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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*

SAP AMERICA, INC.

Employer,  
ETA Case # A-07317-95346  
2010-PER-01250

*On behalf of*

Rajanikanth Kristam  
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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AMERICAN IMMIGRATION LAWYERS  
ASSOCIATION  
1331 G Street NW Suite 300  
Washington DC 20005

Counsel listed on following page

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Attorneys for Amicus Curiae,  
American Immigration Lawyers Association

Scott D. Pollock  
Scott D. Pollock & Associates, P.C.  
105 W. Madison, Suite 2200  
Chicago, IL 60602  
(312) 444-1940

Jeanne M. Malitz  
Malitzlaw, Inc.  
600 West Broadway, Suite 400  
San Diego, CA 92101  
(619) 557-9461

Deborah Smith  
Law Office of Deborah S. Smith  
7 West Sixth Avenue, Suite 4M  
Helena, MT 59601  
(406) 457-5345

Kathleen A. Spero  
Malitzlaw, Inc.  
600 West Broadway, Suite 400  
San Diego, CA 92101  
(619) 557-9129

Prasant Desai  
Iandoli & Presai, P.C.  
38 3<sup>rd</sup> Avenue, Ste. 100E  
Boston, MA 02129  
(617) 482-1010

## Introduction

Fair notice and predictable procedures are hallmarks of administrative law. Individuals and businesses requesting a benefit from executive-branch agencies must be provided with a roadmap in the form of regulations, and policy guidance interpreting such regulations and the governing statutes, so that they know what is required to obtain the benefit. Rational procedures require the roadmap to be provided at the beginning of the process, not part-way through or at the end once a benefit is denied. Evidentiary requirements must be clearly identified upfront to avoid a "Gotcha!" denial for failure to provide a piece of evidence that the applicant had no prior notice might be required.

For the second time in less than one year, the Board of Alien Labor Certification Appeals ("BALCA") requests the participation of the American Immigration Lawyers Association ("AILA") as amicus to address a conflict among its panel decisions concerning the propriety and fairness of adjudicatory procedures in which the Certifying Officer ("CO") denies an application for labor certification based on an inability by the employer to provide a supporting document that no regulation requires the employer to retain.<sup>1</sup> In the present matter, as before in *A Cut Above Ceramic Tile*, AILA submits that the governing regulation is clear, and the Certifying Officer lacks authority to premise a denial of labor certification based on an employer's inability to produce a document that is not required by regulation to be retained or produced upon request by the CO. In *A Cut Above Ceramic Tile*, BALCA agreed with AILA, and affirmed this

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<sup>1</sup> For the previous case, see *In the Matter of A Cut Above Ceramic Tile*, BALCA Case No. 2010-PER-00224, ETA Case No. A-08325-07903, Brief of Amicus Curiae American Immigration Lawyers Association (11/16/2011), available at <http://www.aila.org/content/default.aspx?docid=37703>.

fundamental proposition of administrative law that an employer must be provided regulatory notice of the supporting documentation upon which the CO may base its decision.<sup>2</sup>

In an order dated April 2012, BALCA issued a notice for rehearing *en banc* in the present matter to resolve a conflict that has arisen among its panels on the question of whether a CO may deny an application for permanent labor certification based on an employer's failure to submit a copy of its Prevailing Wage Determination Request ("PWDR") in response to an Audit. *See, e.g., SAP Labs, LLC*, 2010-PER-1233 (Nov. 15, 2011) (reversing denial); *Schnabel Engineering, Inc.*, 2010-PER-1125 (Nov. 9, 2011) (reversing denial); *JDA Software*, 2010-PER-932 (July 12, 2011) (affirming denial); *Misoya Inc.*, 2010-PER-200 (Feb. 28, 2011) (affirming denial). 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 656.20(b), and whether the Program Electronic Review Management (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 respectfully submits that the CO's denial of an application after the expense and effort of recruitment and audit based solely on the omission of a non-required document, in this case the inadvertent omission of the PWDR, contradicts the regulations, is fundamentally unfair, lacks transparency, and invites arbitrary requests for documents. Since PERM is such an exacting and often unforgiving process, the scope of the CO's authority is not without limit. Accordingly, Amicus urges BALCA to adopt the *SAP Labs, LLC* and *Schnabel Engineering, Inc.* line of decisions holding that a CO may not deny a PERM application for failure to produce a PWDR upon request.

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<sup>2</sup> *See id.*, BALCA Decision (03/08/2012)(*en banc*).

### Statement of Interest

The American Immigration Lawyers Association (“AILA”), founded in 1946, is a nonpartisan, not-for-profit organizations 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 number 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 (Sept. 15, 2010); *Matter of East Tennessee State University*, 2010-PER-00038 (April 11, 2011) (*en banc*); *Matter of Karl Storz Endoscopy-America*, 2011 PER 00040 (Dec. 11, 2011) (*en banc*); and *Matter of A Cut Above Ceramic Tile*, 2010-PER-00224 (March 8, 2012) (*en banc*). 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.

### Overview of Prevailing Wage Requests and Regulatory History of 20 C.F.R. § 656.40(a)

When reviewing a contested regulation, BALCA recognizes that the degree of deference owed to the CO’s interpretation 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*, *supra*, at slip op. page 13. 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*. In cases where the regulations are clear on their face, BALCA will not rely upon contrary indications in the regulatory history, but rather will uphold the regulations as written. *Karl Storz Endoscopy- America*, 2011 PER 00040 (Dec. 11, 2011) (*en banc*).

The rules regarding procedures to obtain prevailing wage determinations have changed over time, and a brief history will serve to highlight an employer's requirements under the current regulation.

**A. Pre-PERM Practice, Notice of Proposed Rulemaking and 2004 PERM Final Rule**

Prior to the implementation of the current regulation, prevailing wage determinations (PWD's) were issued by the State Employment Service Agency (SESA) as part of its review of a submitted *Application for Alien Employment Certification*. Former 20 C.F.R. § 656.21(e)(2004), stated that:

The local office shall calculate, to the extent of its expertise using wage information available to it, the prevailing wage for the job opportunity pursuant to § 656.40 and shall put its finding into writing. If the local office finds the rate of wages offered is below the prevailing wage, it shall advise the employer in writing to increase the amount offered. If the employer refuses to do so, the local office shall advise the employer that the refusal is a ground for denial of the application by the Certifying Officer; and that if the denial becomes final, the application will have to be refilled at the local office as a new application.

No separate request for a prevailing wage determination was submitted; rather, the determination was made during review of the submitted application, based on the employer's description of job duties and minimum requirements. Under the provisions of 20 C.F.R. § 656.20(c)(1) – (2) (2004) the employer was required to clearly show that it had enough funds available to pay the wage or salary offered to the alien; that the wage offered equaled or exceeded the prevailing

wage determined; and that the wage the employer would pay to the alien when the alien began work would equal or exceed the prevailing wage applicable to the time the alien began working.<sup>3</sup>

When the Department of Labor published the Notice of Proposed Rule Making to revise the permanent labor certification program, it proposed that employers submit PWDRs directly to the individual State Workforce Agency (“SWA”) overseeing the job location using *Prevailing Wage Determination Request*, ETA Form 9088. “Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,” Employment and Training Administration, Department of Labor, Proposed Rule, 67 Fed. Reg. 30466 (May 26, 2002). Under the proposed system, the *Application for Permanent Labor Certification* form (ETA Form 9089) would not contain a job description or detailed job requirements. Id. Instead, the Department proposed that:

The job description and job requirements would be entered on the PWDR form, which the employer would be required to submit to the SWA for a prevailing wage determination. The SWA would enter its prevailing wage determination on the form and return it to the employer with its endorsement. The employer would be required to submit both forms to an ETA servicing office for processing and a determination.

Id.

ETA Form 9088 was initially proposed to be part of the application packet filed at the ETA application processing center. 67 Fed. Reg. 30466, 30470.

In the final regulation, however, the Department eliminated its proposal for a standardized uniform prevailing wage determination submitted as part of the application packet. “Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,” Employment and Training Administration, Department of

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<sup>3</sup>Under former 20 C.F.R. § 656.40(a)(2)(i)(2004) the wage set forth in a labor certification application was considered as meeting the prevailing wage standard if it was within five percent of the prevailing wage. In other words, the employer was considered to have met the prevailing wage requirement as long as it offered to pay 95% of the prevailing wage as determined by the SESA.

Labor, Final Rule, 69 Fed. Reg. 77326 (Dec. 27, 2004). A complete application would consist only of ETA Form 9089. Id. at 77327. Employers were required to obtain a PWD from the SWA prior to submission of ETA Form 9089, but it was no longer required to be submitted as an initial part of the application. Id. The Department also eliminated the proposal for a single PWDR form using ETA Form 9088, and required that employers request a PWD “using the form required by the state in which the job is being offered.” Id. at 77333. “Information from the state’s prevailing wage determination request form, such as the prevailing wage, occupational code, occupational title, state determination number, and the date the determination is made, will be included on the application form.” Id.

The Department went on to state: “The final rule does not require a particular form for employers to submit requests for wage determinations to SWAs or for SWAs to use in responding to requests for wage determinations. Employers will, however, be expected to provide the PWD they received from the SWAs in the event of an audit or other request from the CO.” Id. at 77341. Moreover, in the section of the final rule entitled “Overview of the Regulation”, the Department noted that “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.*” Id. at 77327. (Emphasis added.) The final rule made no mention of retaining the original PWDR itself or the need to provide this documentation to the Department as part of an audit or other request.<sup>4</sup> Employers were instructed that they were only required to keep the PWD as issued by the SWA. In its final rule, the Department expressly

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<sup>4</sup> There is one mention of the need to retain the initial PWD request in the Federal Register, but it appears under the “Discussion of Comments” section and not the “Overview of the Regulation” section. In response to questions about the ETA 9088 form, the ETA states that “The state workforce agency PWDR form must be retained by the employer, and will be submitted only if the application is selected for an audit or as requested by the CO.” 69 Fed. Reg. 77326, 77365.

envisioned a system where 50 separate PWD formats could be developed by the separate SWA's, all of which would be acceptable.

The final rule provisions regarding PWD's were codified at 20 C.F.R § 656.40. The applicable regulation at 20 C.F.R. § 656.40(a)(2005) stated the following:

The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. *The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.* (Emphasis added).

As stated in the final rule, only the completed PWD issued by the state SWA's was to be retained in case it was required by audit.

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

The Department began publishing FAQ guidance on prevailing wages as early as April 2005, but was silent on any retention requirements for either the original PWDR or the PWD as issued by the SWA. The FAQ's have discussed use of a wage range in advertising,<sup>5</sup> whether prevailing wage determinations were required for college or university teacher positions,<sup>6</sup> and the process for correcting State Workforce Agency errors on PWD's.<sup>7</sup> Regarding this latter inquiry, the Department stated:

In submitting a PERM application, the employer declares that it has read and reviewed the application and that the information contained in the application is true and accurate. The employer is responsible for ensuring the PWD information

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<sup>5</sup> Permanent Labor Certification Program, Final Regulation, Frequently Asked Questions (April 6, 2005), available at [http://www.foreignlaborcert.doleta.gov/pdf/perm\\_faqs\\_4-6-05.pdf](http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_4-6-05.pdf).

<sup>6</sup> Permanent Labor Certification Program, Final Regulation, Frequently Asked Questions (May 4, 2005), available at [http://www.foreignlaborcert.doleta.gov/pdf/perm\\_faqs\\_5-4-05.pdf](http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_5-4-05.pdf)

<sup>7</sup> Permanent Labor Certification Program, Final Regulation, Frequently Asked Questions (Feb. 14, 2006), available at [http://www.foreignlaborcert.doleta.gov/pdf/perm\\_faqs\\_2-14-06.pdf](http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_2-14-06.pdf)

provided by the SWA and entered on ETA Form 9089 is correct and for taking steps to obtain corrected PWDs from the SWA as needed.<sup>8</sup>

To date, there has been no published guidance requiring that an employer retain the initial PWDR for a PWD. The only instruction is that employers review the information and ensure its accuracy, in accordance with its declaration on ETA Form 9089.

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 Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity,” Employment and Training Administration, Department of Labor, Final Rule, 72 Fed. Reg. 27904 (May 17, 2007). No changes or amendments were made regarding the process for obtaining a PWD or retention of the documentation relating to the PWD for audit or review purposes.

### **C. 2009 Amendments to the Prevailing Wage Determination Protocol**

In December 2009, the Department issued new protocols and guidelines for obtaining the PWD required for the labor certification program. “Prevailing Wage Determinations for Use in the H-1B, H-1B1 (Chile/Singapore), H-1C, H-2B, E-3 (Australia), and Permanent Labor Certifications Programs; Prevailing Wage Determinations for Use in the Commonwealth of the Northern Mariana Islands,” Employment and Training Administration, Department of Labor, Notice, 74 Fed. Reg. 63796 (Dec. 4, 2009). Under the new regulations, which went into effect on January 1, 2010, PWD’s are received and processed through the Office of Foreign Labor Certification (OFLC) National Prevailing Wage and Helpdesk Center (NPWHC). *Id.* The SWA’s no longer played any role in the prevailing wage process for labor certifications after that point. Under the revised program, requestors submit a PWD request on a standardized form,

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<sup>8</sup> Permanent Labor Certification Program, Final Regulation, Frequently Asked Questions (Feb. 14, 2006), available at [http://www.foreignlaborcert.doleta.gov/pdf/perm\\_faqs\\_2-14-06.pdf](http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_2-14-06.pdf).

*Application for Prevailing Wage Determination*, ETA Form 9141. Id. Requests were initially only accepted by mail, but electronic means for filing became available on January 21, 2010. “Information from DOL Regarding Electronic Submission of Prevailing Wage Requests,” AILA InfoNet Doc. No. 10011460 (Jan. 14, 2010). Once a determination is made, the occupational category and title, prevailing wage, and prevailing wage level are entered by the analyst on the final page of ETA Form 9141 and returned to the requestor. The original PWD request thus has become part of the issued PWD. The Department issued a series of frequently asked questions about the new prevailing wage determination program in December 2009<sup>9</sup> and March 2010,<sup>10</sup> neither of which amended or updated the document retention guidelines for PWD’s.

The protocols and provisions for PWD’s continue to appear at 20 C.F.R. § 656.40(a) (2009). The language in the regulation as it exists today is as follows:

The employer must request a PWD from the NPC, on a form or in a manner prescribed by OFLC. Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009. On or after January 1, 2010, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with sec. 212(t) of the INA. Unless the employer chooses to appeal the center's PWD under § 656.41(a) of this part, it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

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

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<sup>9</sup> National Prevailing Wage and Helpdesk Center, Prevailing Wage Frequently Asked Questions, December 2009, available at: [http://www.foreignlaborcert.doleta.gov/pdf/National%20Prevailing%20Wage%20and%20Helpdesk%20Center%20%28NPWHC%29%20\\_%20FAQs%20\\_%20Round%201.pdf](http://www.foreignlaborcert.doleta.gov/pdf/National%20Prevailing%20Wage%20and%20Helpdesk%20Center%20%28NPWHC%29%20_%20FAQs%20_%20Round%201.pdf)

<sup>10</sup> National Prevailing Wage and Helpdesk Center, Prevailing Wage Frequently Asked Questions, March 2010, available at: [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_03\\_2010.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_03_2010.pdf)

In its Notice of *En Banc* Review, BALCA stated that a conflict has arisen among the panels on the question of whether an application for permanent labor certification may be denied based on an employer's failure to submit a copy of its initial PWD request. In *JDA Software*, 2010-PER-932 (July 12, 2011) and *Misoya, Inc.*, 2010-PER-200 (Feb. 28, 2011), two separate BALCA panels held that certification could be denied since the employer failed to provide a copy of the determination as requested in the audit notification. Shortly thereafter, the same panel reviewing the decision in *Misoya* determined that denial was inappropriate under the same facts, since the regulations did not require that the initial PWDR be provided or that it is necessary for a CO to review the original request to verify the employer's attestation of the PWD. *Schnabel Engineering, Inc.*, 2010-PER-1125 (Nov. 9, 2011). A third panel agreed with the reasoning in *Schnabel*, finding that the CO could not deny the labor certification application under 20 C.F.R. § 656.20(b) for failure to submit a copy of the initial PWD request as this document was not expressly listed at 20 C.F.R. § 656.40(a), and therefore was not "required supporting documentation" within the meaning of 20 C.F.R. § 656.17(a)(3) and 20 C.F.R. § 646.20(b). *SAP Labs, LLC*, 2010-PER-1233 (Nov. 15, 2011); *Ebenezer Mission Church*, 2010-PER-01232 (Nov. 15, 2011). Therefore, the Board determined *sua sponte* that *en banc* review was necessary to resolve the conflict and maintain uniformity in decisions. *Notice of En Banc Review* (April 20, 2012).<sup>11</sup>

### Argument

1. BALCA should affirm *Schnabel Engineering, SAP Labs, LLC, and Ebenezer Mission Church* as correct applications of the documentation submission and retention requirements of 20 C.F.R. §656.17(a)(3).

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<sup>11</sup> In its Notice of *En Banc* Review, the Board did not mention the decision in *Ebenezer Mission Church* but we include this decision in our discussion because its reasoning is consistent with *Schnabel* and *SAP Labs LLC*.

The underlying issue in *Schnabel Engineering, SAP Labs, LLC, and Ebenezer Mission Church* and this case is the same: Does an employer who fails to submit a PWDR in response to a CO's audit notification letter violate 20 C.F.R. §§ 656.17(a)(3) and 656.20(b). 20 C.F.R. § 656.17(a)(3) provides as follows:

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. (Emphasis added)

Section 656.20(b), which addresses the audit procedures, provides in pertinent part: "A substantial failure by the employer to provide *required* documentation will result in that application being denied. . ." (Emphasis added.) The fundamental issue here is whether the PWDR is a "required" document within the context of the regulations such that an employer's failure to produce the PWDR in response to an audit is grounds for denial. When read in the context of the PERM regulations and the clear intent of their drafters, it is clear that submission of the PWDR was not required. As the panel in *Ebenezer Mission Church* stated: "To require an employer to submit documentation when it had no notice that it needed to retain such documentation runs counter to principles of fundamental fairness and due process." *Ebenezer Mission Church, supra*, at slip op. page 5.

**2. The PWDR is not a "required document" under the regulation in effect at the time this PERM application was filed.**

The issue presented in this case is the meaning of "required supporting documentation" at 20 C.F.R. §§ 656.17(a)(3)<sup>12</sup> and 656.20(b).<sup>13</sup> If the meaning is unambiguous, BALCA cannot

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<sup>12</sup> 20 C.F.R. § 656.17(a) (3) 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."

use the regulatory history, preamble language, or issued FAQ's as overriding authority. *Matter of Karl Storz Endoscopy-America*, 2011-PER-00040 (Dec. 1, 2011) (*en banc*). As a non-Article III court, BALCA lacks both the inherent authority to rule on the validity of a regulation and the express authority to invalidate the regulation as written. *Id.* at slip op. pages 16 – 17, citing *Dearborn Public Schools*, 1991-INA-222, DOL/OALJ Reporter, slip op. at page 4 (Dec. 7, 1993) (*en banc*). The uncertainty in this case arises from the fact that, while the regulations are clear and unambiguous that an employer need only submit a PWD and not a PWDR, they do not expressly define the term “required documentation,” which must be produced in response to the CO’s audit notification. What is a “required document” thus must be determined with reference to regulatory history which interprets the term to mean documents that are required by the regulations themselves.

The regulation regarding PWD’s is 20 C.F.R § 656.40(a) (2005). The language of this regulation in effect at the time of the filing of the employer’ PERM application stated as follows:

The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA’s prevailing wage determination under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. *The determination shall be submitted* to an ETA application processing center in the event it is requested in the course of an audit.

(Emphasis added).

Moreover, in the definition section of the PERM regulations, which remain in effect today, “prevailing wage determination” is defined as “the prevailing wage provided by the State

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<sup>13</sup> 20 C.F.R. § 656.20(b) states: “A substantial failure by the employer to provide required documentation will result in that application being denied under §656.24 and may result in a determination by the Certifying Officer pursuant to §656.24 to require the employer to conduct supervised recruitment under §656.21 in future filings of labor certification applications for up to 2 years.”

Workforce Agency.” 20 C.F.R § 656.3. Consequently, by its own terms, the regulation requires an employer to submit the actual PWD in response to an audit request. Notably, there is no regulatory authority requiring an employer filing a foreign labor certification application to retain a PWDR for submission in response to a CO’s audit request.

In reviewing this regulatory scheme, the BALCA panels in three separate decisions reviewed the regulatory language and correctly determined that the CO erred in denying the employer’s labor certification application solely because the employer failed to produce the PWDR in its audit response. All three panels agreed that the regulations in effect prior to nationalization of the prevailing wage process only required that the employer retain the PWD and that the CO erred in denying the application where the sole ground for denial was based on the employer’s failure to submit the PWDR in response to an audit request. *See Schnabel Engineering, Inc., supra; SAP Labs, LLC, supra; and Ebenezer Mission Church, supra.*

In *Schnabel Engineering*, a case with facts identical to the case at hand, the panel reviewed a PWD issued by the Maryland State Workforce Agency and determined that the Form ETA 9089 contained information that was consistent and verifiable with that found on the PWD *Schnabel Engineering, Inc., supra*, at slip op. page 4.<sup>14</sup> The panel held that the information in the PWD when compared to the Form ETA 9089 was “all the information necessary to verify the Employer’s PWD attestation in the ETA Form 9089.” *Id.* Thus, although the Department may *desire* to review a PWD that contains the job description and job requirements, an employer is not required to submit a PWDR that contains such information and such information is not

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<sup>14</sup> The PWD at issue here is the Pennsylvania PWD. The Pennsylvania PWD contains substantially identical information as the Maryland PWD including the specific items noted by the Board in *Schnabel*, including: prevailing wage tracking number, SOC/O\*Net code, occupation title, OES wage level, wage source, determination date, determination expiration date, employer’s name and contact information, and, job site and wage region. Therefore, contrary to the Department’s assertion that *Schnabel* is distinguishable based on the nature of the PWD, it is not.

necessary to verify the Employer's prevailing wage attestations. *Id.*; see also *SAP Labs, LLC*, *supra*, slip op. at page 4. (Noting that the DOL may request the PWDR in its audit but the Employer was not required to provide it.) Moreover, the regulations do not require such information to be included in the PWD issued by the SWA.<sup>15</sup>

The Department's reliance on two other BALCA decisions to support its denial is misplaced. In *JDA Software*, 2010-PER-932 (July 12, 2011) and *Misoya, Inc.*, 2010-PER-200 (Feb. 28, 2011), BALCA held that certification could be denied where the employer failed to provide a copy of the determination as requested in the audit notification. However, these decisions are flawed because the panels neglected to undergo the required analysis of determining whether the regulations required the employer to submit the PWDR in response to the audit request.<sup>16</sup> As the Board recently observed in *Matter of A Cut Above Ceramic Tile*, 2010-PER-00224 (March 8, 2012) (*en banc*), at slip op. page 10, "[w]hen a regulation does not require an employer to retain a particular type of evidence to document compliance with a recruitment step, such evidence is not 'required documentation' . . . ." Clearly the Department has the authority to *ask* for a PWDR but, as held in *A Cut Above Ceramic Tile*, the employer is not required to provide the PWDR unless the *regulations* require it to do so. The Department cannot deny the application based solely on an employer's failure to do so. *Id.* at slip op. page 12.

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<sup>15</sup> The preamble to the final rule expressly notes that "The final rule does not require a particular form for employers to submit requests for wage determinations to SWAs or for SWAs to use in responding to requests for wage determinations. Employers will, however, be expected to provide the PWD they received from the SWAs in the event of an audit or other request from the CO." Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System," Employment and Training Administration, Department of Labor, Final Rule, 69 Fed. Reg. 77326, 77341 (Dec. 27, 2004)

<sup>16</sup> In both cases, the Board upheld the denial of the labor certification on procedural grounds holding that it was too late to submit the PWRD on a motion for reconsideration because the employer failed to submit the PWD document was not part of the record under 20 CFR § 656.24(g)(2).

**3. The regulations do not authorize the CO to determine what documentation is “required” to be submitted by an employer in response to an audit request.**

The determination of what documentation must be retained and submitted in response to an audit request is controlled by the regulations, and not by the CO’s unbridled discretion. The regulations are clear that the employer is required to retain and produce specific documents in the case of an audit, and expressly omit any reference to retention and submission of the PWDR. 20 C.F.R. § 656.40(a) (2005). The preamble language supplies meaning to the term “required supporting documentation.” As stated in “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):

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. (Emphasis added).

The preamble to the regulations also expressly omits any reference to retention and submission of the PWDR. *Id.* at 7732 and 77341. Amicus refers to the preamble language only as evidence to show that the consistent interpretation of the term “required supporting documentation” supports the contention that only documents specified in the regulations are classified as “required supporting documentation,” and that the PWDR is not a document specified by regulation. The Solicitor’s contention that 20 C.F.R. § 656.20 (a)(1) authorizes the CO to determine what documentation is required in an audit request is unfounded in law and inconsistent with the Department’s own view of the scope of audit requests. In discussing

PERM audits, the Department clearly understood the limited scope of §656.20(a)(1) when it observed

...the system outlined in this final rule is more transparent and user friendly than the current process. The *regulations* indicate what documentation employers are required to assemble, maintain, and submit to respond to an audit letter. ... We believe a prudent employer would gather the documentation before filing the application and have it available in anticipation of a possible audit.

69 Fed. Reg at 77358-77359. (Emphasis added.)

Thus it is the regulations themselves that determine the documents an employer must retain and produce for audit purposes. To interpret this provision otherwise would indeed allow the CO to have carte blanche to require “just any documentation” without notice to employers and would undeniably create a system that violates the principles of due process and fundamental fairness. *See Schnabel Engineering, supra*, at slip op. page 5; *A Cut Above Ceramic Tile, supra*, at slip op. page 5; *see also Ebenezer Mission Church, supra*.

Lastly, the Department’s reference to the preamble language in the Final Rule is misplaced because it is taken out of context, contradicts the regulation itself, and is inconsistent with other parts of the final rule that directly address the issue of PERM audits and more specifically, the requirement to retain and submit only the PWD. Specifically, the Department references a part of the final rule’s preamble language which contains a cursory discussion of the use of ETA Form 9088 which was outlined in the NPRM<sup>17</sup> but never adopted by the final rule. Notably, the Department fails to cite any reference in the final rule that requires an employer to retain and produce a request for a prevailing wage determination. No such requirement exists.

**4. BALCA has confirmed that inadvertent and harmless omissions should not automatically lead to denial of Form ETA 9089.**

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<sup>17</sup> “Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,” Employment and Training Administration, Department of Labor, Proposed Rule, 67 Fed. Reg. 30466, 30470 (May 26, 2002).

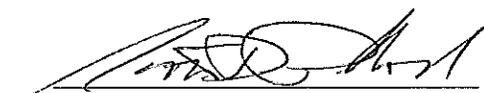
BALCA recognizes that it is “compelled to interpret the rules in a manner consistent with procedural due process.” *Matter of Denzel Gunnels, dba Gunnels Arabians*, 2010-PER- 00628 at slip op. page 10 (Nov. 16, 2010). BALCA has also emphasized in numerous cases that fundamental fairness and due process require the CO’s to exercise discretion and weigh documentation provided by the employer in case of an audit or motion to reconsider on a case-by-case basis, being sure to not elevate form over substance. *See, e.g., Matter of HealthAmerica*, 2006-PER-1 (July 18, 2006) (*en banc*); *Matter of Subhashini Software Solutions*, 2007-PER-00043, 2007-PER-0044 and 2007-PER-00046 (Dec. 18, 2007); *Matter of Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009); *Matter of Clearstream Banking S.A.*, 2009-PER-00015 (March 30, 2010).

Provision of the issued PWD, as required by regulation, in combination with the information present on the ETA Form 9089, provides sufficient documentation that allows the CO to confirm the employer has complied with the prevailing wage request. The CO can easily review the job title, job requirements, job duties, and job location on Form ETA 9089, even if it does not appear on the issued PWD, to determine if the PWD has been accurately assigned by the SWA. The CO has not stated that the documentation submitted by the employer in this case was deficient or failed to provide him with the information required to verify the PWD attestation. Moreover, there is nothing in the regulations stating that it is necessary for the CO to verify the Employer’s attestation of the PWD. *Schnabel Engineering, supra*, at slip op. page 4. Denial of a case based solely on absence of a document that is not required by regulation, and which is unnecessary for the execution of the CO’s duties, is a violation of fundamental fairness and due process. *Id.* at slip op. page 6.

### Conclusion

The regulations direct that an employer need only retain and provide the PWD issued by either the SWA or the NPC. Beyond that, the regulatory history discloses that the employer has never been expected nor required to retain the initial PWDR itself. Employers have been given no notice that they might be expected to produce the records demanded by the CO in this case. Recent BALCA decisions described herein confirm that certification denials based on failure to produce requested evidence may only be upheld if that evidence is in fact required by the regulations. Therefore, BALCA should continue with its current trend of cases and clarify that the CO's authority is not unlimited, and that the CO is as bound by regulations as the employer.

Submitted this 11<sup>th</sup> day of June, 2012.



SCOTT D. POLLOCK

American Immigration Lawyers Association  
1331 G Street, NW  
Suite 300  
Washington, DC 20005-3142

Attorney for Amicus

Certificate of Service

Scott D. Pollock, an attorney, certifies that on June 11, 2012, 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, Suite 300, Washington, DC 20005 to:

Administrator  
Office of Foreign Labor Certification  
U.S. Department of Labor/ETA  
Room C-4312, FPB  
200 Constitution Ave., NW  
Washington, DC 20210

Matthew Bernt, Esq.  
U.S. Department of Labor  
Office of the Solicitor  
Room N-2101, FPB  
200 Constitution Ave., NW  
Washington, DC 20210

Counsel for Litigation  
Employment and Training Legal Services  
Room N-2101, FPB  
200 Constitution Ave., NW  
Washington, DC 20210

Gary M. Buff  
Associate Solicitor  
Employment and Training Legal Services  
U.S. Department of Labor  
Office of the Solicitor  
200 Constitution Ave., NW, Room N-2101  
Washington, DC 20210

ALC Certification Officer  
U.S. Department of Labor/ETA  
Harris Tower  
233 Peachtree Street  
Suite 410  
Atlanta, GA 30303

Gabriele Wells  
Sap America, Inc.  
3999 West Chester Pike  
Newtown Square, PA 19073

Rajanikanth Kristam  
7350 Gallagher Drive  
Apt. 340  
Edina, MN 55435

Rahul M. Shah, Esq.  
Fragomen, Del Rey, Bernsen & Loewy, LLP  
90 Matawan Road  
P.O. Box 2001  
Matawan, NJ 07747