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June 20, 2018

VIA FEDERAL EXPRESS

U.S. Department of Labor
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400-N
Washington, D.C. 30002-8003

Re: **BALCA Case No.: 2013-PER-00052**
ETA Case No.: A-11308-16309

Dear Sir or Madam:

In connection with the above-referenced matter, please find the enclosed brief on behalf of the American Immigration Lawyers Association.

Please direct all correspondence to the undersigned.

Sincerely,
FRAGOMEN, DEL REY, BERNSEN & LOEWY, LLP

Kevin W. Miner
Attorney

Enclosures

UNITED STATES DEPARTMENT OF LABOR

BOARD OF ALIEN LABOR CERTIFICATION APPEALS

800 K. STREET, NW, Suite 400-N

Washington DC 20001-8002

In the Matter of

ARBIN CORPORATION,

Employer,

2013-PER-00052

On behalf of

ZOUCHENG CHENG,

Alien

On Appeal of a Certifying Officer Decision

Brief of the American Immigration Lawyers Association, Amicus Curiae

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INTRODUCTION

The PERM regulations at 20 CFR § 656.17(f)(4) require an employer to indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity, but the regulations contain no definition of what constitutes "travel." The regulations are also silent on how much travel would need to be required to affect the geographic area of employment. Additionally, none of the PERM FAQs contain any guidance for what constitutes travel. In the absence of specific guidance on the definition of the term "travel," employers have had to rely on an uneven patchwork of BALCA decisions, stakeholder meeting notes, and decades-old agency memoranda to attempt to ascertain how to disclose travel requirements in a variety of scenarios.

The issue of what constitutes a "travel" requirement is presented in a variety of circumstances. The various travel scenarios can be summarized as follows: (1) roving employees, or those employees whose job requires them to move from worksite to worksite, whether those sites are anticipated or unanticipated; (2) travel requirements that are viewed as "normal" for a position, such as a traveling salesperson; (3) travel requirements that are viewed as not "normal" for a position, such as an engineer who travels to a different factory location to install new equipment; and (4) positions where travel is occasional but not a normal part of the job, such as a doctor who travels to a medical conference for Continuing Medical Education once per year. With respect to "roving" employees, the Office of Foreign Labor Certification ("OFLC") has noted in stakeholder meetings on multiple occasions that the 1994 "Barbara

Farmer" memorandum[1] is controlling, but OFLC has provided much less guidance on how to address travel requirements in the other situations.

In this case, BALCA has invited the American Immigration Lawyers Association ("AILA") to provide its views as *amicus curiae* related to travel requirements, specifically asking for AILA's views on three issues:

1. Whether the Certifying Officer must cite to the specific regulatory provision in 20 CFR § 656.17(f) to support a denial for failure to include a travel requirement;
2. Whether travel should be considered a benefit or a requirement, or neither; and
3. Whether there are jobs where movement outside of the office is so clearly part of the role that travel need not be disclosed, such as plumber or delivery person.

AILA believes that the concept of due process and fundamental fairness has been and remains a key component of the administration of the PERM labor certification process. For this reason, the Certifying Officer ("CO") should be required to follow the specific language of the PERM regulations in adjudicating cases, just as employers are required to follow that specific language in conducting the labor market test and filing applications. Where the CO believes that the regulations have not been followed and decides to deny a case as a result, the CO should provide, with as much specificity as possible, the precise regulatory basis for a denial. Furthermore, where the regulations are silent or do not provide sufficient guidance, the CO should not deny a PERM application on the basis of a requirement that is not stated in the regulations. Under the plain language of the regulations, travel must be disclosed in the advertisements only where it affects the geographic area of employment, and there are certainly

[1] Employment and Training Administration Field Memorandum, Policy Guidance on Alien Labor Certification Issues, Field Memorandum No. 48-94 (May 16, 1994).

occupations where travel is required but where that travel does not affect the geographic area of employment. If OFLC believes travel must be disclosed when it does not affect the geographic location of employment or where it is a benefit rather than a requirement, it should seek to amend the PERM regulations rather than denying cases for failure to meet a requirement not currently stated in the regulations themselves.

Amicus Statement of Interest

The American Immigration Lawyers Association ("AILA") is a national association with more than 15,000 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. AILA's members practice regularly before the Department of Labor, the Department of Homeland Security, and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts of Appeal, and the Supreme Court of the United States.

Argument

1. **Due process and fundamental fairness require the Certifying Officer to provide, with as much specificity as possible, the regulatory basis for a deficiency in a PERM application that forms the basis for a denial.**

The first question that the Board has requested AILA to address is whether a Certifying Officer must cite to the specific regulatory provision in 20 CFR § 656.17(f) to support a denial for failure to include a travel requirement. For the reasons set forth below, it is AILA's position that due process and fundamental fairness require a Certifying Officer to provide, with as much specificity as possible, the precise regulatory basis for a denial.

AILA recognizes that a line of cases exists in which BALCA determined that the Certifying Officer's failure to cite the appropriate regulatory subsection that formed the basis for the denial was not a violation of due process because, from the discussion in the Certifying Officer's denial, the employer was on notice with respect to the actual basis for denial. AILA notes further that all of these cases involved an alleged failure to include a travel requirement in various forms of recruitment. See *Matter of Cosmos Foundation*, 2012-PER-01209 (July 3, 2013), *Matter of Keihin Fuel Systems, Inc.*, 2011-PER-02974 (July 22, 2013), *Matter of Riverwalk Education Foundation, Inc.*, 2012-PER-01281 (July 22, 2013), *Matter of Ames True Temper, Inc.*, 2012-PER-01419 (August 22, 2016). These BALCA cases take the view that the Certifying Officer's failure to cite the appropriate authority as a basis for denial does not deprive an employer of a substantive right as long as the Certifying Officer provides the substantive reason for the denial.

However, providing a reason for the denial without providing the cited regulatory authority does not sufficiently protect an employer's interests. To the contrary, it causes confusion. As the Board is well aware, PERM is a complex process requiring an employer to comply with a set of very detailed regulations. BALCA has often pointed out that in order for the PERM system to function efficiently, there is little room for error and "strict adherence to the PERM regulations" is necessary for the PERM system to function efficiently. *Matter of MLS*

Inc., 2013-PER-01045 (July 17, 2017); *also see Matter of Tera Technologies, Inc.*, 2011-PER-02541 and 2012-PER-00055 (Aug. 28, 2014) (*en banc*) (affirming strict enforcement of the requirement that the Notice of Filing name the employer and noting that permitting exceptions would "swallow the rule"). Given this context, where the Certifying Officer perceives a deficiency on the part of the employer, it is vital that the employer fully and clearly understand the alleged deficiency and why that deficiency is the basis for a denial of the PERM application. The PERM regulations -- particularly 20 CFR § 656.17(f) which describes advertising requirements --contain several subsections that provide specifics regarding an employer's obligations with respect to the recruitment process. In order for an employer to understand and adequately respond to a Certifying Officer's allegation of a deficiency, due process and fundamental fairness necessitate that the Certifying Officer identify the specific regulatory subsection that the employer's process violated or failed to satisfy. In a case involving a travel requirement, citation to 20 CFR § 656.17(f)(4) (the specific regulatory subsection regarding inclusion of travel in print advertisements) is crucial in order for the employer to make a full argument, and preserve a complete record, in a motion for reconsideration or an appeal. Moreover, such specificity also helps to clarify the rules for subsequent filings by other employers, thereby creating an understandable and predictable body of guidance for all users of the PERM labor certification program. For these reasons, AILA urges this Board to hold that a Certifying Officer must cite to the specific regulatory provision in 20 CFR § 656.17(f) to support a denial for failure to include a travel requirement.

2. **Whether travel should be considered a benefit or a requirement or neither is dependent upon the nature of the travel and the specific job opportunity involved, and there are circumstances where travel can be a benefit, a requirement, both a benefit and a requirement, or neither a benefit nor a requirement.**

The second question that the Board has requested AILA to address is whether travel should be considered a benefit or a requirement or neither. For the reasons set forth below, it is AILA's position that travel can, on a case-by-case basis, be a requirement, or a benefit, or both, or neither one. There is no bright-line rule for this determination, and instead the question should be evaluated based upon the facts of the particular case presented. AILA therefore urges the Board to hold that travel should not be viewed by the CO as a requirement in all cases, and instead should be considered a requirement only if it affects the geographic area of employment or affects where applicants will likely have to reside to perform the job opportunity. This holding would ensure that PERM applications for positions involving travel are adjudicated consistent with the regulatory requirements set forth in 20 CFR § 656.17(f)(4).

Recognition of the fact that travel can sometimes be a benefit and not a requirement is particularly important because it directly affects the calculation of prevailing wages. In 2009, DOL issued guidance on the calculation of prevailing wages in a document titled "Employment and Training Administration, Prevailing Wage Determination Policy Guidance" and this guidance continues to be in effect[2]. Under this policy guidance, all prevailing wage determinations start with an entry-level wage and progress to a wage that is commensurate with that of a qualified, experienced, or fully competent worker after consideration of the experience, education, and skill requirements of an employer's job description. The nature of the job offer is first considered and reviewed and matched to the most appropriate O*NET occupational classification that corresponds to the employer's job offer. "Special Skills and Other Requirements" for a job opportunity are then compared to the O*NET occupational classification

[2] http://www.flcdatacenter.com/download/npwhc_guidance_revised_11_2009.pdf

and if the requirements for a job are generally encompassed by the O*NET job description for the position, no increase in the required wage is assigned.

For example, the O*NET job description for Appraisers, Real Estate contains the following job duty: "inspect properties to evaluate construction, condition, special features, and functional design, and to take property measurements." For a job within the Appraiser, Real Estate job classification, travel to inspect properties is, by the nature of the job, generally encompassed within the job description and can be considered a normal part of the job of any individual working at a position within this classification. If an extra point were added to prevailing wage determinations in these instances, it would place the prevailing wage above the market, as the survey data already accounts for individuals regularly traveling in these occupations. In this example, travel is a requirement but it is not a requirement that should affect the required wage.

In other occupations, travel is part of the job being performed but it is a benefit rather than a requirement affecting the geographic area of employment. For example, an employer might offer to its top sales professionals an all-expense paid trip to an annual sales convention in a tropical location as a reward for excellent performance. The employee is engaging in this travel as part of his or her employment, but this is not a travel requirement affecting the geographic area of employment, nor is it a travel requirement at all. Consequently, there would be no requirement under 20 CFR § 656.17(f)(4) to include this in the required newspaper advertisements for the PERM application.

For these reasons, AILA urges the Board to hold that travel should not be viewed by the CO as a requirement in all cases, and that travel can, on a case-by-case basis, be a requirement,

or a benefit, or both, or neither one. The question should be evaluated based upon the facts of the particular case presented.

3. **There are jobs where movement outside of the office is so clearly part of the role that travel need not be disclosed, and travel requirements must be included in the newspaper advertisements only if they affect the geographic area of employment or restrict where applicants will likely have to reside to perform the job opportunity.**

The third question that the Board has requested AILA to address is whether there are jobs where movement outside of the office is so clearly part of the role that travel need not be disclosed, such as plumber or delivery position. For the reasons set forth below, it is AILA's position that there are jobs where movement outside of the office is so clearly part of the role that travel need not be disclosed, and travel requirements must be included in the newspaper advertisements only if they affect the geographic area of employment or restrict where applicants will likely have to reside to perform the job opportunity.

As noted above, 20 CFR § 656.17(f)(4) governs the disclosure of travel requirements in the context of mandatory PERM newspaper advertisements. The regulation states that the advertisement must "indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity." This is the full extent of regulatory guidance provided by the PERM regulations on disclosure of travel requirements, and therefore an application that meets this regulatory requirement should be deemed compliant with 20 CFR § 656.17(f)(4).

Importantly, the regulatory language does not state that employers must list or describe any and all travel requirements. If that had been the intent of the regulatory language, 20 CFR § 656.17(f)(4) would state that as the requirement. The language of the regulation would state that

the advertisement "describe any and all travel required for the job opportunity" or something similar. Instead, the regulation focuses on the geographic area of employment, and specifically states that geographic area of employment must be disclosed with enough specificity so that a U.S. worker applicant can understand any travel or restrictions on where he or she likely will have to reside. The focus of the regulation is on the geographic area of employment, not on the specifics of travel involved in the job.

In light of this regulatory language, AILA urges the Board to hold that there are jobs where movement outside of the office is so clearly part of the role that travel need not be specifically disclosed. This includes not only the examples provided in the order granting *en banc* review -- plumber and delivery person -- but other occupations as well. Indeed, most professional occupations in the modern economy involve some *de minimus* amount of travel. Lawyers occasionally travel to visit clients and to take depositions. Doctors sometimes travel for continuing medical education. Engineers from time to time travel to a factory to understand how to design equipment. Teachers periodically travel with their students on field trips and to academic competitions. Financial analysts sometimes travel to meet with executives of companies under coverage to understand business plans and projected earnings. Sales and marketing professionals at times travel to meet with potential new customers. This is *de minimus* travel, and should be recognized as such. Travel in these circumstances does not affect the geographic area of employment, nor does it restrict where a U.S. worker applicant would need to reside, and therefore this kind of *de minimus* travel need not be disclosed under the plain language of 20 CFR § 656.17(f)(4).

In *Matter of MLS Inc.,* 2013-PER-01045 (July 17, 2017), the Board provided the following reminder about the nature of the PERM program:

> The PERM program features exacting regulations designed to eliminate back-and-forth between applicants and the government and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *See HealthAmerica*, 2006-PER-00001, slip op. at 19 (Jul. 19, 2006) (*en banc*). The program was "designed to sacrifice in-depth individual adjudication of applications for a theoretically faster and more efficient attestation process that demands strict adherence to the PERM regulations." *Spotsylvania County Schools*, 2011-PER-00562, slip op. at 4 (Dec. 14, 2011) (*en banc* review denied Feb. 13, 2012); *see also* ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives for Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27915 to 27918 (May 17, 2007).

Under the design of the PERM regulations, both the Certifying Officer and employer are bound by the clear and unambiguous regulatory requirements. The plain language of the regulations must therefore be applied in a manner consistent with the common understanding of the terms used. The Board has consistently held that where the language of a regulation is clear, it is binding to both the Certifying Officer and to the employer. For instance, in *Matter of Dearborn Public Schools*, 91- INA-222 (1993) (*en banc*) an employer sought to apply the Immigration and Nationality Act's (INA) "equally qualified" standard to a secondary school teacher although the regulatory language limited that standard to college and university teachers. The Board declined this request, and explained that it was bound by the regulation's unambiguous language. The decision stated that application of the "equally qualified" standard to secondary school teachers "would necessarily involve disregarding, in effect invalidating, the Department's own regulations." *Id.* at 7.

Similarly, in *Matter of SAP America*, 2010-PER-1250 (April 18, 2013), the Board reversed a denial where the CO had concluded that the employer did not produce documents even though those documents were not required by the language of the regulation. *Id.* at 8-9. In finding that the regulations didn't instruct employers of any requirement to maintain a copy of a Prevailing Wage Determination request that is submitted to a SWA, the Board explained "[i]t

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.

If the Department believes that the regulations do not accurately reflect the policies and purposes behind disclosure of travel requirements, then the remedy is to amend the regulations, not to deny applications based upon a mandate that 20 CFR § 656.17(f)(4) does not provide. *See Matter of 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). Amending the PERM regulations is well within the Department's authority, and has occurred before. In *Matter of HealthAmerica*, 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). As it did in 2007, the Department could amend the PERM regulations to provide clarification on what must be disclosed regarding travel if it believes the current regulatory language is not clear.

For these reasons, AILA urges the Board to hold that there are jobs where movement outside of the office is so clearly part of the role that travel need not be disclosed, and travel requirements must be included in the newspaper advertisements only if they affect the geographic area of employment or restrict where applicants will likely have to reside to perform the job opportunity.

CONCLUSION

AILA, in its capacity as *amicus curiae* in this case, takes no position on whether the underlying PERM labor certification application should be certified. In reviewing this matter, however, AILA respectfully requests that the Board confirm that fundamental fairness and due process remain a component of any PERM adjudication, and that the Certifying Officer is bound by the plain language of the regulations. The Board should hold that due process and fundamental fairness require a Certifying Officer to provide, with as much specificity as possible, the precise regulatory basis for a denial. Furthermore, the Board should hold that travel is sometimes a benefit and not a requirement at all, and that travel need be disclosed in the mandatory newspaper advertisements only where that travel is a specific requirement affecting the geographic area of employment or will restrict where a worker will likely have to reside. This will ensure that the plain language of the PERM regulations continues to govern PERM adjudications.

Respectfully submitted June 20, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I have served a true and correct copy of the foregoing document on the persons listed below by sending the document via first-class, United States mail, postage-prepaid to:

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DATED this 20th day of June, 2018.

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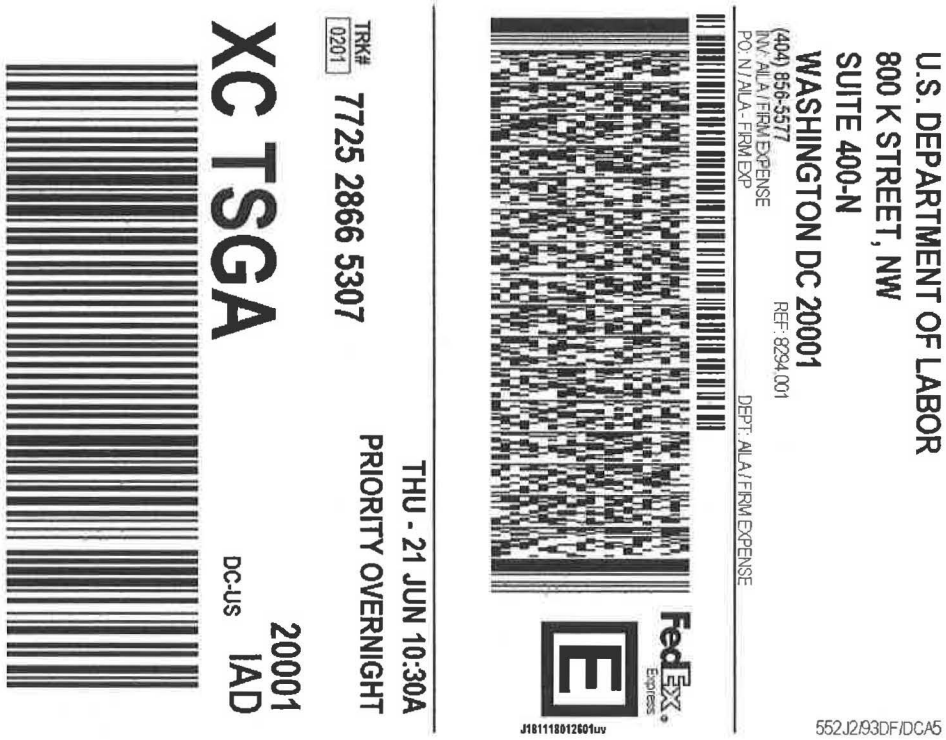

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