U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 July 2006

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

In the Matter of:

HEALTHAMERICA,
Employer,

on behalf of

UTHAYASHANKER WIMALENDRAN,
Alien.

Certifying Officer: Arthur Reyes
Atlanta FLC National Processing Center
Employment and Training Administration
Division of Foreign Labor Certification

Appearances: Shirin Egodage, Esquire
Los Alamitos, California
For the Employer and the Alien

R. Peter Nessen, Esquire
Division of Employment and Training Legal Services,
Office of the Solicitor
For the Certifying Officer

Josie Gonzalez, Esquire
For Amici, American Immigration Lawyers Association and American Council on International Personnel

Before: Burke, Chapman, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.[1] It is the first appeal docketed by the Board under the regulatory scheme that became effective on March 28, 2005, popularly known as "PERM."[2] The PERM regulations emphasize streamlined electronic processing of applications, and as part of the streamlining, the Employment and Training Administration ("ETA") promulgated a restrictive rule on motions for reconsideration. We hold that, although an agency may impose a rigid regulatory scheme to promote administrative efficiency, under the particular circumstances of this case the ETA Certifying Officer's ("CO") denial of reconsideration was an abuse of discretion.

BACKGROUND

THE APPLICATION, DENIAL, MOTION FOR RECONSIDERATION AND APPEAL

Under 20 C.F.R. § 656.17(e), most sponsoring employers are required to attest to having conducted recruitment prior to filing the application. Among other requirements, applications involving professional occupations require the sponsoring employer to attest to having placed two print advertisements "on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, willing, qualified, and available U.S. workers." 20 C.F.R. § 656.17(e)(1)(i).

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[1] Citations in this Decision and Order are to the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006), unless otherwise noted. References to the Appeal File are shown as "AF."

[2] "PERM" is an acronym for "Program Electronic Review Management" system. *See DOL Annual Report, Fiscal Year 2004* at 284 (www.dol.gov/_sec/media/reports/annual2004/response.pdf).

On June 29, 2005, the Employer filed an application for permanent alien labor certification for the position of Associate Financial Analyst, which is a professional occupation required to comply with the two-Sunday publication rule. (AF 11-23). On July 25, 2005, the CO denied the application under section 656.17(e) on the ground that "[t]he application indicates that a Sunday edition of the newspaper of general circulation was available for the second required advertisement but was not used." (AF 8-10). On August 22, 2005, the Employer filed a request for reconsideration by the CO and alternative request for review by BALCA. (AF 3-7). The Employer's attorney stated that she made a mistake in filling out the application. She had indicated on the application that the second advertisement was placed on March 7, 2005; however, that advertisement was actually placed on Sunday, March 6, 2005. In support, the Employer provided newspaper tear sheets.[3]

The CO ruled on the motion to reconsider on February 24, 2006. (AF 1-2). The CO denied reconsideration on the ground that under 20 C.F.R. § 656.24(g)(2) "the request for reconsideration may not include evidence not previously submitted." The CO wrote:

> The PERM regulation that took effect March 28, 2005 created streamlined procedures for filing and processing permanent labor certification applications. To achieve substantial reductions in processing times, 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 at the time of submission to the application's accuracy. 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. In this case, your application was properly denied. As explained in FAQ Round 5, posted on DFLC's website on August 8, 2005, if an employer wishes to change or correct information after filing an application, the employer should withdraw the application and file a new one.

[3] The Employer's attorney stated in the Employer's appellate brief that the reason she did not just refile the application as suggested by the CO in a telephone conversation was that the prevailing wage determination would no longer have been valid. (Employer's Brief at 2).

(AF 1). The CO thereafter forwarded the request for administrative review to BALCA.

The Board received the Appeal File on February 28, 2006. Because this appeal presented an issue of first impression under a new regulatory scheme, on March 9, 2006 the Board *sua sponte* granted *en banc* review. The Board specifically directed that briefs address (1) the proper interpretation of 20 C.F.R. § 656.24(g)(2) as it applies to this case, and (2) the relief available if it is determined that the CO should have granted reconsideration of the application. *See* 20 C.F.R. § 656.27(c).[4]

REGULATORY HISTORY AND PRE-PERM CASELAW[5]

Motions to Reconsider

We begin our analysis with a review of relevant parts of the regulatory history of the permanent alien labor certification program. Although amended from time to time, the labor certification regulations did not change in basic concept from the publication of 20 C.F.R. Part 656 in 1977, s*ee* 42 Fed. Reg. 3440 (Jan. 18, 1977), until December 2004, when the ETA published a Final Rule deleting the prior language of 20 C.F.R. Part 656 and replacing it in its entirety with new regulatory text, effective on March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The new regulations substantially changed the procedure for applying for permanent labor certification, with a primary guiding principle being to ensure the most expeditious processing of cases using the resources available.

[4] The CO, the Employer and Amici (American Immigration Lawyers Association and American Council on International Personnel) submitted timely briefs. The briefing was vigorous and helped crystallize the issues for review. Many detailed arguments were presented, not all of which are reached in this decision. For example, we have not found it necessary to rule on the parameters of 20 C.F.R. § 656.10(e)(1)(i) and (ii), which permits any person to submit any evidence bearing on a labor certification application.

[5] In this decision, we will refer to the version of 20 C.F.R. Part 656 in effect prior to March 28, 2005 as the "pre-PERM" regulations. These regulations were last published in the April 1, 2004 version of Title 20 of the Code of Federal Regulations. Although no longer appearing in the CFRs, those regulations are still applicable to applications filed prior to March 28, 2005 and still pending at ETA Backlog Processing Centers or on appeal at BALCA.

69 Fed. Reg. at 77327. As noted above, the new regulations are popularly known as the "PERM" regulations.

The pre-PERM regulations did not expressly discuss motions for reconsideration before the CO, but did include a "harmless error" rule. 20 C.F.R. §656.24(b)(1) (2004). The Board, which was established in 1987, held in 1988 that Certifying Officers have the authority to reconsider a Final Determination prior to its becoming final. *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (en banc). The Board wrote:

> This does not mean that the CO must reconsider a denial of certification whenever such a motion is filed. Nor must the CO accept the validity of evidence submitted on reconsideration and change the outcome of the case. But at least where, as here, the motion is grounded in allegations of oversight, omission or inadvertence by the CO which, if credible, would cast doubt upon the correctness of the Final Determination, and the Employer had no previous opportunity to argue its position or present evidence in support of its position, the CO should reconsider his or her decision.

Tancredi, supra at 2 (footnote omitted). In general, under pre-PERM law a CO correctly denied a motion for reconsideration of a Final Determination where it was based on new evidence that should have been presented as part of the employer's rebuttal to the NOF. *Royal Antique Rugs, Inc.*, 1990-INA-529 (Oct. 30, 1991). Under pre-PERM law, however, if the employer did not have a prior opportunity to present evidence to support its position, it was considered an abuse of discretion for the CO not to consider such evidence when ruling on a motion for reconsideration. For example, where the Final Determination was based on untimely rebuttal the employer obviously had no prior opportunity to submit evidence to support a contention that it had, in fact, filed a timely rebuttal. *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (en banc).[6]

[6] The CO argues that under pre-PERM law the CO was only required to reconsider "when the motion is grounded in allegations of oversight, omission or inadvertence" by the CO, citing this language in *Tancredi* as support. However, the CO's argument ignores the introductory phrase "at least where" from the Board's statement in *Tancredi*. Rather, *Tancredi* only gave the CO's error as an example of when it would be an abuse of discretion not to reconsider; it did not affirmatively rule that this is the only circumstance when it would be an abuse of discretion not to reconsider. Moreover, it simply is not true that motions for reconsideration are only valid when the CO is the one who makes a mistake. *See, e.g., Lee Baron Fashions, Inc.*, 1989-INA-263 (Apr. 22, 1991) (U.S. applicant did not supply his resume until after the rebuttal period had expired; resume clearly established that the applicant was not qualified).

ETA first announced an intention to "reengineer" Part 656 in 1995. ETA, Notice and request for comments, Reengineering of Permanent Labor Certification Program, 60 Fed. Reg. 36440 (July 17, 1995). The reason for the reengineering initiative was stated to be:

> The labor certification process described above has been criticized as being complicated and time consuming. It can take up to 2 years or more to complete the process; requires substantial government resources to administer; and is reportedly costly and burdensome to employers. ETA, therefore, is reexamining the effectiveness of the various regulatory requirements and the application processing procedure, with a view to achieving considerable savings in resources both for the Government and employers, without diminishing significant protections now afforded U.S. workers by the current regulatory and administrative requirements.

A questionnaire accompanying this Federal Register notice described in broad terms what were to become the PERM regulations. It foreshadowed the question of how complete an application must be when submitted by suggesting "withholding the filing date until an application is complete with required documentation and correction of deficiencies ...."

In August 2000, ETA published a Notice of general principles which were to guide the redesign of the permanent alien labor certification program. ETA, Notice of Guidelines, Labor Certification Process for the Permanent Employment of Aliens in the United States, 20 C.F.R. Part 656, 65 Fed. Reg. 51777 (Aug. 25, 2000). This Notice suggests that once an application passed an initial intake test for acceptability for processing (*e.g.*, was legible and complete) it would be run through a computer system that would flag more problematic applications "for an in-depth review or audit." Random audits would also be conducted.[7]

[7] The schema described in this guideline suggested that any denied application would have first been audited. However, the Final Rule for PERM indicates that an audit does not necessarily precede a denial. *See* 20 C.F.R. § 656.17(b)(1) ("Applications are screened and are certified, are denied, or are selected for audit.").

In 2002, ETA published the Proposed Rule that would become the PERM process. ETA, Proposed Rule, Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"], 20 C.F.R. Part 656, 67 Fed. Reg. 30466 (May 6, 2002). The preamble to the Proposed Rule stated:

> 5. Reconsideration
>
> The present regulations are silent with respect to the availability of motions for reconsideration after a Final Determination. Historically, Certifying Officers sometimes honored such motions but generally treated them as requests for review and transmitted the matter to the ALJ.[[8]]
>
> In order to address this matter, the regulation is amended to specifically provide that while motions for reconsideration before the Certifying Officer may be filed, the Certifying Officer may, in his/her complete discretion, choose to treat the motion as a request for review.

67 Fed. Reg. at 30476. The text of the proposed regulation at section 656.24(f) stated:

> (f) The employer may request reconsideration at any time within 21 days from the date of insurance [sic] of the denial. The Certifying Officer may, in his or her complete discretion, reconsider the determination or treat it as a request for review under Sec. 656.26(a).

67 Fed. Reg. at 30501.

ETA published the PERM Final Rule in 2004. ETA, Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States

[8] Although not directly relevant to the issue presently before the Board, we pause here to observe that although the CO's practice under the pre-PERM regulations was to sometimes treat motions for reconsideration as requests for BALCA review, BALCA expressly rejected this practice in *Sequel Concepts, Inc.*, 1992-INA-421 (Oct. 29 1993) (en banc). In *Sequel Concepts*, the Board observed that "it cannot be assumed, as the CO contends, that by filing a motion for reconsideration an employer desires judicial review and, therefore, intends that the motion serve as a request for review in the alternative." *See also Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988)(en banc) (as the initial fact-finder in alien labor certification cases, it is the CO's job, not BALCA's, to weigh the evidence in the first instance; thus merely forwarding a motion for reconsideration to BALCA will result in remand to the CO). Although the PERM regulations now expressly provide the CO with discretion to treat motions for reconsideration as requests for BALCA review, unless there is some reason to think that the movant also wants BALCA review, it is difficult to see how administrative efficiency could be served by converting a simple motion for reconsideration into a full-blown appeal.

["PERM"], 20 C.F.R. Part 656, 69 Fed. Reg. 77326 (Dec. 27, 2004). The pertinent part of the preamble stated:

> c. Submittal of New Information in Reconsideration Requests
>
> One commenter pointed out the proposed rule did not specify whether an employer may submit new information when making a request for reconsideration. The commenter favored allowing employers to provide new information in the request for reconsideration.
>
> Practice under the current regulations does not contemplate consideration of new evidence in requests for reconsideration. This final rule merely codifies the current practice.

69 Fed. Reg. at 77362. The text of the Final Rule states:

> (g)(1) The employer may request reconsideration within 30 days from the date of issuance of the denial.
>
> (2) The request for reconsideration may not include evidence not previously submitted.
>
> (3) The Certifying Officer may, in his or her discretion, reconsider the determination or treat it as a request for review under § 656.26(a).

69 Fed. Reg. at 77397 (codified at 20 C.F.R. § 656.24(g) (2005)).

Finally, in February 2006, ETA issued a Proposed Rule that, among other things, proposed to add a new regulation to make it clear that, once submitted, applications cannot be modified. ETA, Proposed Rule, Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, Permanent Labor Certification Program, 71 Fed. Reg. 7655 (Feb. 13, 2006). The preamble to this proposed rule states:

> The Department is also proposing to clarify procedures for modifying applications filed under the new permanent labor certification regulation. Under proposed Sec. 656.11(b), DOL clarifies that requests for modifications to an application submitted under the current regulation will not be accepted. This proposed clarification is consistent with the streamlined labor certification procedures of the new regulation. Nothing in the streamlined regulation contemplates allowing or permits employers to make changes to applications after filing. The re-engineered program is

> designed to streamline the process and an open amendment process that freely allows changes to applications or results in continual back and forth exchange between the employer and the Department regarding amendment requests is inconsistent with that goal. Further, the re-engineered certification process has eliminated the need for changes. 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. Moreover, in signing the application, the employer declares under penalty of perjury that he or she has read and reviewed the application and the submitted information is true and accurate to the best of his or her knowledge. In the event of an inadvertent error or any other need to refile, an employer can withdraw an application, make the corrections and file again immediately. Similarly, after an employer receives a denial under the new system, employers can choose to correct the application and file again immediately if they do not seek reconsideration or appeal. In addition, the entire application is a set of attestations and freely allowing changes undermines the integrity of the labor certification process because changing one answer on the application could impact analysis of the application as a whole.

The text of the proposed new regulation at section 656.11(b) would read "After submission of a permanent labor certification application under this part, requests for modifications to the submitted application will not be accepted." As of the date of this decision, this is only a proposed amendment to Part 656.

Document Retention and Filing

PERM includes a requirement that an employer maintain documentation in support of its application. This documentation is not filed with the Form 9089, but must be retained by the employer and produced in the event of an audit. The applicable regulations state:

> **§. 656.10 General instructions.**
>
> * * *
>
> (f) *Retention of documents.* Copies of applications for permanent employment certification filed with the Department of Labor and all supporting documentation must be retained by the employer for 5 years from the date of filing the Application for Permanent Employment Certification.

* * *

§ 656.17 Basic labor certification process.

* * *

(3) 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.

* * *

Computerized Processing; Check for Obvious Errors

The preamble to the Final Rule announced that PERM would be implemented using electronic processing and that the system would help applicants identify obvious deficiencies in their applications. The preamble stated:

> We have decided to implement the redesigned labor certification process using an electronic filing and certification system. This system is partially modeled after the system used for filing and certifying labor condition applications under the H-1B nonimmigrant program. Employers will also have the option to submit applications by mail.
>
> Under the e-filing option, the Application for Permanent Employment Certification (ETA Form 9089) must be completed by the user on-line. The system will assist the employer by checking for obvious errors, and will input the information into an ETA database.

69 Fed. Reg. at 77332.

INTERPRETATIVE STATEMENTS

In implementing PERM, ETA has posted on its web site a series of FAQs. FAQ Round 5 (Aug. 8, 2005), which was cited as authority by the CO when denying reconsideration in this matter, states:

Question: How can corrections be made to a filed application?

Corrections can not 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. (For withdrawal information, see the separate FAQ on procedures for withdrawing an application.)

NOTE: All accurate recruitment information from the prior application, if still applicable and current, can be used in support of the new application.

FAQ Round 6 (Feb. 14, 2006) states much the same policy, but elaborates a bit:

How can corrections be made to a filed application?

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 for the accuracy or certifiability of the application, the employer should withdraw the application and file a new application with the changes and/or corrections (for withdrawal information, see the separate FAQ on procedures for withdrawing an application.)

NOTE: All accurate recruitment information from the prior application, if still applicable and current, can be used in support of the new application.

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.

DISCUSSION

The facts relevant to this appeal are not in dispute. The date shown on the Form 9089 for the second advertisement was a Monday rather than a Sunday. The Employer asserted that the Monday date was a typographic error. The newspaper tear sheets submitted by the Employer with its motion for reconsideration substantiate that the Employer ran the second advertisement on a Sunday. Thus, the Employer was actually in compliance with the two-Sunday publication requirement of section 656.17(e). The shortfall in its application was simply its failure to provide the correct date on the ETA Form 9089. The central issue, therefore, is whether the CO abused his discretion when denying the Employer's motion for reconsideration on the grounds (1) that the request for reconsideration was based on evidence "not previously submitted" in violation of section 656.24(g)(2), and (2) that the CO will only grant requests for reconsideration "when the mistakes were committed by the Department of Labor and resulted in an erroneous denial of an application." (AF 1).

The CO's decision on reconsideration is partially based on FAQ No. 5. Although web site FAQ postings are a very powerful method of disseminating information and undoubtedly provide helpful guidance to applicants and their representatives, they are not a method by which an agency can impose substantive rules that have the force of law. The United States Supreme court noted in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), that agency interpretations, such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines, lack the force of law and do not

warrant *Chevron*-style deference.[9] The Administrative Review Board (a Department of Labor appellate body for many DOL programs) has described the level of deference owed by an agency review body to a programmatic agency's policy interpretation of its own regulations. The ARB wrote:

> The measure of deference to an agency administering its own statute, absent an express delegation of authority on a particular question, has been understood to "vary with circumstances." *Mead*, 533 U.S. at 228. The reasonableness of the agency's view is judged according to 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. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944). *See also Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *OFCCP v. Keebler*, ARB No. 97-127, ALJ No. 87-OFC-20, slip op. at 17 (ARB Dec. 21, 1999). "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. *See also, e.g.*, *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.").

United Government Security Officers of America, ARB No. 02-012 (ARB Sept. 29, 2003), USDOL/OALJ Reporter at 5; *see also Cody Zeigler Inc. v. Administrator, Wage and Hour Division, USDOL*, ARB Nos. 01-014 and 01-015, ALJ No. 1997-DBA-17 (ARB Dec. 19, 2003) (Judge Boggs' concurrence and dissent); *Compare USDOL v. Beverly Enterprises, Inc.*, ARB No. 99-050, ALJ No. 1998-ARN-3 (ARB July 31, 2002) (ARB applying *Chevron* level deference to a regulation, as opposed to a policy statement).

[9] *Chevron* is the landmark U.S. Supreme Court decision regarding the deference afforded by the courts to an agency's construction and interpretation of federal statutes and implementing regulations. "Legislative regulations" are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statutory law being implemented. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Moreover, Amici correctly states in its brief that the imposition of a substantive rule with the force of law may only be achieved through notice and comment rulemaking.[10]

Thus, whether FAQ No. 5 provides persuasive authority depends on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. For the reasons stated below, we find that FAQ No. 5 imposes substantive rules not found in the PERM regulations, nor supported by PERM's regulatory history, nor consistent with notions of fundamental fairness and procedural due process.

ETA's Division of Foreign Labor Certification faces an unenviable task of processing large numbers of permanent alien labor certification applications with limited resources. As discussed by both Amici and the CO in their briefs, for almost three decades ETA administered a set of regulations that permitted a dialogue between the applicant and government agencies that often allowed deficient applications to be corrected and perfected during the application process. For the immigration law community, this became a very familiar procedure of

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[10] Amici's brief states:

> 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.50/ A statement is a substantive rule where the agency statement imposes an obligation on private parties or on the agency.51/ 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.52/ 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).53/
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> 50/ 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).
> 51/ National Family Planning v. Sullivan, 919 F.2d 227, 237-38 (DC Cir. 1992).
> 52/ Croplife America v. EPA, 329 F.3d 876, 883 (DC Cir. 2003).
> 53/ 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.

- Initial intake and screening by a state workforce agency, which often assisted the applicant in identifying and correcting potential problems with the application.
- Supervised recruitment or "reduction in recruitment" processing.
- Transfer of the application to a federal certifying officer who either granted certification -- or, if apparent deficiencies were present -- issued a "Notice of Findings" identifying the deficiencies and providing instructions on how the notice could be rebutted.
- Submission of rebuttal by the employer in which all evidence and argument responsive to the deficiencies identified in the Notice of Findings had to be presented.
- Either a finding by the CO that the rebuttal had cured the deficiencies and certification could therefore be granted or -- if the rebuttal was found to be inadequate -- issuance of a Final Determination denying certification. Where the rebuttal raised new issues, a supplemental NOF was often used.

As noted in the Background section above, under pre-PERM decisional law employers could file motions for reconsideration, but the CO was not required to consider new evidence unless the Final Determination had been based on a finding on which the employer had not had an opportunity to present evidence. A CO was not required to explain his or her reasoning for denying reconsideration, but was required to clearly indicate that the motion had been considered and denied. *Richard Clarke Associates*, 1990-INA-80 (May 13, 1992) (en banc).

ETA was already considering a redesign of the regulatory scheme by the mid-1990s and had sketched out a framework for what would become the "PERM" regulations by 2000. Because of a robust economy, a very large influx of new applications related to the Legal Immigration Family Equity Act and LIFE Act Amendments' extension of section 245i,[11] increased workload relating to temporary labor

[11] Section 245(i) allowed aliens who were out of status, entered the U.S. without inspection, or violated the terms of their non-immigrant status, to file a petition for adjustment of status if they were beneficiaries of a labor certification application. Although section 245i originally contained a Jan. 14, 1998 deadline, the Life Act amendments extended the deadline to April 30, 2001. About 236,000 labor certification

certification programs, and tight or reduced budgets, by the early 2000s ETA faced a backlog of over 350,000 permanent alien labor certification applications. *See Liberty Fund, Inc. v. Chao*, 394 F.Supp.2d 105, 110-13 (D.D.C. 2005).

Thus, ETA designed a new system where the emphasis is on administrative efficiency and streamlining. The PERM regulations eliminated the former regulation's state workforce agency intake and processing (except in regard to prevailing wage determinations) and eliminated the NOF/Rebuttal procedure. [12]

In the Background section above, we reviewed the regulatory history of the reconsideration regulation which was ultimately codified at section 656.24(g)(2). In the Proposed Rule, the drafters of the PERM regulations determined that a regulation expressly governing motions for reconsideration would be added to make it clear that a CO would, as a matter of his or her complete discretion, be allowed to treat motions for reconsideration as a request for BALCA review. At this point in the rulemaking process, however, there was no mention of whether motions for reconsideration could be based on "new evidence." In the Federal Register publication of the Final Rule, one commenter was noted as favoring allowing employers to provide new information in the request for reconsideration. In response, the drafters of the regulation stated that the pre-PERM practice did not contemplate consideration of "new evidence" in requests for reconsideration, and announced that they would codify that practice in the PERM rules. Thus, in the publication of the Final Rule, ETA added the following provision into the rule governing motions for reconsideration: "The request for reconsideration may not

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applications were filed between the time the Life Act was signed by President Bush in December of 2000 and the April 30, 2001 deadline. *See* 69 Fed. Reg. 43716, 43717 (July 21, 2004) (notice amending the pre-PERM regulations to permit processing by Backlog Processing Centers rather than State Workforce Agencies or Regional ETA offices).

[12] The CO's brief argues that the Employer and Amici want to return to the NOF-Rebuttal model of the pre-PERM regulations, and that such a model was expressly rejected in Notice and Comment rulemaking. We agree that the regulatory history illustrates ETA's general desire to streamline and explicit intent to eliminate the NOF-Rebuttal model; however, there was no debate in the rulemaking process about section 656.24(g)(2) – the regulation governing motions for reconsideration at issue here. Subsection (2) did not even appear in the regulation until the Final Rule was published. Thus, we reject any implication in the CO's brief that the Employer's and Amici's argument relating to motions for reconsideration was expressly considered and rejected in Notice and Comment rulemaking.

include evidence not previously submitted." The regulatory language, therefore, was intended as a "no-new-evidence" rule. As subsequently interpreted and applied by ETA, this rule bars an employer from presenting any evidence that was not "submitted" at the time that the CO denies the application. Because the CO's interpretation of "submitted" does not include materials retained by an employer as part of the recordkeeping requirements of PERM, this interpretation is not simply a codification of pre-PERM law, but rather has the impact of negating the "no prior opportunity to present evidence" aspect of pre-PERM law. The "no prior opportunity to present evidence" exception was based on procedural due process and fundamental fairness. BALCA cannot invalidate or rewrite a regulation, *Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993)(en banc); *Hunter Holmes McGuire VA Medical Center*, 1994-INA-210 (Oct. 7, 1996)(en banc). The Board, however, has the responsibility to interpret the meaning of regulations and decide whether they have been applied in individual cases consistent with procedural due process.

The District Court for the District of Columbia has clearly ruled in a series of decisions involving the Federal Communications Commission (FCC) that an agency may write strict procedural rules in order to deal with the administrative demands of processing large numbers of applications within a tight budget. The quid pro quo for such stringent criteria is explicit notice. The less forgiving the standard, the more precise its requirements must be. *Glaser v. FCC*, 20 F.3d 1184, 1186 (D.C. Cir. 1994); *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985); *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320 (1994); *Florida Cellular Mobil Communications Corp. v. FCC*, 28 F.3d 191 (1994). In the FCC cases, the FCC had seized upon the District Court's suggestion in an earlier case that the FCC could write regulations requiring that certain license application be "letter-perfect" (i.e., complete and sufficient) when submitted.

While ETA takes the position that PERM applications in essence must be "letter-perfect" when submitted, the regulation as adopted after notice and comment rulemaking did not describe such perfection as a requirement. Rather, the Final Rule -- instead of

eliminating motions for reconsideration -- expressly provided for them by inserting a new rule on such motions. The rule has limitations regarding timeliness, the codification of pre-PERM "no new evidence," and the discretion to treat such a motion as a request for BALCA review. The rule and the regulatory history, however, contain no limitation stating that only ETA errors can be corrected in response to a motion for reconsideration. Nor does the regulation define what "submitted" means.

Similarly, the existence of an audit process and a procedure for supervised recruitment also indicate that applications might be corrected during processing. As noted in the Background section of this decision, ETA has issued a proposed amendment to PERM prohibiting requests for modifications to submitted applications -- but the fact that ETA felt it necessary to make this clarification only illustrates the point that the current PERM rules do not necessarily prohibit correction of submitted applications.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the U.S. Supreme Court wrote:

> [Due process] "... unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961). "[D]ue process is flexible, and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy, supra* at 167-168 (POWELL, J., concurring in part); *Goldberg v. Kelly, supra* at 263-266; *Cafeteria Workers v. McElroy, supra* at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See, e.g., Goldberg v. Kelly, supra* at 263-271.

In the appeal before us, the Employer has a private interest in seeking to sponsor an alien for permanent employment. The risk of erroneous deprivation under the rule as

interpreted and applied by ETA is great and the potential consequences significant.[13] In the instant case, the reality was that the Employer complied with the regulation in question but merely made a typographical error in filling out the application. Obviously there is no motive to deceive or defraud the government. The CO's denial of the application based on the typographical error in the Form 9089 elevates form over substance.

On the other hand, ETA's interest in eliminating the constant back-and-forth between applicants and the government is substantial. ETA faces a huge challenge in trying to administer a program that has long been criticized as inefficient and too slow. It has obviously determined that favoring administrative efficiency over dialogue will better serve the public interest given the resources available to administer the program.

Nonetheless, it is not entirely clear that ruling on motions for reconsideration imposes a substantial procedural burden on the COs. Even under the restrictive interpretation it has argued in this appeal, ETA still has to receive and record motions for reconsideration and review them closely enough to determine whether it was ETA or the Employer that made the error and whether the CO will rule on the motion and/or exercise

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[13] As noted in footnote 3, the Employer in the instant case decided to pursue an appeal because by the time the denial was received, its prevailing wage determination was no longer valid. Amici's brief also identifies other significant problems that can arise as the result of a delay between the filing of an application and the CO's ultimate denial that cannot be remedied merely by re-filing:

> 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;
> 3. Re-filing applications also means the loss of 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.

Amici's Brief at 24-25, quoting AILA comments to ETA's Feb. 13, 2006 proposed PERM amendments that would prohibit amendments once an ETA 9089 is filed (available at AILA InfoNet Doc. 06033162 (posted Mar. 31, 2006)).

the discretion to treat the motion as a request for BALCA review. In the instant case, one would be hard-put to claim any significant burden on the CO when it is quite obvious that the Employer's attorney made a simple typographical error. Given the certainty provided by the tear sheet evidence, this conclusion can be reached without a time-consuming or probing analysis. It is likely that in many cases it will not be so clear that the Employer merely made an unintentional error. However, even under pre-PERM law, a CO was not required to state reasons for denying reconsideration, but only state whether reconsideration was granted or denied. *See Richard Clarke, supra*.

After careful review of the facts of this case, the regulatory language of the applicable regulations and regulatory history, and balancing ETA's authority to write strict procedural rules against notions of fundamental fairness and procedural due process, we hold that the CO abused his discretion in denying reconsideration in this matter. In so holding, we emphasize the following findings:

(1) *The meaning of "previously submitted."* Section 656.24(g)(2) was placed into the Final Rule without full notice and comment rulemaking. Although the Board cannot invalidate or re-write this regulation, the *Glaser, Salzer, JEM Broadcasting Co. and Florida Cellular Mobil Communications Corp.* decisions noted above provide that a strict procedural rule requires explicit and precise notice of the standard. The preamble to the Final Rule indicated that addition of subsection 2 to the proposed motion for reconsideration rule was intended to codify existing law on whether new evidence could support a motion for reconsideration.[14] In the instant case, what the Employer provided with its motion for reconsideration was not new evidence, as that term was understood prior to PERM. This evidence was not newly created nor newly discovered. Rather, it was merely documentation that was held for government inspection if an application was reviewed. It was submitted merely for the purpose of substantiating that there was a typographical error in the application. Under the PERM regulations, the Employer is not

[14] Technically, the pre-PERM caselaw did not rule that a CO was prohibited from considering new evidence presented with a motion for reconsideration, but only that a CO would not be found to have abused his or her discretion in refusing to consider new evidence, unless the Employer had not been afforded an opportunity to present such evidence.

permitted to "file" such documentation with the application, *see* section 656.17(a)(3). We hold that for purposes of section 656.24(g)(2), documentation "submitted" in support of a labor certification application constructively includes the materials held by an employer under the recordkeeping provisions of PERM. To hold otherwise would permit the regulations to be administered in a manner inconsistent with due process of law by making it impossible for an employer to document typographic errors merely because the CO chose to deny the application without an audit or other review in which the Employer could have submitted the documentation (that it was required to retain in support of the application). Interpreting the submission to include documentation required to be retained in support of the application reconciles the regulation with procedural due process and brings it in line with the purpose stated in the preamble to the Final Rule of codifying pre-PERM law on the type of evidence that may support a motion for reconsideration.

We recognize that questions may arise as to knowing what documentation actually was being held by the Employer. Since ETA made the Employer the custodian of supporting documentation, it will be difficult to fashion a fail-safe standard that prevents a dishonest applicant from misrepresenting what was in its recordkeeping file. However, we provide the following criteria: (a) The record must be the type of specific documentation required to be held. (b) The document must have been demonstrably in existence at the time of application. In other words, obvious fabrications created after the fact to address a deficiency may be discounted. Moreover, a CO will not be found to have abused his or her discretion in denying a motion for reconsideration of a denial that was based on a pro forma computer check if the pre-existing documentation does not establish conclusively that the error was merely on the face of the Form 9089, and that there was actual compliance with the applicable substantive requirement.

(2) *Circumstances showing lack of fundamental fairness.* We recognize that parameters of this ruling will have to be fleshed out. Thus, we limit our ruling to the precise circumstances of this specific case. The most relevant of those circumstances include:

- The PERM regulations, as written, permit motions for reconsideration. The applicable regulations do not limit such motions to correction of errors by the government, and, as ruled above, documentation required to be retained in support of an application is constructively considered to have been submitted to ETA for purposes of section 656.24(b)(2).

- As represented in the CO's brief, this application was denied based on a pro forma computer check, and not based on an audit and or other review of the application.

- The denial was not immediate, but took several months by which time the Employer's prevailing wage determination was no longer valid.

- The CO's policy not to consider mistakes made by employers is arbitrary and capricious and not supported by any regulatory language, regulatory history or decisional law.

- ETA's electronic submission process included no checks to warn the Employer that the dates used on the application would result in an automatic denial.[15]

- The Employer asserted that there had been a typographical error in the application, and the tear sheets were submitted for the purpose of substantiating that assertion; not for the purpose of amending the application.

- The Employer's tear sheets were demonstratively in existence at the time the application was filed and were precisely the type of documentation that an

[15] As noted in the Background section of this decision, the preamble to the Final Rule indicated that ETA's computerized system would assist applicants in identifying obvious errors in their applications. It does not appear, however, that ETA's electronic filing system contains logic to warn applicants about errors in critical dates. As noted in *Mathews*, *supra*, due process is a flexible concept. If ETA had provided immediate feedback warning the Employer that its application did not make sense, we may not have found it an abuse of discretion to have denied reconsideration in this case, even with the presentation of the tear sheets as evidence.

Employer would be expected to hold in its recordkeeping files in support of the labor certification application. They were clearly not after-the-fact fabrications.

- The tear sheets conclusively establish that the Employer was in compliance with the two-Sunday publication rule.

- There was obviously no intentional misrepresentation of the facts in the ETA Form 9089; the error was clearly typographical.

- Finally, it is just too obvious in this case that the denial of reconsideration was an injustice. The consequences to the Employer were out of proportion to the mistake.

REMEDY

The PERM regulations omitted the explicit statement of authority of BALCA to remand cases found in the pre-PERM regulations. *Compare* 20 C.F.R. § 656.27(c)(3) (2004) with 20 C.F.R. § 656.27(c) (2005). The regulatory history states that this omission was intended to deprive BALCA of the authority to remand cases.[16] In view of this intent, the Certifying Officer was directed in his brief to state whether, if the CO is found to have improperly refused to reconsider, the application would have been granted or whether it would have been subject to further processing before a decision would have been made to deny or grant certification.

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[16] Specifically, the preamble to the Final Rule stated in response to commenters who objected to the elimination of remands:

> After reviewing all of the comments, we have concluded BALCA should not have authority to remand cases to the CO. The processing model that underlies this rule does not contemplate the type of interchange between the employer and the Certifying Officer that is reflected in the current process; thus, it is not apparent what the Certifying Officer would do if a case were "remanded." Accordingly, the final rule does not allow for remands.

69 Fed. Reg. at 77363. We observe that the text of the regulation itself does not affirmatively bar BALCA from remanding a case, but rather just removes the pre-PERM regulation's explicit authorization of BALCA to remand.

In its brief, the CO argued that "an application rejected by the computer has not undergone the more thorough review of the CO; nor has the application been subject to random selection for an audit. Therefore, HealthAmerica's application cannot be granted immediately. The CO must have the opportunity to review the application more closely." CO's Brief at 7.

In regard to the Board's authority to remand, the CO wrote the following:

> Assuming the BALCA concludes that the CO should have granted reconsideration, the application should be placed in the same position as any other application for which reconsideration was granted – in queue awaiting the more searching review by the CO. This is not a remand, as a remand simply instructs the CO to reassess its original decision but does not order the CO to reach the opposite conclusion. Here, the BALCA would not be requiring the CO to reexamine whether reconsideration was appropriate; instead, the BALCA would be telling the CO exactly what the decision on reconsideration should have been, and ordering the CO to act accordingly.

CO's Brief at 7 (footnote omitted).

The CO's argument puts a unique gloss on the meaning of the term "remand." However, we choose not to examine this gloss too closely. Rather, we interpret it solely as a concession that the Board may return a PERM labor certification application for further processing where the Board, as here, finds that the CO should have granted reconsideration of an application rejected without a formal audit or other detailed review. In so ruling, we expressly decline to express an opinion on whether the CO's formulation of the meaning of the "no-remand" regulation in his brief states a rule of broad application. We reserve for future cases further examination of the full implication of 20 C.F.R. § 656.27(c).[17]

[17] Amici and the Employer argue that the Board must grant certification if the CO is found by the Board to have improperly denied a motion for reconsideration of an application. However, the purpose of protecting U.S. workers would not be served by simply granting certification prior to a full consideration of an application by the CO. Thus, we reject automatic granting of certification as a remedy for the CO's abuse of discretion in denying a motion for reconsideration where, as here, it is clear that the CO never looked at the merits of the application beyond ETA's pro forma computer check.

ORDER

The denial of labor certification is **VACATED** and this matter is returned to the Certifying Officer to complete processing.

At Washington, D.C.

For the Board:

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JOHN M. VITTONE
Chief Administrative Law Judge