It isn't clear to Amici why DOL feels that allowing an employer to use its supporting documentation to challenge a denial, "permitting an applicant to provide evidence rebutting any decision by the CO," is something "unreasonable," and something that would wreak havoc with DOL's processing of PERM applications.

HealthAmerica took its responsibility seriously. It submitted a labor certification application in good faith, expecting that the considerable resources it had expended to demonstrate compliance with the statutory mandate governing labor certification applications would be considered by DOL. It expected, as in other administrative and judicial proceedings, that it would be accorded a meaningful opportunity to present evidence on its behalf if necessary. It was in possession of supporting documentation as required by the PERM regulations that would demonstrate that it recruited U.S. workers at prevailing wages and working conditions, and that the employment of Mr.

Wimalendran, an Associate Financial Analyst, would not have an adverse impact on the U.S. labor market.

It is unimaginable to HealthAmerica and to Amici that the only purpose of document retention is to supply it in the event of an audit and that if an audit is not initiated by DOL, that the supporting documentation is useless.[2] The supporting documentation goes to the veracity of the statements made on the labor certification application. If it can be used against an employer, it also should be useable to support an employer's case.

We agree that the position that Amici takes regarding the nature of supporting documentation does somewhat resemble the "pre-PERM world." The regulation expressly provides that in lieu of submitting documentation up front, for the ease of e-filing, the documents are to be retained for subsequent presentation to DOL. After all, these documents serve as evidentiary proof of compliance with the organic statute, which remains unchanged. INA 212(a) (5) (A), 8 U.S.C. 1182(a) (5) (A). Contrary to Thomas Wolfe, we can and should go home again on this issue.

Viewing a petitioner's retained documents as "constructively submitted" for purposes of 20 CFR 656.24(g)(2) is also necessary to reconcile 656.24(g)(2) with 20 CFR 656.10(e)(1)(i), which specifically allows "any person" to "submit to the Certifying

[2] Indeed, the regulations make clear that document retention is for purposes well beyond the audit. Section 656.15(f) requires that documents be retained for five years. In that DOL has estimated that the typical time frame for a PERM application to reach a decision will be 45 to 60 days, obviously a five-year retention contemplates other uses for the documentation.

Officer documentary evidence bearing on an application for permanent alien labor certification." DOL takes the position that 20 C.F.R. 656.10 (e) (1) (i) does not apply after a denial.[3] ***DOL's narrow interpretation of 656.24(g)(2) stands in direct conflict with 656.10(e)(1)(i).*** DOL attempts in vain to reconcile this conflict by arguing that 656.10(e)(1)(i) "can only apply prior to the CO's final decision."[4] A simple reading of 656.10(e)(1)(i) reveals no restriction on when any person may submit documentary evidence bearing on an application to the Certifying Officer.[5] Moreover, if BALCA were to adopt DOL's reading of 656.10(e)(1)(i), DOL would be barred from using any documentary evidence submitted by any person once the CO's final decision is rendered. Such a reading would seriously undermine DOL's ability to revoke an approved labor certification under 20 CFR 656.32 based on evidence submitted by any person subsequent to an approval.

DOL makes much of the meaning of the word "submitted."[6] Frankly, we do not think that DOL fully defined the meaning of this word in its preamble to the regulations. Repeatedly in the preamble DOL states that the employer **will not be required** to submit any documentation with its application. Many readers of the regulations interpreted this

---

[3] Id at 11

[4] Id. Curiously, in its footnote to this argument, DOL undermines its own position with the additional commentary that "[t]he CO takes no position on the precise meaning of the quoted regulations." *See* DOL Reply Brief at 11, note 1.

[5] DOL may be referring to 20 CFR 656.10(e)(1)(ii), which states, "The Certifying Officer must consider this information in making his or her determination." However, the Certifying Officer may reconsider the determination under 20 CFR 656.24(g)(3). Thus, even under DOL's interpretation, the time frame in which any person may submit evidence must extend to include at least the period required to make a determination on a request for reconsideration. If documentation is provided to the CO that the employer never recruited on a Sunday when it asserted in the ETA 9089 that it did, or worse yet, that it never recruited at all, the CO would most assuredly take this documentation into consideration in rendering a Final Determination.

[6] Id.at 5

to mean that document submission was not "required" but "may" be submitted. In fact, at the inception of PERM processing, when arbitrary and irrational computer denials were plentiful, many AILA attorneys sought to avoid the numerous "computer glitch" problems by seeking to submit mail-in applications with documentary evidence so that legal positions could be clarified.

DOL asserts that Amici and HealthAmerica have erroneously relied on Harry Tancredi, 88 –INA-441 (BALCA Dec. 1, 1988) for the proposition that the CO should consider evidence not previously submitted if the employer had no previous opportunity to argue its position or present evidence in support of its position. It states that this reasoning only applies if there is an allegation of CO oversight, omission or inadvertence.[7] But that allegation was not pivotal to the result in Tancredi. What was pivotal was the Board's holding that "Certifying Officers have the authority to reconsider Final Determinations prior to their becoming final" in a circumstance where the regulations did not confer authority to reconsider: "the power to reconsider is inherent in the power to decide."

Amici argue that it is a basic tenet of administrative law and procedure that one be given an opportunity to present evidence on one's behalf, and if such opportunity is not provided, the ends of justice are not well served. Furthermore, this basic tenet of American jurisprudence seems to be recognized in BALCA's Handbook under the heading: "B. Newly obtained evidence. 2. No prior opportunity to present evidence. If the employer did not have a prior opportunity to present evidence to support its position,

[7] Id at 5-6

it is an abuse of discretion for the CO not to reconsider." The Handbook cites Harry Tancredi, 88-INA-441 (Dec 1, 1988) (*en banc*). While the regulations may have changed since Tancredi was decided and the Handbook written, nothing in the new regulations alters this basic tenet of justice.

DOL asserts that amici do not understand the meaning of the word "inconsistency."[8] The inconsistency lies in the fact that the employer answered that there was a Sunday edition of the newspaper (ETA 9089, Ic8) and it listed the name of that newspaper. It correctly provided a Sunday date on Ic10 but incorrectly inserted a Monday date for the second ad. Per Webster, these responses were inconsistent, i.e. "not in agreement or harmony." These inconsistencies highlighted a problem that could have been resolved in a simple request for documentation in an audit,[9] or, alternatively, in a request for documentation under 20 C.F.R. 656.20(d). Interestingly, DOL fails to ever address in its brief why it failed to use the latter vehicle to seek the actual tear sheets.

On the final very important issue of the relief available to HealthAmerica if BALCA determines that the CO should have granted reconsideration, DOL relies largely on the arguments already submitted in its initial brief. It states: "It is entirely possible,

[8] Id at 10

[9] Please note that the issuance of audits does not involve a laborious effort on the part of DOL since they are essentially boiler-plate requests for information and documents. DOL sends at least two types of audit letters: one elicits a voluminous amount of documentation; and the other simply asks for a summary of the recruitment report and a copy of the tear sheet. Since a recent article on this topic was written by Josie Gonzalez, we will not cite to that article but merely include as exhibits A &B samples of both types of audit notices.

though not certain, that HealthAmerica's application suffers from further deficiencies for which the computer does not look."[10]

As stated in Amici's brief[11], "DOL cannot administer a program making up the rules as it goes along, particularly rules or policy guidance that are so biased against the employer that the CO appears to act as an adversary of the employer, not an impartial adjudicator." DOL has established a system to issue Final Determinations that runs contrary to its own regulations. The Certifying Officer's brief describes two types of Denials, with each involving different levels of review. One Denial is generated by a computer (hereinafter called "Hal," the Decision Matrix software program); the other Denial is generated by a human, the "Certifying Officer." Apparently, DOL wants two bites at the apple – two opportunities to issue denials.

If Hal issues the Denial, and one files a Request to Reconsider that " [i]s meritorious under the regulations, the CO will place the application back in the process for a more thorough check by the CO."[12] Presumably, the second review of the application goes beyond the basis upon which Hal initially denied the application. This procedure violates the regulations which provide that in a Request to Reconsider, the scope of review is limited to the narrow grounds specified in the Denial notice. There is no provision in the regulations to permit two distinct determinations. Is DOL saying that Hal's denial is not a real denial -- perhaps because it was generated by a computer? Doesn't the opportunity to conduct two different types of reviews and potentially issue

[10] Id.at 14
[11] Amici Brief, pages 20-21.
[12] CO Brief, page 2

two Denials thwart DOL's goal "to streamline processing and ensure the most expeditious processing of cases, using the resources available."[13]?

Is the Denial of the Request to Reconsider also generated by Hal, or does it involve the thoughtful analysis of a human? If one receives a Denial, how does one know whether it was issued by Hal or the Certifying Officer? The instant Denial was signed by the CO, leading Amici to believe that the CO reviewed what he signed. How will BALCA know which applications should be returned for further processing? In the future, will some Final Determinations bear Hal's name while others will be signed by the CO?

A regulatory change is necessary in order to allow the CO the opportunity at this juncture "to review the application more closely." Its procedure, where reconsideration is granted, of putting applications back "… in the queue awaiting the more searching review by the CO" violates the regulations. If not a regulatory change, then DOL must consider other means of processing its cases where some cases are perhaps "rejected" but not "denied" by Hal. There should be only one denial leading to a Final Determination.

The other options that were proposed in Amici's brief will be mentioned here, but for a more detailed discussion of these options, please refer to our initial brief. First, DOL should improve its "customer-friendly" website. "The Web site includes detailed instructions, prompts and checks to help employers fill out the form."[14] The computer

[13] Id, page 6, citing 69 Fed. Reg. 77326, 77326 (Dec.27, 2004)
[14] Fed.Reg. 77326, 77328 (Dec.27, 2004)

was able to note that the advertisement date entered was not a Sunday. DOL could have provided this alert at the time of completion of ETA 9089 -- such a simple, straightforward alert would not invite fraud, as DOL suggests.[15] If there were still lingering suspicions of fraud, DOL could use the audit mechanism to further investigate the matter and request the actual tear sheet to review.

Second, as noted earlier in the brief, DOL should provide an automated "rejection" mechanism if the application contains errors that do not withstand initial computer review and that make the application unacceptable for processing. Such a mechanism should be instantaneous so that applicants can immediately correct any denials and re-file. In the instant case, it took one month for DOL to issue its denial. As noted in our initial brief, it is not always possible for applicants simply to re-file an application in order to correct a mistake, and the consequences of "automatic" denials taking a month (or much longer, in many cases) can sometimes be devastating: if the employer's recruitment for the position is stale, the countless hours and thousands of dollars spent in such recruitment and in preparing the application can be lost; employees can lose their eligibility for further extensions of stay in the United States in nonimmigrant visa status; families can be uprooted and forced to leave the United States.

[15] "If DOL were to allow changes to an application after the CO had pointed out a flaw to the applicant, nothing would stop a dishonest applicant from simply asking the CO to make the required change—claiming an innocent mistake. Such an applicant could easily claim that any substantive flaw in its application was scrivener's error, or perhaps that the applicant had accidentally filed an earlier draft of the proper application." DOL's Brief at page 6

Third, DOL can refer the application for an audit; or, fourth, the CO also has the authority to simply request additional information before making a final determination. Fifth, DOL could accept Requests for Reconsideration, as it does when the error was its own, including as a result of Hal's mis-programming. Indeed, as indicated in Amici's initial brief, such Requests are entertained when the typographical error was made by DOL personnel.[16] It is puzzling why DOL should find it prohibitive to reconsider when the error is on the part of the preparer, but not when the error is its own.

Amici must confess to not fully understanding DOL's discussion regarding the reversal of the Denial of Reconsideration for it seems that DOL is again inventing rules.[17] In this discussion, DOL creates a fourth avenue for BALCA, apart from the three regulatory avenues that currently exist under 656.27 (c)(1)(2)(3) --- affirming the denial; directing the CO to grant the certification; or directing that a hearing on the case be held. In this new fourth avenue BALCA would "send" the application back to the DOL for further processing in order to place the application in the status that it would have been had reconsideration been granted. However, inexplicably, this "sending back" of the application is not a "remand."[18] Further, as suggested by Amici earlier, DOL doesn't have the regulatory authority, once it has issued a Denial, to reopen the case and expand the potential grounds for review by running an application again through its computer and/or human reviews.

---

[16] AILA members have reported numerous instances in which typographical errors were made by DOL staff in inputting ETA 9089s submitted by mail. DOL has, quite rightly, reopened many of these cases in order to allow the correction. See Minutes of AILA-DOL Liaison Meeting, March 23, 2006, item 12(a), indicating that a motion to reopen is the way to correct problems with errors made by the PERM Centers in inputting.

[17] DOL's Brief at pages 7-8.

[18] Webster defines "remand" as: "1. To send or order back. b) To send back (a case) to a lower court with orders about further action."

DOL compares the PERM regulations to the agricultural regulations found at 20 CFR 655.101 on the issues of application determinations and appellate review. A review of the agricultural regulations is quite enlightening and suggestive of ways that DOL should have operated the PERM program – had it enacted regulations comparable to the agricultural ones. For example, under 20 CFR 655.101(c)(2) the RA promptly reviews the applications and notifies the applicant in writing within seven calendar days of any deficiencies which render the application not acceptable for consideration. The applicant then has five calendar days in which to submit an amended application. Further, minor technical corrections to the application are permitted[19] – unlike the zero tolerance position enunciated by DOL in its PERM FAQ#5.

The procedures set forth for review of determinations of agricultural worker applications at 20 CFR 655.104 are totally inapposite to 20 CFR 656.24, 656. 26 and 656.27 (c)(1)(2)(3). The agricultural regulations discuss procedures for prompt "rejection," (not denial), of the application; opportunity for resubmission of the application; opportunity for modifications; opportunity to request expedited administrative review of the "non-acceptance" of the application. None of these concepts or procedures is enunciated in the PERM regulations.

[19] 20 CFR 655.101 (5) (e): "Minor *amendments to applications.* Minor technical amendments may be requested by the employer and made to the application and job offer prior to the certification determination if the RA determines they are justified and will have no significant effect upon the RA's ability to make the labor certification determination required by § 655.106 of this part. Amendments described at paragraph (d) of this section are not ''minor technical amendments.'' (Note that paragraph (d) refers to applications to increase the number of workers).

While it may be true that pursuant to 20 CFR 655.112, the ALJ may only affirm, reverse or modify the CO's decision, these choices are not pertinent to the matter at hand which is governed by a different regulatory scheme. The analyses set forth by DOL in its brief, comparing the agricultural regulations to PERM, are simply inapplicable. BALCA's choices are quite clear –they are prescribed in 20 CFR 656.27. However, if BALCA determines that there is a regulatory method to achieve a fuller review of the application, we support the notion that all applications should be thoroughly reviewed. Given the high importance of ensuring that U.S. workers are protected, this review should be conducted by a human, not a computer, prior to the issuance of a Final Determination.

Respectfully Submitted:

Josie Gonzalez, American Immigration Lawyers Association

Lynn Shotwell, American Council on International Personnel

Careen Shannon
Geoff Forney
Kerry Dockstader
Mary Jane Weaver
Ron Wada
Robert Cohen.