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**UNITED STATES DEPARTMENT OF LABOR  
BOARD OF ALIEN LABOR CERTIFICATION APPEALS**

**800 K. Street, NW, Suite 400-N**

**Washington DC 20001-8002**

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*In the Matter of*

**A CUT ABOVE CERAMIC TILE**

**Employer,  
ETA Case # A-08325-07903  
2010-PER-00224**

*On behalf of*

**Fernando Bueno-Perez  
Alien**

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**On Appeal of a Certifying Officer Decision**

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**Brief of the American Immigration Lawyers Association, Amicus Curiae**

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## **Introduction**

BALCA granted a petition for rehearing en banc in order to resolve a conflict between the panel decision in this case and *Mandy Donuts Corp.*, 2009-PER-481 (Jan. 7, 2011). The issue is whether an employer may be required to maintain a copy of the published job order with the State Workforce Agency or SWA and produce it in response to a Certifying Officer's ("CO) audit notification. In this brief, Amicus will address the questions of what the regulations mean when they refer to "required supporting documentation" at 20 C.F.R. § 656.17(a)(3), and whether the PERM regulations permit a CO to deny an application for labor certification based solely upon a failure of an employer to provide documents that an employer is not specifically required to maintain under the current regulatory scheme. Amicus is particularly concerned in this case that a failure of warning or notice to the employer, by way of appropriate rule-making, that the job order might be required, renders the CO's denial fundamentally unfair.

## **Statement of Interest**

The American Immigration Lawyers Association (AILA), founded in 1946, is a nonpartisan, not-for-profit organization comprised of over 11,000 attorneys and law professors who practice and teach immigration law. AILA members provide professional services, continuing legal education, information and, additionally, represent U.S. families, businesses, foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. AILA has participated as amicus curiae in numerous cases, such as *Matter of HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc); *Matter of Albert Einstein Medical Center*, 2009-PER-00379 and *Abingdon Memorial Hospital*, 2009-PER-433; *Matter of Hawaii Pacific University*, 2000-PER-00127 (June 30, 2009), *Matter of Syracuse University*, 2010-PER-00772 (September 15, 2010) and *Matter of East Tennessee State University*, 2010-PER-00038 (April 11, 2011). As a friend of the court, AILA

hopes to provide a larger context for the present appeal in order to promote the just administration of law.

**Regulatory History of 20 C.F.R. § 656.17(e)(1)(A)**

When reviewing a contested regulation, BALCA recognizes that the degree of deference owed to the CO's decision depends on many factors, including "the quality of the agency's reasoning, the degree of the agency's care, its formality, relative expertness, whether the agency is being consistent or, if not, its reasons for making a change, and the persuasiveness of the agency's position." *Matter of HealthAmerica*, 2006-PER-1, 13 (July 18, 2006). The agency's interpretation of its regulation must be rational at the price of being labeled "arbitrary and capricious." *Puerto Rico Sun Oil Co. v. US EPA*, 8 F.3d 73, 77 (1st Cir. 1993). It also must be consistent with its own earlier pronouncements, or explain the reason for the difference. *U.S. Department of Treasury v. FLRA*, 995 F.2d 301, 303 (D.C. Cir. 1993); *Matter of HealthAmerica*, *supra*.

**A. Notice of Proposed Rulemaking and 2004 PERM Final Rule**

Prior to the implementation of the current regulation, any job order for a permanent labor certification application was placed by the appropriate State Employment Service Agency (SESA), as part of the required SESA-supervised recruitment regimen. 20 C.F.R. § 656.21(f), sunset date March 24, 2005: "The local office, using the information on the job offer portion of the *Application for Alien Employment Certification* form, shall prepare and process an Employment Service job order." As a result, any documentation of the job order was created by the State Employment Service Agency, and transmitted directly to the Department as part of the application. The employer did not have any role in creating a job order for a labor certification application nor in documenting that a job order had been placed with the appropriate State agency.

When the Department published the Notice of Proposed Rule Making (NPRM) to revise the permanent labor certification program, the following language was proposed for documentation of the job order: "The start and end dates of the job order entered on the application serve as documentation of this step." Employment and Training Administration, Proposed Rule, Implementation of New System, 20 CFR Part 656, 67 Fed. Reg. 30466, 30497 (May 26, 2002). Neither the summary of the NPRM nor the discussion of the required pre-filing recruitment provided any further guidance or clarification on the job order documentation, nor indicated that anything further than the dates on the application would be required as proof of the job order. The NPRM also included a proposal that employers be given only 21 days to respond to an audit notice on an application, and that if no response was filed within 21 days, the application would be denied. 67 Fed Reg 30499-30500.

In the final regulation, published on December 24, 2004, the Department left the job order documentation regulation unchanged from the language in the NPRM. Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System," Employment and Training Administration, Labor, Final Rule, 69 Fed. Reg. 77326 (Dec. 27, 2004) ("Final Rule"). In the preamble to the final regulation, the Department noted that it received very few comments with regards to the job order requirement, and that the Department had chosen to retain the job order requirement as part of the pre-filing recruitment, 69 Fed Reg 77343. In the discussion of sending and responding to the audit letter, one commenter specifically expressed concerns about documenting proof of the job order within the proposed 21 days to respond to an audit: "[S]ome records may be purged in the state systems after a short period of time, such as 30 or 60 days, making it impossible to retrieve information by the time an audit is requested." 69 Fed Reg 77359. In response to this comment, DOL stated that "The *Application for Permanent*

*Employment Certification* requires the employer to provide the start and end date of the job order on the application form to document the job order has been placed. Gathering additional information on the job order from the SWA will not be necessary; therefore, no extension of the response time is warranted for this purpose.” 69 Fed Reg 77359.

**B. Post-promulgation Development and Understandings of the 2004 Final Rule**

DOL published FAQ guidance on SWA job orders as early as April 2005, but this guidance was silent on what type of documentation of a job orders will be required. DOL’s FAQs have discussed how a job order should be placed,<sup>1</sup> and whether an employer must contact applicants who are listed as a ‘match’ to the job order,<sup>2</sup> but have not addressed what documentation of a job order placement might be required. There has been no published guidance qualifying the plain language of the regulation which specifies that the start and end dates on the 9090 form “shall serve as documentation of this step.” 20 C.F.R. § 656.17(e)(1)(i)(A).

The permanent labor certification regulations at 20 C.F.R. § 656 were amended in 2007 (Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the

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<sup>1</sup> See [http://www.foreignlaborcert.doleta.gov/pdf/perm\\_faqs\\_4-6-05.pdf](http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_4-6-05.pdf), also posted on AILA Infonet Doc. No. 05041463, at p. 5 (April 6, 2005):

**Should the employer seek the information required regarding the placement of job orders from the State Workforce Agency (SWA) in the area of intended employment?**

Yes, the employer should seek any information required regarding job orders from the SWA. If an employer is not clear on how to place a job order, the employer should check with the SWA responsible for the area of intended employment. Placement of job orders with a SWA must be in accordance with each SWA’s rules and regulations. In other words, SWAs place labor certification job orders the same way they place any other job order.

<sup>2</sup> See [http://www.foreignlaborcert.doleta.gov/pdf/perm\\_faqs\\_6-1-05.pdf](http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_6-1-05.pdf), also posted on AILA Infonet Doc. No. 05060364 at p. 5 (June 1, 2005):

**Must the employer contact all individuals identified as a "match" by a computerized state employment system or must the employer only contact those applicants who have submitted a resume and/or response as specified by the employer in the job order?**

The employer is responsible for considering/contacting those applicants who have affirmatively provided a response as specified by the employer in the job order.

Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity,” Employment and Training Administration, Labor, Final Rule, 72 Fed. Reg. 27904, (May 17, 2007)), and again in 2009 (Prevailing Wage Determinations for Use in the H-1B, H-1B1 (Chile/Singapore), H-1C, H-2B, E-3 (Australia), and Permanent Labor Certification Programs; Prevailing Wage Determinations for Use in the Commonwealth of the Northern Mariana Islands,” Employment and Training Administration, Labor, Final Rule, 74 Fed. Reg. 63796, (December 4, 2009)). Neither of these amendments made any changes to the definition of what would constitute documentation of the required job order.

### **C. Conflicting BALCA decisions and the need for *en banc* review**

In its Order Granting En Banc Review, BALCA noted that the CO denied certification because A Cut Above Ceramic Tile, the employer, did not provide a copy of the job order placed with the State Workforce Agency (“SWA”), and a BALCA panel affirmed the CO’s decision. In *Mandy Donuts Corp.*, 2009-PER-481 (Jan. 7, 2011), a different panel found that the start and end dates of the job order entered on the application serve as documentation of the SWA job order and that it is unreasonable for the CO to request proof that the SWA job order was actually published. Therefore, the Board determined that *en banc* review is necessary to resolve the conflict and maintain uniformity. *Order Granting En Banc Review* (September 26, 2011).

### **Argument**

#### **I. BALCA should affirm *Mandy Donuts* as a correct application of a clear regulation that is supported by consistent regulatory history.**

The underlying issue in both *Mandy Donuts* and this case is the same: Does an employer that fails to submit a SWA job order in response to a CO’s audit notification letter violate the regulation that provides:

Documentation supporting the application for labor certification should not be filed with the application, however in the event the Certifying Officer notifies the employer that its application is to be audited, the employer must furnish required supporting documentation prior to a final determination.

20 C.F.R. § 656.17(a)(3).

**A. A copy of the SWA job order is not a “required document,” and the CO’s denial for failure to product it violates both the letter and spirit of PERM.**

**1. A SWA job order copy is not a required document under the regulations.**

PERM’s purpose was to streamline a complex and cumbersome labor certification process:

The process for obtaining a labor certification has been criticized as being complicated, time consuming, and requiring the expenditure of considerable resources by employers, State Workforce Agencies and the Federal government. The new system is designed to streamline processing and ensure the most expeditious processing of cases, using the resources available.

Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, Employment and Training Administration, Labor, Final Rule, Supplementary Information, 69 Fed. Reg. 77326, 77327 (Dec. 27, 2004) (“Final Rule”).

With regard to the new regulations’ requirement that an employer must maintain documents of its recruitment efforts, the rule is plain:

The employer will not be required to submit any documentation with its application, but will be expected to maintain the supporting documentation *specified in the regulations*. The employer will be required to provide the supporting documentation in the event its application is selected for audit and as otherwise requested by a Certifying Officer.

*Ibid* (emphasis supplied).

Later in the Supplementary Information, the DOL stated that:

If an application is selected for audit, the employer will be notified and required to submit, in a timely manner, *documentation specified in the regulations* to verify the information stated in or attested to on the application. Upon timely receipt of an employer's audit documentation, it will be reviewed by ETA personnel. If the employer does not submit a timely response to the audit letter, the application will be denied. If the audit documentation is complete and consistent with the employer's statements and attestations contained in the application, and not deficient in any material respect, the application will be certified the employer will be notified.

*Id.* at 77378 (emphasis supplied).

These passages indicate the drafters of the regulations intended, consistent with a more convenient and streamlined process in which onerous audits should be the exception rather than the rule, for an employer to maintain only supporting documentation specified in the regulations. Since proof of publication of the SWA job order was not one of these, an employer should not be penalized for failing to provide a document that is not specified in the regulations.

2. **The CO should not deny certification solely because an employer did not provide a non-required document.**

May the CO deny an application based on an employer's failure to provide documents requested by the CO, even though the regulations do not require an employer to maintain or provide such documents as part of the application process? AILA submits that the answer to this question is definitely "no".

As explained in the supplementary information to the Final Rule, a CO's decision to grant or deny an application involves examination of three factors:

The standards used in adjudicating applications under the new system will be substantially the same as those used in arriving at a determination in the current system. The determination will still be based on: whether the employer has met the procedural

requirements of the regulations; whether there are insufficient U.S. workers who are able, willing, qualified and available; and whether the employment of the alien will have an adverse effect on the wages and working conditions of U.S. workers similarly employed.

*Id.* at 77377 (emphasis supplied). If these three questions are satisfactorily resolved, then the application must be approved.

The Board's recent decision in *Schnabel Engineering, Inc.*, 2010-PER-01125 at 5-6 (BALCA Nov. 9, 2011) is instructive. There, BALCA reversed the CO's denial based on the employer's failure to provide a copy of its request for a prevailing wage determination with the SWA. The panel noted that the pertinent regulation required the employer to submit the prevailing wage determination itself, which the employer had submitted, but did not require its request for the prevailing wage determination. *Id.* at 5. The *Schnabel* panel ruled that:

While an application may be denied under § 656.20(b) due to "a substantial failure by the employer to provide required documentation," the CO does not have carte blanche to require just any documentation. The application may only be denied under § 656.20(b) when the absent documentation is *required*. In this case there is no support in the regulations that the underlying request for the PWD is a *required* document.

*Schnabel Engineering, Inc.* at 5 (emphasis in the original). *See also, Clearstream Banking S.A.*, 2009-PER-00015 (BALCA March 30, 2010) (where record demonstrates compliance with regulations, employer's failure to provide requested documentation with audit response will not require denial); *Pickering Valley Contractors*, 2010-PER-01146 (Aug. 23, 2011) ("verification of sponsorship by telephone is not a regulatory requirement...." Where employer complied with the regulation, BALCA reversed the CO's denial).

In cases involving audits, the CO should first determine if there has been a procedural violation by the employer. If not, the CO's decision should be based on whether the evidence

demonstrates that there are sufficient qualified U.S. workers or the employment of the alien will have an adverse impact on U.S. workers. *See* 8 U.S.C. § 1182(a)(5)(A). The regulation only requires the employer to disclose the dates that the job order was posted with the SWA on the ETA 9089. 20 C.F.R. § 656.17(e)(1)(i)(A). If that was done, then the employer has not committed a procedural violation by failing to provide the evidence stated in the audit notification letter.

**B. A Certifying Officer is bound by the regulation, which prohibits requiring an employer to produce a job order.**

The CO has authority to request documentation through an audit at 20 C.F.R. §656.20(a)(1). But a demand to provide information regarding publishing of the SWA job order exceeds what is required by the government's own regulation at 20 C.F.R. §656.17(e)(1)(i)(A).

In *Mandy Donuts Corp.*, BALCA 2009-PER-00481 (Jan. 7, 2011), the CO required proof that the SWA job order was published, as part of an audit. The panel determined that the controlling regulation does not require additional documentation beyond the listing of the start and end dates of the SWA job order. *Id.* at 5. It further found that “neither the regulation nor any other rule or instruction suggests that an employer must retain documentation establishing that the SWA job order was actually run. . . .” but only that the SWA job order had been posted as indicated by the stop and start dates of the job order. *Id.*

The regulatory history of 20 C.F.R. §656.17(e)(1)(i)(A), as contained in the comments to the published regulations, reveals that DOL understood that SWAs do not retain actual copies of published job orders because they are expunged after a short period of time—usually between 30 and 60 days after publication--and that employers would not be required to maintain documentation of the job orders as published by the SWA. Final Rule, 69 Fed. Reg. 77326, 77359 (Dec. 27, 2004). Specifically rejecting a commenter's objection that obtaining proof of published

job orders within the proposed 30 day audit response time-frame may prove impossible, DOL explained that only the start and end dates of the job order were required in the final regulation and so “additional information on the job order from the SWA will not be necessary[.]” *Id.*

The *Mandy Donuts* panel properly held that this regulatory history supported its conclusion that the CO’s demand for information about a SWA job order beyond the start and end dates was unreasonable:

In order to verify that an employer has complied with the conditions it must attest to when filing a permanent labor certification application, *see* 20 C.F.R. § 656.10(c), it would be perfectly reasonable in an audit for the CO to require an employer to produce a copy of the job order that was actually placed. But, where neither the regulations nor any other rule or instruction suggests that an employer must retain documentation establishing that the SWA job order was actually run as opposed to merely placed, it is unreasonable for the CO in assessing the response to the audit notification to demand such documentation.

*Mandy Donuts*, 2009-PER-00481 at p.6 (Jan. 7, 2011), *citing Gencorp.* 1987-INA-659 (Jan. 13, 1988)(*en banc*); *Lam Garden Chinese Restaurant*, 2008-PER-14 (Dec. 17, 2007).

In *Gencorp*, a pre-PERM case, BALCA held that, where the CO requests a document that is not mentioned in the regulations, the employer should produce it if it is “obtainable by reasonable efforts.” 1987-INA-659 at 2. But under the PERM streamlining regulation, DOL appears to have gone further and specifically determined that proof of publication of the job offer will not be required at all.

**C. Substantive Changes to the PERM Regulations Would Require Notice-And-Comment Rulemaking, Pursuant to The Administrative Procedures Act.**

Regulations provide guidance to the regulated community and the agency. BALCA can

uphold a DOL regulation requiring strict compliance of an employer, but only where there has been adequate notice and opportunity to comment: “The quid pro quo for such stringent criteria is explicit notice.” *Matter of Health America*, at 17; *Matter of Deloitte*, 2009-PER-00312 at 5 (March 12, 2010).

An audit request encompassing documents outside the scope of the regulations would constitute a new interpretation of the PERM regulations. An agency “may not unilaterally impose novel substantive or evidentiary requirements” beyond the relevant regulation. *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010). *See also, Dia Navigation Corp. Ltd. v. Pomeroy*, 34 F.3d 1255, 1267 (3rd Cir. 1994) (determining that a new INS policy that was not explicitly permitted in the statute required promulgation of the rule via notice and comment pursuant to the APA). The *Dia* court determined that any agency action that requires a new action or duty by the regulated must be subject to rule-making, particularly when the agency goes beyond the specific requirements established via statute or prior regulation. *Id.*

Clarity of procedural rules helps employers understand, and follow, the requirements under PERM. Allowing a CO to add new requirements to the rules, without requiring publication and notification under the APA, would violate an employer's right to a fair and transparent process. Thus, BALCA should affirm the ruling in *Mandy Donuts*, inasmuch as that panel considered the regulatory language and regulatory history in coming to its conclusion that the CO cannot deny certification based on non-production of a document that is not specified in the regulations.

**II. Fundamental fairness requires that an employer not be penalized for inability to comply with an audit request for documents that need not be maintained under the regulations.**

The PERM final rule extended the hope of relief from an all too often frustrating and lengthy process. Among other things, it promised:

The new system is designed to streamline processing and ensure the most expeditious processing of cases, using the resources available. \*\*\* Employers will receive a more prompt adjudication of their applications than would have been the case under a system that permitted only submission of applications by facsimile or by mail.

Final Rule, 69 Fed. Reg. 77326, 77327 (Dec. 27, 2004).

BALCA recognizes that it is “compelled to interpret the rules in a manner consistent with procedural due process.” *Matter of Denzel Gunnels, d/b/a Gunnels Arabians*, 2010 PER 00628 at 11 (Nov. 16, 2010). BALCA should apply a fundamental fairness analysis when faced with a manifest injustice, as well as where the CO’s decision reveals an inconsistent agency interpretation. In *Matter of Microsemi Corp.*, 2010-PER-675 (June 17, 2011) at 3, BALCA noted that where differing agency instructions causes applicants to be misguided: “Any inconsistency which exists must be construed against the promulgator of the form and/or instructions, not the applicant.”

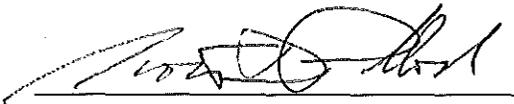
Here, unlike with certain other required recruitment steps, the controlling regulation does not require an employer to maintain copies of specified documents. The regulatory history expressly assured employers that they would not be called upon to produce a SWA job order. In these circumstances, upholding the denial based on a new requirement in an audit notification letter would violate due process and would be fundamentally unfair. *See, e.g. MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) (reversing agency determination where parties were not provided adequate notice and opportunity to comment on a final agency rule).

### **Conclusion**

The regulations direct that an employer need only declare the start and end dates that it placed a SWA job order to document that particular recruitment step. Beyond that, the

regulatory history discloses that, under PERM, an employer would not be expected or required to maintain records relating to the publication of the job order. Employers have been given no formal notice that they might be expected to produce the records demanded by the CO in this case. Therefore, BALCA should clarify that the CO's authority is not unlimited, and the CO is as bound by the regulations as the employer.

Submitted this 16<sup>th</sup> day of November, 2011.

A handwritten signature in black ink, appearing to read "Scott D. Pollock", written over a horizontal line.

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Certificate of Service

Scott D. Pollock, an attorney, certifies that on November 15, 2011, he caused a copy of the foregoing **Brief of the American Immigration Lawyers Association, Amicus Curiae** on the parties, by depositing it in regular U.S. mail, proper postage prepaid, at 1331 G Street, NW, Washington, DC 20005 to:

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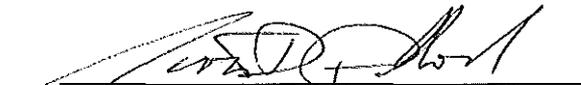
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