UNITED STATES DEPARTMENT OF LABOR

BOARD OF ALIEN LABOR CERTIFICATION APPEALS

In the Matters of

TERA TECHNOLOGIES, INC.,
Employer,

ETA Case No.: A-09013-20326

2011-PER-02541

***On behalf of*,**

Hitendra Babaria,
Noncitizen

and

USA WOOL, INC.,
Employer,

ETA Case No. A-09083-35485

2012-PER-00055

On behalf of,

Alejandro Krall,
Noncitizen

On Appeal from a Certifying Officer's Decision

BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS AMICUS CURIAE

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INTRODUCTION

In these consolidated *en banc* proceedings, the Board has an opportunity to once again remind all parties in the alien labor certification process that the regulations mean what they say, that the regulations have to be interpreted in the context of the statute, and that certification of a labor certification application is appropriate where the employer has complied with the plain language of the regulations. Moreover, these proceedings present the Board with an opportunity to reiterate that while compliance with the plain language of the regulations is required, review of decisions made in connection with the PERM process is not devoid of considerations of fundamental fairness.

In the Immigration Act of 1990[1] (ImmAct), Congress required an employer to notify its employees that it is embarking on the labor certification process.[2] ImmAct § 122(b). Congress did not require employers to comply with a specific method or include specific information in this notice**.** In PERM, the Department of Labor (Department) imposed specific requirements on employers. The Notice of Filing must include the information contained in 20 C.F.R. § 656.17(f). 20 C.F.R. § 656.10(d)(4).

The American Immigration Lawyers Association (AILA), in its capacity as *amicus* in this case, takes no position on whether the underlying PERM labor certification applications should be certified. Instead, AILA urges the Board to

[1] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).
[2] ImmAct § 122(b) was a "slight extension" of prior notice requirements, as found in former 20 C.F.R. § 656.21(b)(3) (1989). 56 Fed. Reg. 54920, 54924-25 (Oct. 23, 1991); *Matter of Hawai'i Pacific University*, 2009-PER—127 at 7 (Mar. 2, 2010).

confirm – regardless of the outcome of these specific applications – that fundamental fairness remains an appropriate element that should be considered when the CO adjudicates labor certification applications, and that when information is provided by the employer on a Notice of Filing (NOF) that satisfies the regulatory requirements, even if it is not in a format preferred by the CO, the employer has satisfied its obligations under the regulations. Such a conclusion would not require the Board to apply or endorse a harmless error standard. Rather, we urge the Board to conclude that fundamental fairness mandates that if under the totality of the circumstances, the location, manner, and details of the NOF provide the information required by the regulation, the labor certification cannot be denied for failing to comply with § 656.10(d)(4).

INTEREST OF AMICUS

AILA is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. Through its government agency liaison activities, AILA regularly engages with the Department of Labor and the Office of Foreign Labor Certification (OFLC) directly and through quarterly "stakeholder" meetings conducted by the OFLC as

part of its outreach to the regulated community on matters of policy and operation. AILA has a substantial interest in the issues presented in this case, which implicate due process and fundamental fairness in PERM adjudications.

ARGUMENT

I. The plain language of the Department's regulations are binding unless they are inconsistent with the statute

The regulations are both the field upon which labor certifications are adjudicated and the rules by which they decided. The Board, the COs, and employers are bound by the clear and unambiguous regulations. The plain language of the regulations must be applied in a manner consistent with the common understanding of the terms used. The regulations cannot be disregarded for policy or other reasons. Not only is this required by agency law, it is also the only way to fulfill PERM's purpose of providing greater predictability for employers. PERM is an exacting process, often with harsh results for relatively minor errors.

Over twenty years ago, the Board explained that lacked the authority to expand the scope of the plain language of a regulation. *Dearborn Public Schools*, 91-INA-222 (1993) (*en banc*). There, an employer sought to apply the Immigration and Nationality Act's (INA) "equally qualified" standard to a secondary school teacher. Although the INA made no distinction among teachers, the Department through notice and comment rulemaking limited the "equally qualified" standard to college and university teachers. The employer and amici argued that the Department's failure to list other types of teachers in the regulations should not bind the Board in

light of the broad expanse of the statute. Noting it was bound by the regulation's unambiguous language, the Board explained:

> [A]pplication of the "equally qualified" standard in this case would necessarily involve disregarding, in effect invalidating, the Department's own regulations which were purposefully enacted after express consideration of the issue presented in this case. The test for determining whether an administrative-judicial body such as BALCA has the authority to invalidate a regulation involves a two-fold inquiry: 1) whether the administrative-judicial body possesses the inherent authority to rule on the regulation; and 2) if not, whether such authority has been expressly delegated by statute or regulation. We hold BALCA, as a non-Article III court, lacks inherent authority to rule on the validity of a regulation. Moreover, we hold that it also lacks express authority to invalidate the regulations as written.

Dearborn Public Schools at 7 (internal citation omitted).

More recently, the Board resisted an effort by the CO to impose requirements not found in the regulations. *SAP America*, 2010-PER-1250. In that case, the CO denied certification because the employer did not produce documents even though those documents were not required by PERM. *Id.* at 8-9. The Board reversed the denial of certification. The regulations required employers to maintain the prevailing wage determination issued by the SWA. "It was unreasonable for the CO to assume that [the prevailing wage request] 'should be readily available to the employer' at the time of the audit *when the regulations provide employers with no notice* that this form must be copied before it is submitted to the SWA." *Id.* at 9 (emphasis added).

Furthermore, in *Karl Storz*, the Board was required to apply the plain language of the regulations even when that language conflicted with the regulatory history or preamble. 2011-PER-40 at 16-17. In that case, the Board rejected the

employer's argument that the regulation has to be interpreted in light of the preamble and regulatory history because the Board "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 17.

Deference to an agency's interpretation of its own rules

> is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous.... To defer the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.

Christensen v. Harris County, 529 U.S. 576, 588 (2000).

Section 122(b) of ImmAct requires employers to notify its employees that it is filing a labor certification. To the extent they are consistent with the statute, 20 C.F.R. §§ 656.10(d)(4) and .17(f) require employers to provide specific information as part of this notice. If this information is provided to the employees, the employer has complied with the regulations.

If the Department believes that the regulations do not accurately reflect the policies and purposes behind the recruitment provisions, then the remedy is to amend the regulations. *See SAP America*, 2010-PER-1250 at 9 (rejecting attempt by CO to go beyond the plain language because the remedy is to revise the regulations). The Department has done this before. In *Health America*, 2006-PER-1 (July 18, 2006) (*en banc*), the Board granted an employer's appeal because its application was denied based on a harmless error. Following this decision, the Department amended the PERM regulations to provide that typographical or similar errors are not immaterial if they cause an application to be denied for

failing to satisfy regulatory requirements. 72 Fed. Reg. 27904, 27917 (May 17, 2007); *see also Basonas Construction Corp.*, 2011-PER-2382 (Oct. 11, 2012).

II. The Notice of Filing requirement

Section 122 of the Immigration Act of 1990 created a statutory Notice of Filing requirement for the labor certification process. The statute mandates that:

> [N]o certification may be made unless the applicant for certification has, at the time of filing the application, provided notice of the filing (A) to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or (B) if there is no such bargaining representative, to employees employed at the facility through posting in conspicuous location. . . .

ImmAct § 122(b).

It is important to consider that the Notice of Filing is "not designed to be a recruitment vehicle." 69 Fed. Reg. 77236, 77338 (Dec. 27, 2004); *see also Matter of Hawai'i Pacific University*, 2009-PER-127 (Mar. 2, 2010) (with PERM, "the recruitment aspect of the posting requirement was significantly diminished"). Rather, Congress required this notice to "provide a way for interested parties to submit documentary evidence bearing on the application." *Id.*

Section 656.10(d) implements the statutory requirement in the context of the PERM process. In particular, 20 C.F.R. §§ 656.10(d)(3) and (d)(4) enumerate the information that must be included in the Notice of Filing. In determining whether a Notice of Filing meets those requirements, AILA encourages the Board to consider the regulatory requirements in the context of the statutory language, Congressional intent, and the target audience. BALCA panels have correctly performed this kind

of interpretation on numerous occasions. For instance, *Matter of Stone Tech Fabrication*, 2008-PER-00187 (January 5, 2009) correctly applied this analysis, finding that while the regulatory requirements must be satisfied, it is possible that there could be situations where the purpose of the Notice of Filing could be fully served even if the specific name of the company is not listed on the Notice of Filing. Similarly, *Matter of Il Cortile Restaurant*, 2010-PER-683 (October 12, 2010), found that the regulatory requirement to post the Notice of Filing for 10 consecutive business days needs to be interpreted to mean days when the specific company is open for business, not a generalized "one size fits all" Monday through Friday standard. Those decisions looked to the statutory purpose of the Notice of Filing, and interpreted the regulatory requirements accordingly. We urge the Board to confirm this approach, and to ensure that regulatory requirements are read and interpreted consistent with statutory intent.

Furthermore, AILA would urge the Board to confirm, as it has done previously, that fundamental fairness and due process remain a component of any PERM adjudication. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (due process applies to administrative proceedings); *Peugh v. U.S.*, 133 S. Ct. 2072, 2085 (2013) (there is a fundamental fairness interest in having the government abide by the rules of law it establishes). This Board has long recognized that the purpose of any adjudication, including adjudication of a PERM application, is to reach a fair, appropriate, and equitable result. *Matter of HealthAmerica*, 2006-PER-1 at 23 (July 18, 2006) (*en banc*) ("it is just too obvious in this case that the denial of reconsideration was an

injustice"). The July 2007 amendments to the PERM regulation did not change this fundamental fairness standard, and this conclusion from *Matter of HealthAmerica* remains a cornerstone of the PERM process and any other administrative adjudication.

Fundamental fairness and procedural due process remain critical components of PERM adjudications. *Hawai'i Pacific University*, 2009-PER-127 at 13. In that case, the problems with the Notice of Filing went to the heart of the posting requirement, which is to allow interested parties to submit comments on the labor certification to the Department. *Id.* (use of wrong address for CO in the Notice of Filing). In *Hawai'i Pacific University*, the fundamental fairness and due process concerns were overridden by the clear Congressional mandate in ImmAct § 122(b). Conversely, the Board cannot ignore traditional notions of fundamental fairness and due process in deciding the question raised in this *en banc* proceeding. Fundamental fairness and due process require the application of a totality of the circumstances approach because this approach is consistent with the language of the statute and fulfills the purpose of ImmAct § 122(b). This approach does not ask COs to disregard the statutory or regulatory requirements but rather to be flexible in determining whether those requirements have been met.

Consequently, in this case and in other adjudications, the CO should review whether the regulations have been satisfied, and whether a denial would amount to an injustice. Fundamental fairness has been and should continue to be an element of each PERM adjudication.

CONCLUSION

AILA, in its capacity as *amicus* in this case, takes no position on whether the underlying PERM labor certification applications should be certified. In reviewing these cases, however, AILA respectfully requests that the Board confirm that fundamental fairness and due process remain a component of any PERM adjudication. When the information provided by the employer on a Notice of Filing satisfies the regulatory requirements, the employer has met its obligations under the regulations. Furthermore, fundamental fairness and due process mandate that if under a totality of the circumstances the location, manner, and details of the Notice of Filing provide the information required by the regulation, or if such information is provided by way of an audit response, the labor certification application cannot be denied for failure to comply with § 656.10(d)(4).

Respectfully submitted July 8, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2014, I served this document on the parties listed below by first class mail, postage prepaid.

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