

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

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## **BRIEF OF AMICI CURIAE**

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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

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## **STATEMENT OF THE FACTS**

The facts in this matter are quite simple. The employer submitted an on-line Application for Permanent Employment Certification (ETA Form 9089, hereinafter “ETA 9089”) on June 29, 2005. No documentation in support of ETA 9089 was submitted as such is not allowed by the Department of Labor, Employment and Training Administration, (hereinafter referred to as DOL).<sup>1</sup> Due to a clerical error, the application contained an erroneous date indicating that the employer placed a Monday ad in lieu of the requisite Sunday placement, when in fact the employer had fully complied with the regulatory requirement to place the ad in a Sunday newspaper. Nearly a month later, on July 25, 2006, DOL issued a denial on the ground that the application indicated that a Sunday edition of the newspaper was available but was not used.

In the employer’s timely Request to Reconsider/Review the denial, it submitted a copy of the Sunday tear sheet. Six months thereafter, on February 24, 2006, DOL upheld the denial. DOL stated that it could not consider the evidence submitted with the Request to Reconsider because, pursuant to 20 CFR § 656.24(g)(2), a Request to Reconsider may not include evidence not previously submitted. Thus, under DOL’s interpretation of the regulation, the employer’s evidentiary record – where, as here, DOL did not audit the application – consists merely of Form ETA 9089. DOL further argued that PERM does not include a mechanism for correction or alteration of information after submission, and that denials will only be reversed upon Requests for Reconsideration when the mistakes were committed by DOL, citing FAQ, No. 5, issued on August 8, 2005, as its authority.

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<sup>1</sup> 20 CFR 656.17(a)(3)

## **STATEMENT OF THE ISSUES**

BALCA has asked all parties to specifically address, in addition to any other relevant arguments, two critical issues:

1. What is the proper interpretation of 20 CFR § 656.24(g)(2) as it applies to this case.
2. What is the relief available if it is determined that the Certifying Officer should have granted reconsideration of the application.

## **SUMMARY OF THE ARGUMENT**

While we are indeed operating under a new regulatory scheme since the unveiling of the Program Electronic Review Management regulations (PERM) on December 27, 2004, the organic statute has not changed. DOL must still make a determination to grant a labor certification based on a finding that there are no able, willing, qualified and available U.S. workers and that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.<sup>2</sup> Amici will argue that DOL has misinterpreted 20 CFR § 656.24(g)(2), and that its misinterpretation strips the evidentiary record in PERM filings to such an intolerable degree that it makes a complete mockery of the employer's opportunity to present evidence in a labor certification filing as required by the Administrative Procedure Act, as well as frustrates DOL's ability to make a finding on employer compliance with the organic statutory mandate regarding the employment of alien workers.

Amici will argue as follows:

**First**, the correct interpretation of 20 CFR § 656.24(g)(2) dictates that all documentary evidence that DOL requires employers to retain, including any legal arguments that interpret such documentation, should be considered an integral, non-divisible part of the administrative

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<sup>2</sup> INA § 212(a)(5)(A), 8 U.S.C. §1182(a)(5)(A)

record submitted in PERM e-filing applications. In the instant case, the employer's tear sheet should not be considered "new evidence;" rather, it is evidence that the regulations require be retained in support of an application, and must be made readily available upon DOL's request. Controlling case law under the Administrative Procedure Act makes clear that DOL may not control the submission of required documentary evidence to such an extent that the employer is not given an opportunity to present an adequate administrative record merely because DOL elects not to request relevant documentation in an audit.

**Second**, DOL's evisceration of the administrative record in this matter is contrary to the APA's "relevant factors" requirement. Under this standard, BALCA need not accept DOL's purported record, a solitary, electronically filed ETA 9089, but should consider other evidentiary documents, such as the tear sheet which should have been part of the record but was impermissibly disallowed by DOL's misinterpretation of 20 CFR § 656.24(g)(2). DOL's error has the effect of frustrating adequate administrative review, which is required to determine if the employer has complied with the statutory mandate

**Third**, DOL should have elicited the employer's tear sheet in an audit, or pursuant to 20 CFR § 656.20(d) (whether or not in the course of an audit) DOL could and should have requested supplemental information or documentation. Failure to request the tear sheet was an abuse of discretion.

**Fourth**, DOL has, in its application of the PERM regulations, created two distinct systems regarding the submission of evidence. This has resulted in an inconsistent definition as to what constitutes the evidentiary record within the labor certification regime. DOL permits the record to be fully developed, documentarily and otherwise, to determine if the prevailing wage will be paid;<sup>3</sup> while on the other hand, with relation to all other statutory requirements, its erroneous misinterpretation of 20 CFR § 656.24(g)(2) forecloses the employer from

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<sup>3</sup> 69 Fed. Reg. 77365-77373, 20 CFR § 656.40-656.41 (Dec. 27, 2004).

affirmatively presenting the required supporting evidence. The statute requires that the job be offered at the prevailing wage and that DOL determine that there are no able, willing, qualified, and available [U.S.] workers.<sup>4</sup> Only if BALCA rules that the administrative record must include the documentary evidence that the employer is required to maintain in support of its recruitment effort can this irrational inconsistency be resolved.

**Fifth**, 20 CFR § 656.10(e)(1)(i) and (ii) permits any person, including the employer, to submit any evidence bearing on a labor certification.<sup>5</sup> All such documentation must be considered by the CO in making a determination. This regulation provides yet another vehicle for BALCA to hold that the submission of the employer's tear-sheet should be considered part of the evidentiary record that should have been evaluated by DOL in making a determination whether to certify the application in question.

**Sixth**, the Certifying Officer's position that a Request for Reconsideration may only be granted based on DOL, not employer, error is utterly without regulatory support, and is so arbitrary and capricious that it violates all sense of fair play and due process.

**Seventh**, on the distinct issue that DOL, pursuant to FAQ, No. 5, cannot or will not correct or amend the ETA 9089, amici will argue that there is no regulatory support for this position. Although DOL will argue that it is entitled to issue "interpretive guidance" to the regulations, there is simply no PERM regulation that supports DOL's "zero tolerance" standard for employers --- a standard that it has not required of itself. As fully discussed under this section in the brief, BALCA may ignore interpretive guidance that has no regulatory support.

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<sup>4</sup> INA § 212(a)(5)(A), 8 U.S.C. §1182(a)(5)(A).

<sup>5</sup> 20 CFR 656.10(e)(1)(i) Submission of evidence. Any person may submit to the Certifying Officer documentary evidence bearing on an application for permanent alien labor certification filed under the basic labor certification process at Sec. 656.17 or an application involving a college and university teacher selected in a competitive recruitment and selection process under Sec. 656.18.

(ii) Documentary evidence submitted under paragraph (e)(1)(i) of this section may include information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions for the employment of alien workers and co-workers. The Certifying Officer must consider this information in making his or her determination.

**Finally**, on the question of what relief is available if BALCA rules that the CO should have granted favorable reconsideration of the application, amici posit that the only relief permitted under 20 CFR § 656.27(c) is that the application be ordered certified forthwith.

## **BACKGROUND ON THE PERM PROGRAM**

Prior to implementation of the PERM program, the labor certification application process allowed for dialogue between the employer and the government. While this undoubtedly contributed to the processing backlogs which both stakeholders and the government agree had become unreasonably lengthy, it also helped the employer to perfect the application and the record, and gave the CO sufficient information in most cases upon which to base a final determination. The more streamlined application under PERM has substantially eliminated the dialogue between the applicant and the government.

### **Traditional Labor Certification Process**

Sec. 212(a)(5)(a) of the Immigration and Nationality Act (INA) (formerly INA § 212(a)(14)) prohibits the entry of certain immigrants to the United States for the purpose of performing labor unless the Secretary of Labor has certified that (1) there are not sufficient workers who are able, willing, qualified and available to perform the work, and (2) the employment of the immigrant will not adversely affect the wages and working conditions of workers in the United States who are similarly employed.<sup>6</sup>

Until implementation of the new PERM program on March 28, 2005, an employer who wanted to apply for a labor certification on behalf of a foreign worker was required to file a

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<sup>6</sup> Since 1975, the labor certification program (which was originally administered within the DOL by the Bureau of Employment Security) has been administered by the DOL's Employment and Training Administration (ETA). In 1977, the ETA published new regulations adding a new part 656 to Title 20 of the Code of Federal Regulations that established the basic framework of the labor certification process. 42 Fed. Reg. 3440 (Jan. 18, 1977). The new regulation was effective as of February 18, 1977.

signed and dated Form ETA-750, in duplicate, with the State Workforce Agency (SWA) in the state of intended employment. Form ETA-750 had two parts: Part A, Offer of Employment (signed by the employer), and Part B, Statement of Qualifications (signed by the foreign national).<sup>7</sup>

The SWA was responsible for initial processing and recruitment before referral to the regional office of ETA. Its role was to receive and process applications, supervise employers' recruitment efforts, assemble facts regarding prevailing wages and availability of U.S. workers, and forward applications to the regional ETA office.

Prior to placing a job order and issuing recruitment instructions to the employer, the SWA would send the employer an assessment letter if there was any question about whether the terms of the job offer complied with the applicable regulatory requirements.

The dialogue between the SWA and the employer that would result from the issuance of an assessment letter helped ensure that the employer's job requirements were clear, met all regulatory requirements, and were likely to satisfy the DOL once the SWA referred the case to the regional ETA office after recruitment was complete. It also permitted the employer to make other changes to the application, such as correcting typographical errors or updating job titles or other details of the job offer that may have changed while the application remained pending – sometimes for years – with the SWA. Once this process was complete, the employer would engage in recruitment for the position under SWA supervision.

The SWA would then forward the application to the appropriate regional office of the DOL, where the CO would either certify the application, or issue a Notice of Findings (NOF) indicating its intent to deny the case and detailing the grounds for denial. The employer was then given the opportunity to provide supporting documentation and legal arguments addressing the

potential grounds for denial. If the CO determined that the employer had successfully overcome the stated grounds for denial, the case would then be certified.

## **1. Reduction in Recruitment**

In 1996, in an effort to increase efficiency in the labor certification process and to address concerns about lengthy processing backlogs, the DOL encouraged the filing of applications under 20 CFR 656.21(i), the regulation in effect prior to PERM. In addition, a General Administration Letter (GAL) articulated the standards for processing applications that came to be known as “Reduction in Recruitment” or RIR.<sup>8</sup> Under the RIR process, employers were permitted to file labor certification applications with documentation of prior recruitment efforts that adequately tested the local labor market during the six months prior to filing.

The same dialogue between the SWA/CO and employer described above in the traditional labor certification process also took place in the RIR context.

## **2. PERM**

In 2000, the DOL published a “notice of guidelines” in which it set forth the general principles that would guide the development of proposed regulations to effectuate the redesign of the permanent alien labor certification process.<sup>9</sup> The DOL issued its proposed rule in 2002.<sup>10</sup> The final rule implementing the new PERM program was published in December 2004 and was effective as of March 28, 2005.<sup>11</sup>

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<sup>8</sup> See old 20 CFR § 656.21(i) in the pre-PERM regulation. *See also* General Administration Letter (GAL) 1-97, reproduced at 73 Interpreter Releases 1476 (Oct. 21, 1996); also available on-line at <http://www.ows.doleta.gov/XDMS/indexfrm.xml>.

<sup>9</sup> 65 Fed. Reg. 51777 (August 25, 2000).

<sup>10</sup> 67 Fed. Reg. 30466 (May 6, 2002).

<sup>11</sup> 69 Fed. Reg. 77325 (Dec. 27, 2004). Note also that, in anticipation of the final rule’s publication, DOL promulgated an interim final rule on July 21, 2004, effective as of Aug. 20, 2004, that created a new 20 CFR § 656.24a that gave the Chief of the Division of Foreign Labor Certification and National Certifying Office discretion to direct SWAs and ETA regional offices to transfer pending labor certification applications to centralized processing centers. Beginning in late 2004 all applications pending at an SWA office were transferred to one of two new Backlog Elimination Centers (BECs), as were all cases pending at one of the ETA’s regional offices if processing had not yet commenced. Initially, a total of 363,000 cases were transferred to the BECs. At this writing, DOL had reported that 50,000 cases had been certified, and that 108,000 cases had been “completed” (i.e., either

PERM is an attestation and audit process whereby employers seeking permanent labor certification conduct advertising and recruitment during the thirty to one hundred and eighty day period prior to filing the labor certification application. The complete application process consists of one form, the “Application for Permanent Employment Certification” (ETA Form 9089), which contains both basic labor certification and prevailing wage information. Cases are no longer filed at state offices. Labor certification applications are filed online at a dedicated DOL website (<http://www.plc.doleta.gov/>) or may be sent by mail to one of two national processing centers. Some cases are selected for audit by DOL personnel, either randomly or because responses to certain questions on the application trigger a need for additional information or supervised recruitment. When a case is selected for audit, processing times increase.

The PERM system imposes a streamlined and automated electronic application process, preceded by a recruitment period with a stringent list of mandatory steps and strict posting requirements. The system also makes important changes to recordkeeping and documentation requirements. Employers are obligated to maintain documentation of their recruitment efforts and of layoffs by the employer in the area of intended employment and in the occupation that is the subject of the labor certification or a related occupation. Such documentation – including a detailed recruitment report – is not submitted up front with the labor certification application, but provided only if and when the application is selected for audit by the DOL. As discussed in detail elsewhere in this brief, employers are required to retain all supporting documentation for five years from the date of filing the ETA 9089.<sup>12</sup>

The automated nature of the PERM application process was designed to ensure speedy adjudications and reduce processing backlogs. As such, the process does not allow for the

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certified, denied or closed, so the 50,000 certified cases are included in this figure.) This still leaves 255,000 pending cases.

<sup>12</sup> 20 CFR § 656.10(f).

dialogue between the applicant and the DOL that existed in the old system. This does not mean, however, that “PERM does not include a mechanism for correction or alteration of information after submission,” as stated in the DOL’s Feb. 24, 2006 notice denying the employer’s motion for reconsideration. On the contrary, DOL does have the ability to correct errors and re-run an application through its automated system. In fact, DOL does this to correct its own mistakes (which DOL implicitly acknowledges in its notice when it says that “[r]equests for reconsideration will only be granted when the mistakes were committed by the Department of Labor.”). The PERM system has been so fraught with problems that to date, DOL has issued eight PERM FAQs to provide “interpretive clarification” on PERM standards and filing procedures; nonetheless, multiple technical limitations, unexplained denials, unclear instructions and other problems remain. [See *DOL PERM Error Timeline*, attached to this brief as Appendix 1.]

## **ARGUMENT**

### **1. ALL DOCUMENTARY EVIDENCE THAT EMPLOYERS ARE LEGALLY REQUIRED TO RETAIN, ALONG WITH RELATED LEGAL ARGUMENTS, ARE PART OF THE ADMINISTRATIVE RECORD IN PERM FILINGS**

#### **A. The Legally Mandated Documentation and Supporting Legal Arguments Must Be Considered Part of the Record**

At every opportunity – in the preamble to the regulations, in the instructions to Form ETA 9089, and in the regulations – DOL repeatedly stresses that the employer must retain documentation needed to support an employer’s *answers, attestations, and other information provided on the form* for five years.<sup>13</sup> One author on this topic equates an electronic PERM filing to an attestation-based government filing, like a federal income tax return, where the form is a summary of information which cannot be logically separated from the supporting documentation

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<sup>13</sup> 69 Fed. Reg. at 77327, 77392, 20 CFR § 656.10(f). See also Instructions to Form ETA 9089, page 2.

that must be retained for submission in the event of an audit. The PERM documentation is meant to serve as evidence of regulatory compliance related to issues such as the adequacy of the employer's good faith test of the U.S. labor market, the reasonableness and normalcy of the employer's job requirements and the justification for special requirements.<sup>14</sup>

The type of documentation that DOL requires employers to retain is 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. The PERM regulation requires specific, significant documentation with respect to the employer's recruitment activities, including tear-sheets of the advertisements. The timing and duration of these recruitment activities is vital as many of them must take place for a specific period of time. For instance, job orders must be placed for 30 days, internal postings for 10 business days, and all recruitment must be done within 30 to 180 days of filing (with the exception of one of the optional recruitment activities for professional applications, which may take place within 30 days of filing).<sup>15</sup>

Further, employers must be prepared to provide legal arguments justifying that the newspaper or journal chosen is the most appropriate to the occupation.<sup>16</sup> Most importantly, the recruitment report must describe the steps taken, the results achieved, the number of hires, and the number of U.S. workers rejected. The employer must summarize the lawful job-related reasons for rejection, and if requested by DOL, resumés must be presented sorted by the reasons for rejecting any U.S. workers.<sup>17</sup> DOL makes clear in the preamble to the regulations that an

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<sup>14</sup> The David Stanton Manual on Labor Certification, Successful Strategies for Practice Under PERM, Josie Gonzalez & Ester Greenfield, "Demystifying the PERM Audit," Josie Gonzalez, 13-23.

<sup>15</sup> 69 Fed. Reg. at 77344-77349, 20 CFR § 656.17(e)(ii). *See also* DOL ETA, "Permanent Labor Certification Program, Final Regulation: Frequently Asked Questions,": Section on 'Advertisement: Acceptable Publications,' at 9, at [http://ows.doleta.gov/foreign/pdf/perm\\_faqs\\_3-3-05.pdf](http://ows.doleta.gov/foreign/pdf/perm_faqs_3-3-05.pdf) (hereinafter DOL PERM FAQs set, Round 1).

<sup>16</sup> 69 Fed. Reg. at 77344

<sup>17</sup> *Id.* 20 CFR 656.17(g).

employer must attest to having conducted the requisite recruitment prior to filing the application pursuant to 20 CFR § 656.17(e).<sup>18</sup>

The penalties for failure to retain documentation are intentionally severe in order to provide a strong deterrent to employers. “A ‘substantial failure’ to provide requested documentation may result in a denial of the labor certification, and a requirement to conduct supervised recruitment in future labor certification filings for up to two years under 20 CFR § 656.20(b) or 656.24(e).”<sup>19</sup> However, a denial of the application and an order of supervised recruitment or a revocation of the labor certification is not the worst fate that can befall an employer who fails to maintain and present documentation. As one author suggests, “the threat of criminal prosecution generally lurks in any attestation-based government program...specific admonitions of potential criminal prosecution or civil penalty proceedings are included in the application.”<sup>20</sup>

Even the manner of saving and storing the supporting documentation has been addressed by DOL in an FAQ:

Q: How must the employer save and/or store the documentation to support a labor certification? A: No one method for saving and/or storing necessary documents is prescribed, nor is any particular method proscribed. The burden of establishing the validity of any documentation provided in support of a labor certification application rests with the employer. In establishing a method by which to

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<sup>18</sup> 69 Fed. Reg. at 77326. Other examples of documentation that must be retained, unrelated to recruitment activities, include: foreign language business necessity justification [20 CFR 656.17(h)(2)]; combination of occupations-related evidence [20 CFR 656.17(h)(3)]; whether the alien gained experience with the employer in substantially similar job [20 CFR 656.17(h)(4)]; live-in household domestic service employment contract [20 CFR 656.19]; evidence demonstrating the existence of a *bona fide* job opportunity in a closely held corporation or when there is a familial relationship between the alien and the shareholders, owners, partners, corporate officers, incorporators [20 CFR 656.17(l)]; and documentation demonstrating that the job requirements are normal for the occupation or are supported by business necessity [20 CFR 656.17(h)(1)].

<sup>19</sup> The David Stanton Manual on Labor Certification, Successful Strategies for Practice Under PERM, Josie Gonzalez & Ester Greenfield, “Demystifying the PERM Audit,” Josie Gonzalez, at 19.

<sup>20</sup> Id at 20-21. In fact, DOL warns that case files developed in processing labor certification applications may be released to government entities such as the Office of Inspector General, Immigration and Customs Enforcement and U.S. Citizenship and Immigration Services. See ETA 9089: Appendix B, Draft, Instructions at 1 (published at the end of the PERM regulation, 69 Fed Reg. at 77402).

save/store supporting documentation, the employer must remember that the responsibility for producing valid and defensible documentation in the event it is requested by a Certifying Officer rests solely with the employer. Such documentation must be retained by the employer for five years from the date of filing.<sup>21</sup>

**Like the taxpayer's retained receipts and back-up documentation, the employer's data used to support its answers in the ETA 9089 and its attestations must be considered part of the administrative record.** In the instant matter, the tear sheet was retained to prove a Sunday ad, and submitted at the first opportunity, in the Request to Reconsider. The tear sheet was held in trust for DOL, for its administrative convenience. To rule that the employer is prohibited from ever submitting such documentation, unless pursuant to an audit or a request from DOL for documentation, would violate a fundamental tenet of the Administrative Procedure Act: that a party be provided with an opportunity to present evidence on its behalf and have a meaningful review of its case. BALCA commented in its Benchbook that "On several occasions, the Board has reversed the FD and granted labor certification rather than remand to the CO where the CO has been recalcitrant or unreasonable in refusing to consider evidence that could not have been obtained during the rebuttal period, where the motion is meritorious and further fact finding is not needed to grant certification."<sup>22</sup>

**B. The Employer's Tear Sheet Should Not Be Considered "New Evidence." DOL's Refusal to Accept It Frustrates Adequate Administrative Review and Is An Abuse of Discretion**

Amici agree with the basic principle that a party should not be entitled to present evidence on appeal that has not been presented in administrative proceedings, provided that the party had an opportunity to present the evidence, and failed to do so. We also agree that

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<sup>21</sup> Frequently Asked Questions, at [http://www.foreignlaborcert.doleta.gov/foreign/pdf/perm\\_faqs\\_5-4-05.pdf](http://www.foreignlaborcert.doleta.gov/foreign/pdf/perm_faqs_5-4-05.pdf).

<sup>22</sup> BALCA Benchbook, Chapter 21, page 4., B. Newly obtained evidence, 2. No prior opportunity to present evidence.

documents that should have been presented during administrative proceedings but were not, should be viewed as “new evidence” and not be considered by the court.<sup>23</sup>

Here, the employer’s tear sheet should not be considered new evidence simply because the DOL opted to ignore it. The employer presented this evidence at the earliest opportunity. Prior to issuance of a Final Determination, the CO should have accepted the employer’s documentation in order to cure any deficiencies or to allow for a complete record enabling adequate administrative and judicial review.

In the preamble to the regulation at 69 Fed. Reg. 77326, 77362, DOL discusses the submission of new information in reconsideration requests. DOL states 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.*”<sup>24</sup> (*emphasis added*) The practice in effect under the prior regulation provided for the submission of all the basic supporting documentation, augmented with legal and factual arguments related to the employer’s answers and attestations on the application, before the CO decided either to certify or deny the application. Accordingly, an employer’s ability to submit supporting documentation to clarify the record should also attach under the new regime in PERM filings.

The CO abused his discretion in refusing to accept and consider the required supporting evidence that the employer was never given an opportunity to present as the result of the new streamlined PERM electronic filing system. This action frustrates adequate administrative review, which is required to determine if the employer has complied with the statutory mandate. It is arbitrary and capricious and violates fundamental principles of administrative procedure. BALCA should now consider the employer’s evidence.

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<sup>23</sup> Id., “If the employer did not have a prior opportunity to present evidence to support its position, it is an abuse of discretion for the CO not to reconsider.” Harry Tancredi, 88-INA-441 (Dec. 1, 1988) (*en banc*);

<sup>24</sup> The prior regulation found at 20 CFR 656.26(b)(4) is nearly identical to 20 CFR 656.26(a)(2).

## 2. DOL'S EVISCERATION OF THE ADMINISTRATIVE RECORD IS CONTRARY TO THE APA'S "RELEVANT FACTORS" REQUIREMENT

DOL's evisceration of the administrative record in the instant case is contrary to the relevant factors requirement incorporated into the APA by the federal courts. Limiting the administrative record to an electronically filed Form ETA 9089, without permitting the employer the opportunity to add to the record relevant recruitment documents that are mandated by regulation to be maintained by the employer is arbitrary and capricious, since such limitation excludes from consideration the relevant factors specifically identified in the labor certification statute, namely, factors bearing on the lack of available U.S. workers.

DOL's adjudication of labor certification applications filed under the new PERM system is governed by the procedural rules of the Administrative Procedure Act (APA) and by related federal court decisional law. Although DOL's adjudication of PERM applications is considered an "informal" adjudication under the APA, DOL must nonetheless conduct a minimum level of fact finding, taking into account the relevant factors bearing on whether sufficient U.S. workers are able, willing, qualified and available at the time of issuing a final decision on a PERM application. **The limitation of the administrative record in an informal adjudication to the information listed on an electronically filed form, without providing the employer an opportunity to correct or augment such information with relevant supporting documentation that is required to be retained under the regulation, is a clear breach of DOL's obligation under the APA to consider the relevant factors set out in the organic statute creating the labor certification program.** Such an impermissible agency limitation of the administrative record violates basic tenets of the Administrative Procedure Act.<sup>25</sup>

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<sup>25</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) *overruled on other grounds* by *Califano v. Sanders*, 430 U.S. 99 (1977).

The Supreme Court requires that all informal adjudication be evaluated under an arbitrary and capricious standard in light of the agency's statutory mandate.<sup>26</sup> In *Overton Park*, the Supreme Court held that an organic statute setting out factors to be considered by an agency in an informal adjudication requires the agency to apply law, and does not commit the decision making process to agency discretion.<sup>27</sup> An informal adjudication applying statutory law will be arbitrary and capricious where the agency decision is not based on a consideration of "relevant factors."<sup>28</sup> The Supreme Court has consistently maintained the "relevant factors" analysis, specifying that such factors are to be determined under the organic statute to be applied by the agency.<sup>29</sup>

The Court has not clearly defined the exact boundaries of the relevant factor analysis, but the facts presented by the agency in a challenged action must be sufficient to allow for judicial review of the agency's reasoning process required by the statutory mandate.<sup>30</sup> The Court has accepted the agency's presentation of the administrative record without requiring additional facts to be placed in the record only in cases where the agency had already established an extensive record detailing factual findings relevant to its statutory guidelines.<sup>31</sup> Lower federal courts have applied the "record rule" in a similar manner, recognizing the Supreme Court's requirement that the administrative record sufficiently reflect relevant factors. As a result, the courts do not blindly accept the record presented by the agency, but will determine what matters the agency should have considered but did not.<sup>32</sup> The agency will not narrow the court's determination of

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<sup>26</sup> *Id.*

<sup>27</sup> *Overton Park*, 401 U.S. at 410

<sup>28</sup> *Overton Park*, 401 U.S. at 416.

<sup>29</sup> *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 645-46 (1990); *see also NationsBank v. Variable Annuity Life Insurance Co.*, 513 U.S. 251, 257 (1995).

<sup>30</sup> *LTV Corp.*, 496 U.S. at 654

<sup>31</sup> *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("extensive administrative record" already existed)

<sup>32</sup> *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

whether the information used by the agency was complete enough to fulfill the agency's statutory duty.<sup>33</sup>

The relevant factors exception to the record rule requires the agency to have a sufficiently full administrative record. In the instant matter, DOL purports that the administrative record consists solely of the ETA 9089. Cases where the courts require further addition to the administrative record have the common characteristic of an agency adjudication that excluded a relevant factual element or piece of documentary evidence having a direct bearing on the legal conclusion to be drawn under the statutorily defined premises. The labor certification statute requires DOL to determine whether “there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor.” 8 USC §1182(a)(5)(A)(i)(I) (2005).<sup>34</sup> The relevant factors to be considered by DOL in making a determination on a labor certification application are the sufficient availability of able, willing and qualified U.S. workers.

DOL's determination, through notice and comment rulemaking under 5 USC § 553(b), that a particular pattern of recruitment will evidence the unavailability of U.S. workers is a further specification of the facts to be considered in making a labor certification determination. *See* 20 CFR § 656.17(e)(1)(i). DOL recognizes the importance of recruitment “facts” in making a determination under the statute, since the employer must attest to these facts, and must retain relevant recruitment documents for five years, under § 656.10(f). To exclude these recruitment facts and supporting documents in an informal adjudication is a refusal to consider a relevant

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<sup>33</sup> National Audubon Society v. Hoffman, 132 F.3d 7, 15 (2d Cir. 1997); *see also* Sierra Club v. Peterson, 185 F.3d 349, 370

<sup>34</sup>This portion of the labor certification statute has remained fundamentally the same since its first enactment in 1952. *See* 66 Stat. 163, 183 (June 27, 1952) (originally Section 212(a)(14) of the Immigration and Nationality Act).

factor on “availability,” and contradicts DOL’s own regulatory recognition that recruitment facts are a determinative factor under the statute.

### **3. DOL COULD HAVE CONDUCTED AN AUDIT TO SECURE THE TEAR SHEETS OR REQUESTED SUPPLEMENTAL DOCUMENTATION PURSUANT TO 20 CFR § 656.20(d)**

Issuing an automatic denial of a substantive benefit without an audit or review of the application by a human being should not be permitted as a matter of equity and fundamental fairness. The preamble to the final PERM rule contains language – virtually identical to language included in the DOL’s 2000 notice of guidelines<sup>35</sup> and its 2002 proposed rule<sup>36</sup> – that mandates that an audit be issued in “problematic cases.”

After ETA’s 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*. Additionally, as a quality control measure, some applications will be randomly selected for audit without regard to the results of the computer analysis... *If an application has not been selected for audit, and satisfies all other reviews, the application will be certified and returned to the employer.*” [Emphasis added.]<sup>37</sup>

The language cited above suggests that any “problematic applications” will be triggered for audit before a final decision is rendered. Applications not selected for audit will be certified so long as they satisfy “all other reviews,” which are unspecified.

In addition, any particular answers on the form should be read in a manner that is consistent with the other answers on ETA 9089. Note that Section I on ETA 9089 relates to

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<sup>35</sup> In 2000, the DOL published a “notice of guidelines” in which it set forth the general principles that would guide the development of proposed regulations to effectuate the redesign of the permanent alien labor certification process. *See* 65 Fed. Reg. 51777, 51779 (August 25, 2000).

<sup>36</sup> 67 Fed. Reg. 30466, 30467 (May 6, 2002).

<sup>37</sup> 69 Fed. Reg. at 77328.

recruitment questions. The employer answered affirmatively that there was a Sunday edition of the newspaper in the area of intended employment (I.c.8); the employer listed the name of the newspaper in I.c.9; it provided a correct Sunday date in I.c.10; however, in I.c.12, it inadvertently inserted a Monday date in lieu of a Sunday date. When read together, these answers should have highlighted an inconsistency and the CO should have audited the case or requested supplemental documentation, to seek clarification rather than merely deny the application.

**4. DOL MUST BE CONSISTENT IN ITS TREATMENT OF EVIDENCE AND MUST PERMIT THE ADMINISTRATIVE RECORD TO REFLECT ALL MATERIALS AND RELATED ARGUMENTS THAT PERTAIN TO THE ANALYSIS REQUIRED BY THE ORGANIC STATUTE**

To issue a labor certification, the organic statute requires that the DOL reach two basic conclusions: that the job offered the foreign national will not adversely affect the wages and working conditions of U.S. workers, and that there are no able, willing, qualified and available U.S. workers to do the job. While the DOL allows the record to be fully developed, documentarily and otherwise, to determine if the first finding can be made with respect to wage conditions,<sup>38</sup> its erroneous interpretation of 20 CFR § 656.24(g)(2) forecloses the employer from presenting evidence with regard to the second required finding. That is, the DOL has taken the position that an employer is precluded from affirmatively providing the documentary evidence related to the recruitment effort and the inability of the employer to locate a minimally qualified U.S. worker as required by the regulations. There is no rational basis for such an evidentiary distinction to be made.

Certainly, the regulations<sup>39</sup> and the correlating preamble discussion<sup>40</sup> provide a system where the employer may provide alternate wage surveys and supplemental information to the

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<sup>38</sup> 69 Fed. Reg. 77365-77373, 20 CFR 656.40-656.41.

<sup>39</sup> 20 CFR §§ 656.40-656.41.

<sup>40</sup> 69 Fed. Reg. at 77370-71.

SWA charged with determining the prevailing wage for any given position under the labor certification program. An employer may provide alternate wage data to the SWA regarding the appropriateness of the skill level applied, regarding the rejections of the employer-provided survey, or other relevant matters. Once the SWA issues a wage determination, an employer may request a review of this determination by the Certifying Officer.<sup>41</sup> All of the above described rebuttal and supporting documentation is incorporated in a request to review the wage determination.<sup>42</sup> If the prevailing wage determination is upheld by the CO, all of the related documentation is made a part of the administrative record in connection with a Request for Review by BALCA.<sup>43</sup>

Similar to the scheme with regard to the documentation of the prevailing wage, as has been discussed previously herein, the regulations also provide for the documentation of the extensive recruitment process that an employer must undergo prior to the submission of a PERM application. In practice, because DOL prohibits the employer from affirmatively providing this required recruitment documentation in the review process, DOL has created a labor certification regime that results in an inconsistent evidentiary process. There is no rational basis to justify the differential treatment of supporting documentation in the review process. BALCA can cure this inconsistency by interpreting § 656.24(g)(2) expansively to allow the evidence that is considered “submitted” to include documents required by the regulations and relevant to the required analysis of whether both of the statutory requirements have been met.

#### **5. 20 CFR § 656.10(e)(1)(i) and (ii) PERMITS ANY PERSON, INCLUDING THE EMPLOYER, TO SUBMIT EVIDENCE**

This regulatory provision allows any person to submit to the CO documentary evidence bearing on the labor certification application including information on worker availability, wages

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<sup>41</sup> See 20 CFR 656.41(a).

<sup>42</sup> See 20 CFR 656.41(a).

<sup>43</sup> 20 CFR 656.41 (e)(1).

and working conditions, or the employer's failure to meet any regulatory requirements. All such documentation **must** be considered by the CO in making a determination.<sup>44</sup> Although DOL probably anticipated using this provision as a vehicle for the receipt of complaints from the public, it is phrased in expansive terms and there is no reason to prohibit an employer from submitting the tear sheet under this regulation. Certainly this evidence bears on the question of whether the employer failed to meet a regulatory requirement.

In contrast to 20 CFR 656.10(e)(1)(i) and (ii), note that under 20 CFR 656.10(e)(2)(i) and (ii) one may submit evidence to DHS in Schedule A applications but the type of documentary evidence under this section is circumscribed. It is limited to "information relating to possible fraud or willful misrepresentation." Since no such limitation exists in the former provision, BALCA may strictly interpret this regulation to allow the submission of relevant documentary evidence bearing on whether the regulatory requirements have been met.

**6. THE CERTIFYING OFFICER'S POSITION THAT A REQUEST TO RECONSIDER MAY ONLY BE GRANTED BASED ON DOL, NOT EMPLOYER, ERROR IS UTTERLY WITHOUT REGULATORY SUPPORT, AND IS ARBITRARY AND CAPRICIOUS**

In the CO's denial of the employer's Request to Reconsider, the CO states, "Requests for Reconsideration will only be granted when the mistakes were committed by the Department of Labor and resulted in an erroneous denial of an application." (Appeal Index, Denial of Application, page 7) Amici have made an exhaustive, but futile search for any regulatory authority supporting DOL's position. Thus, DOL's stance in this matter is ultra vires. DOL cannot administer a program making up the rules as it goes along, particularly rules or policy

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<sup>44</sup> 20 CFR 656.10(e)(1)(i) and (ii).

guidance that are so biased against the employer that the CO appears to act as an adversary of the employer, not an impartial adjudicator.<sup>45</sup>

## **7. DOL'S POSITION THAT IT CANNOT OR WILL NOT CORRECT OR AMEND THE ETA 9089 IS ULTRA VIRES**

In response to DOL's proposed rulemaking, AILA requested that DOL put in place sufficient procedures to ensure that electronically filed applications would not be "denied because of a single mistake."<sup>46</sup> DOL did not respond to this comment, did not consider the alternatives proposed by AILA, and simply insisted that the replacement of the Notice of Findings (NOF) system with an audit-based approach was sufficient to warn employers of possible defects in the application.<sup>47</sup> DOL's current PERM FAQ No. 5 procedural rule on typographical errors clearly shows that DOL has not taken into account AILA's comment, and has failed to put in place a safeguard against mistakes having no bearing on the underlying relevant factors of the labor certification program.<sup>48</sup>

DOL justifies its decision to issue denials based on typographical errors on the ground of efficiency in processing. *See* ETA Denial of Request for Reconsideration at 1. As a result, DOL has made a policy choice of expediency over detailed review and form over substance. Such balancing flies in the face of the relevant factors test mandated by the APA. Certainly, relevant documentation bearing on a statutory mandate cannot be excluded simply to reduce processing times. DOL is required to issue its policy decisions under the statute, and the statute is clear about what factors must be considered.

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<sup>45</sup>*See, e.g.*, LA SALSA, INC., 1987-INA-580 (Aug. 29, 1988) (en banc) BALCA's Benchbook. ("The Certifying Officer appears to have acted as though he was Employer's adversary rather than an impartial adjudicator of the certification application. This Board will not stand idly by in such cases.") Reversal and grant of certification where CO made numerous factual errors in assessing the application.

<sup>46</sup>69 Fed. Reg. at 77358.

<sup>47</sup> *Id.* at 77358-59.

<sup>48</sup> *See* FN 35, *supra*.

Subsequent to the final PERM rule, DOL sought to further define significant elements of the PERM rule with interpretive “FAQs” not published pursuant to the notice and comment provision under 5 USC § 553(b). In particular, DOL provides that “[c]orrections cannot be made to an application after the application is submitted under PERM [,which] applies to typographical errors as well.”<sup>49</sup>

The combination of PERM FAQ No. 5 and DOL’s interpretation of the rule against the addition of documentary evidence to the administrative record in a request for reconsideration under § 656.24(g)(2) substantially and impermissibly alters the rights of employers filing a PERM application under the new regulations.

Where a non-legislative “policy statement” limits the decision maker’s exercise of discretion, the statement is considered a substantive rule, which must be issued according to notice and comment rulemaking.<sup>50</sup> A statement is a substantive rule where the agency statement imposes an obligation on private parties or on the agency.<sup>51</sup> The manner in which the statement is issued is not determinative; rather, the effect of the agency statement on private parties or agency action is evaluated to determine whether the statement has the force of law.<sup>52</sup> The imposition of a substantive rule with the force of law may only be achieved through notice and comment rulemaking pursuant to 5 USC § 553(b).<sup>53</sup>

Implicitly acknowledging that FAQ No. 5 is a procedurally defective “interpretive” rule published without the benefit of notice and comment under 5 USC § 553 (b), on February 13, 2006, DOL published a proposed regulation entitled, “Labor Certification for the Permanent Employment of Aliens in the United States: Reducing the Incentives and Opportunities for Fraud

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<sup>49</sup> PERM FAQ NO.5 at 3 (Aug. 8, 2005), [www.foreignlaborcert.doleta.gov](http://www.foreignlaborcert.doleta.gov)

<sup>50</sup> *American Bus Ass. v. U.S.*, 627 F.2d 525, 532 (DC Cir. 1980); *see also* *Alaska v. DOT*, 868 F.2d 441, 446 (DC Cir. 1989)

<sup>51</sup> *National Family Planning v. Sullivan*, 919 F.2d 227, 237-38 (DC Cir. 1992).

<sup>52</sup> *Croplife America v. EPA*, 329 F.3d 876, 883 (DC Cir. 2003).

<sup>53</sup> *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (DC Cir. 2000); *see also* ATTORNEY GENERAL’S MANUAL ON THE APA (1947) at 33 and 39.

and Abuse and Enhancing Program Integrity.”<sup>54</sup> Among the changes being proposed to the regulatory scheme is a provision to prohibit any changes whatsoever, no matter how minor, to filed PERM applications.<sup>55</sup>

On March 31, 2006, AILA submitted comments to this proposed regulation and because those comments are tremendously relevant to amici’s arguments, we now quote liberally from them.

As justification for this proposal, the Department claims it fears that an “open amendment process” would engender “continual back and forth exchange between the employer and the Department.” thus subverting the goals of a “streamlined” process.<sup>56</sup> The DOL will not even make allowances for small mistakes, and has crafted an unforgiving rule admitting of no human error: “The online application system is designed to allow the user to proofread and revise before submitting the application, and the Department expects and assumes users will do so.”<sup>57</sup>

The DOL commends itself for creating a system so efficient that modifications aren’t even necessary: “Further,” the Department says, “the re-engineered certification process has eliminated the need for changes.”<sup>58</sup> Clearly, that’s not true. Take, for example the *errors made by the DOL* in reviewing applications, which many of our members are still trying to sort out. We are aware of cases that were denied for failure to include the language that the employer would accept “any suitable combination of education, training, or experience,” when, in fact, that language *was* included in the application. We have also reviewed cases denied because, the DOL said, the alien did not possess the required academic credentials, when, in fact, he did and those credentials were clearly noted in the application in the appropriate place. In yet another case, the DOL denied a case because, it said, the alien did not meet the minimum

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<sup>54</sup> 71 Fed. Reg. 7656.

<sup>55</sup> 71 Fed. Reg. 7659

<sup>56</sup> 71 Fed Reg at 7659

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

requirements for the position as stated in the advertisements. In that case, the employer listed *two* positions in its advertisements, and the examiner looked at the wrong one and denied the case.

Perhaps most troubling of all is the Department's insinuation that any request for modification is grounded in fraud:

Moreover, in signing the application,<sup>59</sup> the employer declares under penalty of perjury that he or she has read and revised the application and the submitted information is true an[d] accurate to the best of his or her knowledge.<sup>60</sup>

In other words, the DOL is saying that by signing an application, an employer swears that he has read it and attests to the accuracy and truth of every single word in that application. Hence, the Department asks, how can any change be needed? Our answer, which even the DOL agrees with, is that "inadvertent errors" happen.<sup>61</sup>

A common example of an inadvertent error is a mistake on the date that an advertisement ran in the newspaper. There are cases, for example, where the date entered on the form 9089 was not one of the required Sundays, a mere typographical mistake on the application, when in fact, the ad *did* run on a Sunday. The DOL's remedy? "In the event of an inadvertent error or any other need to re-file, the employer can withdraw the application, make corrections and file again immediately."<sup>62</sup> While that may be a reasonable option in some cases, there are many reasons why re-filing is not usually a viable alternative:

1. Often, an application preparer is not aware that an error had been made. Even if the mistake comes to light before the DOL issues a denial, it may be too late to re-file because the recruitment may have become stale by that time.
2. Certain post-filing, pre-certification events, including but not limited to changes in corporate structure resulting in a change of employer name, tax identification number, or address, require the amendment of the application;

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<sup>59</sup> Note that an employer does *not* sign an application filed electronically until the application is certified.

<sup>60</sup> 71 Fed. Reg. 7659

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

3. Re-filing applications also means the loss of the priority date set by the first filing. That, in turn, may render an H-1B nonimmigrant otherwise eligible for a seventh year extension under AC21, ineligible, since to benefit from that legislation, the application had to have been filed at least 365 days before the worker reached the end of year six in H-1B status;
4. All too often, DOL has taken so long in rendering and sending the decision that the recruitment is no longer valid.

Therefore, the employer should be permitted to amend the application through a clearly articulated, reasonable and described mechanism.

If this proposed regulation were to go into effect, it would make the DOL the only Government agency we can think of to adopt such a truculent rule. Every other agency, guided by notions of fundamental fairness and due process, permits amendments[,] corrections, and supplemental submissions to correct minor mistakes. But this rule could have the effect of banishing a person from the country simply because of a mistaken keystroke.<sup>63</sup>

DOL could have avoided this dilemma by creating a cautionary pop-up window within the electronic PERM application. For example, a pop-up window could have appeared in the situation attendant to this appeal that read “You entered a Monday date. Are you sure this date is accurate?” The employer would have been alerted to the typo, the typo would have been corrected and the CO and BALCA would not have needed to review this application. Moving forward, DOL should create such safeguards in their system to enable DOL to continue with the streamlined, automated processing system.

**8. PURSUANT TO 20 CFR § 656.27(C) BALCA MUST ORDER THAT THE APPLICATION BE CERTIFIED WITHOUT ANY FURTHER DOL PROCESSING**

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<sup>63</sup> AILA InfoNet Doc. 06033162 (posted Mar. 31, 2006).

In its quest to create a speedy adjudicative system, by foreclosing the ability to remand a case back to DOL for further processing and fact finding, DOL appears to have shot itself in the foot.

Many DOL denials – perhaps including the one at issue in this appeal – are triggered by the Decision Matrix, PERM’s programming system, before the application has been fully run through the system. As discussed in detail in Section 1 of our argument, in considering appellant’s motion for reconsideration, the CO impermissibly failed to consider the employer’s documentary evidence that it had, in fact, complied with the regulatory requirement that its second advertisement run on a Sunday. In so doing, it shut down an avenue for dialogue with the applicant and the DOL. The CO elected not to grant an opportunity to clarify the record via an audit letter; rather it simply denied the application.

In reviewing a Request to Reconsider the CO is limited solely to a review of the specific grounds set forth in its Denial. The CO’s denial is based on a narrow challenge and cannot now be expanded to include other grounds outside the denial notice. “Where the CO leads the employer to believe that she is making a challenge on narrow grounds, the Board will not undertake a review of all possible grounds for the challenge... Similarly, the Board will not consider issues that might have been raised by the CO but were not.”<sup>64</sup> Therefore, the scope of review in this appeal is limited to the narrow ground specified in the Denial notice.

In eliminating BALCA’s ability to remand an application, DOL eliminated the last remaining avenue for the development of an adequate administrative record essential to render a determination whether to order certification or uphold the denial of the labor certification.

On the elimination of remands, the commentators to the regulations were quite prescient. AILA argued that one of DOL’s bases for eliminating remands – that the cases would be

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<sup>64</sup> ( U.S. Dept. Of Labor, Board of Alien Certification Appeals, Judges’ Benchbook, 2<sup>nd</sup> Edition, May 1992, *See* Chapter 26, D (Scope of Board Authority, Jurisdiction and Review).

sufficiently developed by the time they got to BALCA – was erroneous. AILA’s experience was just the opposite since even under the old regulatory scheme – when employers submitted supporting documentation with the application – it was not uncommon for BALCA to remand a case because it had insufficient information in the record.<sup>65</sup> Echoing this sentiment, another commentator stated that, with the elimination of assessment notices and NOFs, unquestionably the record would be less developed.<sup>66</sup> In eliminating remands, DOL must have contemplated that the employer would be provided with an opportunity to present its supporting documentation and create an ample record.

Under 20 CFR § 656.27(c), once BALCA has jurisdiction over a case it can only order certification, uphold the denial, or hold a hearing. Therefore, BALCA should direct the CO to certify the application.

## **CONCLUSION**

The instant case presents a number of issues of first impression under a new regulatory scheme, but especially (1) the proper interpretation of the term “evidence not previously submitted” under 20 CFR § 656.24(g), and (2) what relief is available in light of the fact that the PERM regulations deliberately deprive BALCA of the authority to remand cases.

As discussed in depth by amici, the correct interpretation of 20 CFR § 656.24(g)(2) dictates that all documentary evidence that DOL requires employers to retain, including any legal arguments that interpret such documentation, should be considered an integral, non-divisible part of the administrative record submitted in PERM e-filing applications. The limitation of the administrative record in an informal adjudication to the information listed on an electronically filed form, without providing the employer an opportunity to correct or augment such

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<sup>65</sup> 69 Fed. Reg. at 77363

<sup>66</sup> *Id.*

information with relevant supporting documentation that is otherwise required to be retained under the regulation, is a clear breach of DOL's obligation under the APA to consider the relevant factors set out in the organic statute creating the labor certification program. Such an impermissible agency limitation of the administrative record violates basic tenets of the Administrative Procedure Act.

Further, the employer's tear sheet should not be considered "new evidence;" rather, it is existing evidence that the regulations require be retained in support of an application. It is evidence that DOL arbitrarily declined to solicit. DOL should not control the submission of required documentary evidence to such an extent that the employer is not given an opportunity to present an adequate administrative record merely because DOL elects not to request relevant documentation in an audit or otherwise.

DOL's misinterpretation of 20 CFR § 656.24(g)(2) strips the evidentiary record in this PERM filing to such an intolerable degree that it makes a complete mockery of the employer's right to present evidence in a labor certification filing. Consequentially, without an adequate record, it also frustrates DOL and BALCA's ability to make a finding on employer compliance with the organic statute.

Should BALCA determine that DOL mistakenly failed to grant employer's Request to Reconsider, 20 CFR § 656.27(c) dictates that BALCA direct the CO to grant the certification without further review.

Although amici have focused in this conclusion on the two salient issues which BALCA asked us to address, elsewhere in our brief we raise a host of other very serious PERM operational matters that interfere with and foreclose an employer's opportunity to present evidence that it had in fact complied with the governing statute and regulations: for example, concern over DOL's stance that Requests to Reconsider will only be granted to address DOL, not employer, errors and DOL's refusal to permit corrections or amendments to the ETA 9089.

**Respectfully Submitted:**

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## APPENDIX I: PERM PROBLEM TIMELINE

- **December 27, 2004**: DOL publishes final PERM regulation
- **March 3, 2005**: DOL issues its PERM FAQ No. 1, providing general information on PERM standards and filing procedures. (See [http://ows.doleta.gov/foreign/pdf/perm\\_faqs\\_3-3-05.pdf](http://ows.doleta.gov/foreign/pdf/perm_faqs_3-3-05.pdf).)
- **March 17, 2005**: In a liaison meeting between AILA and DOL-ETA, AILA asks for clarification on where on the form certain required language (stating that the employer will accept “any suitable combination of education, training or experience”) must be included in cases where the foreign worker qualifies based on alternative experience. DOL’s answer: “DOL is working on this.” (See Minutes of AILA/DOL-ETA Liaison Meeting on March 17, 2005, prepared by AILA DOL Liaison Committee, April 5, 2005 [updated April 25, 2005].)
- **March 28, 2005**: Effective date of PERM regulation. As of this date, all applications for permanent labor certification must be filed according to the provisions of the new regulation.
- **April 7, 2005**: DOL issues its PERM FAQ No. 2, providing further clarification on certain prevailing wage and recruitment issues, among others. (See [http://ows.doleta.gov/foreign/pdf/perm\\_faqs\\_4-6-05.pdf](http://ows.doleta.gov/foreign/pdf/perm_faqs_4-6-05.pdf).)
- **April 18, 2005**: AILA reports that member attorneys have been receiving on-line denials with no follow-up notices describing the reasons for denial. DOL has not been able to determine why this is happening, but *DOL believes that most of the denials resulted from a technical problem that has not yet been identified*. In addition, the form originally limited to three the number of jobs that could be described under “Alien’s Work Experience.” After AILA made DOL aware of this problem, DOL fixed it. (See AILA InfoNet Doc. No. 05041864, posted April 28, 2005).
- **April 27, 2005**: At another AILA-DOL liaison meeting, AILA asked once again where to put the “alternate experience” language. DOL promised to address it in an upcoming FAQ. (See Minutes of AILA/DOL-ETA Liaison Meeting on April 27, 2005, prepared by AILA DOL Liaison Committee.)
- **May 4, 2005**: DOL issues its PERM FAQ No. 3, addressing primarily issues related to prevailing wages, recruitment, and re-filing cases originally filed under the previous regulation. In answer to a question about re-filing, DOL wrote: “*The burden of establishing the validity of any documentation provided in support of a labor certification application rests with the employer*. In establishing a method by which to save/store supporting documentation, the employer must remember that the responsibility for producing valid and defensible documentation in the event it is request by the Certifying Officer rests solely with the employer. Such documentation must be retained by the employer for five years from the date of filing.” (See [http://ows.doleta.gov/foreign/pdf/perm\\_faqs\\_5-4-05.pdf](http://ows.doleta.gov/foreign/pdf/perm_faqs_5-4-05.pdf).)
- **May 25, 2005**: AILA reports that it contacted DOL to address, again, the issue of on-line denials where employers never received follow-up letters stating the reasons for denial, as

well as *denials that appeared to be based on plain error*. DOL responded that it recognized that, in some of these cases, the *denials were indeed in error and were the result of the decision logic of their automated system*. Accordingly, DOL halted sending denial letters until it could get its system re-programmed. Thereafter, all cases previously denied were run through the system again. (See AILA InfoNet Doc. No. 05052560, posted May 25, 2005).

- **June 1, 2005:** DOL posts its PERM FAQ No. 4. Among other things, this document provides detailed information on how an employer registers, files an application online, and creates sub-accounts for attorneys. This FAQ was prompted by the fact that *many employers have been unable to create accounts, losing data, unable to access their accounts or unable to create sub-accounts*. (See [http://ows.doleta.gov/foreign/pdf/perm\\_faqs\\_6-1-05.pdf](http://ows.doleta.gov/foreign/pdf/perm_faqs_6-1-05.pdf).)
- **June 16, 2005:** AILA reports that is still working on the decision logic that has been resulting in *erroneous denials*, and hopes to have the system fixed soon. It will then run the prior denials through the system again. Those that should not have been denied will, it is hoped, instead go into the full processing system. Notices will be issued on those cases for which a denial still stands. Estimates currently are that the new notices may go out in early July. (See AILA InfoNet Doc. No. 05061614, posted Jun. 16, 2005.)
- **July 1, 2005:** AILA conveys following message from DOL re continuing problems with **inappropriate denials** and other problems. “Unfortunately, we have not had all issues fixed on the technology side, but we are in the process of doing so now. We will notify you when the changes are implemented. Please advise your members to be patient and not re-submit their applications.” (See AILA InfoNet Doc. No. 05070141, posted Jul. 1, 2005.)
- **July 15, 2005:** From AILA: “The Department of Labor has been addressing PERM decision logic issues that AILA has been bringing to its attention. As a result, it re-ran the cases already in its system--including those for which a denial notice has actually been sent--and a large number of previously-denied cases are now in processing for full review.” (See AILA InfoNet Doc. No. 05071564, posted Jul. 15, 2005.)
- **August 8, 2005:** DOL posts its PERM FAQ No. 5. *“Question: How can corrections be made to a filed application? Answer: Corrections cannot be made to an application after the application is submitted under PERM. Once an application has been electronically submitted or mailed, it is considered final and no changes to the application will be permitted. This applies to typographical errors, as well. If the employer believes changes and/or corrections are necessary to the admissibility and/or appropriateness of the application, the employer should withdraw the application and file a new application with the changes and/or corrections.... NOTE: All accurate recruitment information from the prior application, if still applicable and current, can be used in support of the new application.”* (See [http://ows.doleta.gov/foreign/pdf/perm\\_faqs\\_8-8-05.pdf](http://ows.doleta.gov/foreign/pdf/perm_faqs_8-8-05.pdf).)
- **November 14, 2005:** In an AILA-DOL liaison meeting, AILA notifies DOL that many attorneys are not getting approvals in the promised 45-60 days. In particular, many applications filed in March-June are still awaiting decision, while later cases have already been processed. *“Question: A member was advised that Certifying Officers do not have the authority/ability to overturn denials generated by the automated system. Please advise as to whether this is correct. If so, is it a sensible approach, given the number of erroneous*

*denials the system has generated and continues to generate? Answer (DOL): The statement that the CO does not have authority to overturn the denial is incorrect.” (See Minutes of AILA/DOL-ETA Liaison Meeting on November 14, 2005, prepared by AILA DOL Liaison Committee and posted on December 2, 2005.)*

- **February 14, 2006:** DOL posts its PERM FAQ No. 6. *“Question: How can corrections be made to an application? Answer: [Repeats language from FAQ No. 5] The PERM regulation and filing system does not include a mechanism for correction or alteration of information after submission because PERM was designed to achieve fast and streamlined processing of applications. In the past, the process of obtaining a permanent 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. Backlogs in applications awaiting processing have been a recurring problem requiring resource-intensive efforts to address. The PERM system was designed to respond to these performance issues, streamline the process and ensure the most expeditious processing of cases using the resources available. The most significant change involved the introduction of automated processing to the permanent labor certification process. Automated processing yields a large reduction in the average time needed to process labor certification applications, but requires establishment of and adherence to defined business rules. Allowing manual corrections or other mechanisms to change filed applications would decrease the system’s efficiency and create the possibility of new backlogs. Therefore, PERM does not include a mechanism for correction or alteration of information after submission, but rather relies on employers and their agents to carefully prepare filings and attest to their accuracy.” (See [http://ows.doleta.gov/foreign/pdf/perm\\_faqs\\_2-14-06.pdf](http://ows.doleta.gov/foreign/pdf/perm_faqs_2-14-06.pdf).)*
- **February 21, 2006:** DOL issues its PERM FAQ No. 7, addressing issues related to posting notices of filing at the worksite. (See [http://ows.doleta.gov/foreign/pdf/perm\\_faqs\\_2-21-06.pdf](http://ows.doleta.gov/foreign/pdf/perm_faqs_2-21-06.pdf).)
- **March 20, 2006:** DOL issues its PERM FAQ No. 8, addressing procedures for requesting a duplicate labor certification. (See [http://ows.doleta.gov/foreign/pdf/perm\\_faqs\\_3-20-06.pdf](http://ows.doleta.gov/foreign/pdf/perm_faqs_3-20-06.pdf).)
- **March 23, 2006:** AILA provided examples of cases where the employer’s designated PERM signatory has left the company, or the attorney who filed the application on the employer’s behalf has left the law firm, or a corporate merger or acquisition occurred and the new company has no access to any pending cases filed by the acquired company. *“Question: What is the best way to notify a PERM center of a change of address of the attorney, the employer, or worker while the PERM application is pending? Answer: As DOL has said before, the system was not designed to permit correction. They are looking at these questions and how to address them without redesigning the system, which was based on no amendments.” (See Minutes of AILA/DOL-ETA Liaison Meeting on March 23, 2006, as prepared by AILA DOL Liaison Committee and posted on April 10, 2006.)*
- **March 23, 2006:** At the same AILA-DOLETA Liaison Committee Meeting, DOL acknowledges that it is taking “several months” to send out denials. (See Minutes of AILA/DOL-ETA Liaison Meeting on March 23, 2006, at page 4, question 8, prepared by AILA DOL Liaison Committee and posted on April 10, 2006.)

- **April 3, 2006:** In a DOL Stakeholders Teleconference on April 3, 2006, **stakeholders reported receiving erroneous denials of PERM applications, allegedly for missing information which is in fact contained in the application, and asked for options for correcting errors (other than re-filing the application) that might be more time efficient? DOL's response: "For obvious error, you can make a motion to reconsider which is likely to be granted. We discussed the fact that there may be training issues. Answer all questions completely."** [Note: documenting such a motion to reopen may often require submission of more than a copy of the denied ETA-9089 form, as was the case in the matter underlying this appeal.] (See Summary of AILA-DOL Stakeholders Teleconference of April 3, 2006, AILA InfoNet Document No. 06041412, posted April 14, 2006).