U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 January 2015

BALCA No.: 2012-PER-00940
ETA No.: A-08322-06241

In the Matter of:

SIMPLY SOUP LTD.
d/b/a
NY SOUP EXCHANGE,
Employer,

on behalf of

MORALES VELASQUEZ, PEDRO PABLO,
Alien.

Appearances: Arlene L. Boas, Esquire
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For the Employer

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Washington, DC
For the Certifying Officer

Russell Reid Abrutyn
Dan Webb Howard
Catherine L. Haight
American Immigration Lawyers Association
and
Leslie K. Dellon
American Immigration Council
Amici Curiae

Before: Paul R. Almanza, *Administrative Law Judge*; Alan L. Bergstrom, *Administrative Law Judge*; William S. Colwell, *Associate Chief Administrative Law Judge*; Paul C. Johnson, Jr., *District Chief Administrative Law Judge*; and Kenneth A. Krantz, *Administrative Law Judge*

Opinion for the Board filed by JOHNSON, *District Chief Administrative Law Judge* with whom COLWELL, *Associate Chief Administrative Law Judge*, and ALMANZA, BERGSTROM, AND KRANTZ, *Administrative Law Judges*, join:

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This appeal before the Board of Alien Labor Certification Appeals ("BALCA" or the "Board") arises under section 212(a)(5)(A) of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. § 1182(a)(5)(A), and the "PERM" regulations at 20 C.F.R. Part 656.[1] It presents the issue of whether a Certifying Officer ("CO") may deny an *Application for Permanent Employment Certification* (ETA Form 9089) based on an employer's failure to file a recruitment report describing the recruitment steps undertaken where those steps can be identified through review of the Form 9089 and other audit response documentation. This appeal also presents the issue of whether an employer's inadvertent failure to file a complete copy of its recruitment report with an audit response may be cured through the submission of the missing portion of the report with a motion for reconsideration.

BACKGROUND

Procedural Background

On November 12, 2008, Simply Soup Ltd., d/b/a NY Soup Exchange ("Employer") filed *Application for Permanent Employment Certification* ("Application") sponsoring the Alien beneficiary for permanent employment in the United States as a cook. (AF 117-131).[2] On October 5, 2011, the CO issued an audit notification letter directing the Employer to submit certain specified documentation.[3] (AF 75-78). One document specified for production was

[1] "PERM" is an acronym for the "Program Electronic Review Management" system established in support of the regulations that went into effect on March 28, 2005.

[2] Citations to the Appeal File will be abbreviated "AF" followed by the page number.

[3] The Application was initially denied by the CO on the ground that the Employer's experience requirement did not represent the Employer's actual minimum requirement because the Alien obtained his qualifying experience while working for the Employer in a position that appeared to be identical to the position for which the Employer was seeking certification. (AF 105). The Employer requested that the CO reopen the case to allow it to demonstrate, as permitted by 20 C.F.R. § 656.17(i)(3)(ii), why it was no longer feasible to train an inexperienced worker. (AF 101). After some delay, the CO issued a Request for Additional Information directing the Employer to provide its infeasibility-to-train documentation. (AF 96). After the Employer responded by letter (AF 79-95), the CO issued the October 5, 2011 audit notification letter. The Appeal File contains no indication that the question of whether the experience requirement was justified based on infeasibility to train was addressed by the CO. The CO did not mention that issue in the post-audit denial letter, or in his decision on reconsideration of the post-audit denial letter,

"[t]he recruitment report for this position as described in § 656.17(g)(1) signed by the employer or the employer's representative *describing the recruitment steps undertaken* and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, summarized by the lawful job-related reasons for such rejections." (AF 75-76) (emphasis added).

The recruitment report that the Employer provided with its audit response did not describe the recruitment steps undertaken. (AF 37). Following review of the Employer's audit response, the CO denied certification on two grounds, one of which was that the recruitment report failed to describe the recruitment steps undertaken. The CO cited 20 C.F.R. § 656.17(g)(1) as the regulatory basis for this ground for denial. The second ground for denial of certification was that the State Workforce Agency ("SWA") job order placed by the Employer did not provide sufficient contact information to direct applicants to the Employer. (AF 19-21).

In a motion for reconsideration/request for BALCA review, the Employer argued that it inadvertently omitted from its audit response the first page of its recruitment report, and that this page described the recruitment steps undertaken. (AF 4). The Employer attached a copy of a document that it contended was the missing first page of the recruitment report page, and asked the CO to excuse its oversight given that the original audit response included evidence documenting all of its recruitment efforts. (AF 4, 8). In regard to the SWA job order, the Employer argued that a state department of labor employee had checked the wrong box when a printout of the job order was created. (AF 4-5).

On his decision on reconsideration, the CO refused to consider the document that was purportedly the missing first page of the recruitment report.[4] The CO stated that 20 C.F.R. § 656.24(g)(2)(i) prohibited the Employer from providing such evidence with its request for reconsideration. Because the recruitment report in the Employer's audit response did not specify the recruitment steps undertaken, as required by 20 C.F.R. § 656.17(g)(1), the CO determined that the denial of certification was valid. The CO also found that the denial of certification was valid on the SWA job order issue. The CO then forwarded an Appeal File to BALCA. (AF 1-2).

In its initial brief before BALCA, the Employer reiterated in regard to the recruitment report issue that it had inadvertently omitted the first page of the recruitment report from its audit response, and argued that this evidence should be considered pursuant to the Board's reasoning in *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc). The Employer further argued that even if the newly submitted page from the recruitment report is not considered, its original audit response was sufficient because it included: (1) "a report describing the number of applicants, the steps taken to contact them and the reasons for non-hire, as well as a statement on the back of the posted sign stating where and when the sign was placed and that 'no one applied,' both statements signed by the employer"; and (2) "all the supporting materials required with reference

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or in his briefing before the Board. Accordingly, we find that the infeasibility-to-train issue is not before us on appeal.

[4] Although the font size appears to be different on the purported first page of the report (AF 8) as compared to the purported second page of the report (AF 37), it is not necessary to determine in this appeal whether this document was actually part of the original recruitment report. We note only that it is plausible, but not a foregone conclusion, that the document was the first page of a two page report.

to the ads placed, the posted sign, the copies of all letters sent to applicants and copies of the return receipt cards and proof of timely mailing, a printout of the announcement placed on the N.Y.S. Dept. of Labor job-posting website, a copy of the prevailing wage request filed which included the prevailing wage determination of the DOL filled in by them on the appropriate pages." According to the employer, this information was in essence a complete response to the audit notification letter.

On May 1, 2013, a three-judge panel of the Board issued a Decision and Order Affirming Denial of Certification. This decision was based solely on the SWA job order issue. The panel did not reach the recruitment report issue.

The Employer petitioned for en banc review of the three-judge panel decision. The Board granted the petition on June 5, 2014. En banc review was granted on issues relating to the SWA job order ground for denial. The Board noted, however, that should it reverse the CO on the SWA job order issue, it would address the recruitment report issue. During the briefing period, the CO filed a letter withdrawing reliance on the SWA job order ground for denial, and requesting that the Board remand the matter to the three-judge panel to consider the recruitment report issue. The Employer opposed granting permission to the CO to withdraw the first ground for denial and a remand for consideration of the second ground for denial. On July 29, 2014, the Board issued an "Order Permitting Withdrawal of Ground for Denial; Denying Motion to Return Matter to Three Judge Panel; and Enlarging Time for Filing of Briefs." Consequently, the issue presently before the Board is whether to affirm or reverse the CO's denial based on the failure of the Employer to present a recruitment report describing the recruitment steps undertaken.

En Banc Briefs

The CO asserts that *HealthAmerica* does not stand for the broad proposition for which the Employer cites it, but rather, the narrow proposition that a minor typographical error in an application should not be grounds for denial. The CO distinguishes the instant case on the ground that it does not involve a typographical error, but rather, the Employer's failure to submit a required document—a complete recruitment report—that the Employer previously had the opportunity to present. The CO argues that he correctly declined to consider the missing page from the recruitment report when the employer sought to submit it with the request for review/reconsideration. The CO argues that BALCA may not consider this documentation because it is not a part of the record upon which the CO made his decision. According to the CO, whether the recruitment steps the Employer undertook can be discerned from other documentation in the audit response does not matter because the regulations specify that the employer must describe the recruitment steps taken in a signed recruitment report, 20 C.F.R. § 656.17(g), and the Employer in this case failed to meet this regulatory requirement.

The Employer contends that its initial audit response contained a complete recruitment report, even though it mistakenly omitted the first page of the recruitment report from this response, because the information on the missing page could be easily verified in the other documentary evidence that the Employer provided. The Employer argues that this information must be considered because the regulations only state what information is to be contained in the report, not the form in which the information must be provided. The Employer argues that

BALCA should consider the missing first page because it was maintained as part of the audit file and should be considered to have been in existence at the time the Employer filed its application. The Employer contends the late submission of this document is clearly not an attempt to make false statements because the information on the document is duplicative of details that the Employer provided over its signature in the initial audit response and can easily be proven as accurate when compared to the documentary evidence in the audit response. The Employer additionally contends that the instructions in the audit notification letter are contradictory and confusing, since the first page refers to § 656.17(g)(1) and the third page describes a recruitment report that requires different information. *Compare* AF 75 *with* AF 77.

Finally, the Employer contends that the consequences of denial far outweigh the error on which the denial is based, as the CO does not dispute that the Employer performed all of the recruitment steps required by the regulations and did not locate a qualified U.S. worker.

The American Immigration Lawyers Association and the American Immigration Council, filing a joint brief as Amici Curiae, ask the Board to rule that a CO cannot deny a PERM application for failure to comply with the recruitment report requirements in 20 C.F.R. § 656.17(g)(1), when the employer's compliance is evident from the record despite the omission of certain documentation. AILA contends that the regulatory framework governing the application process permits, and due process and fundamental fairness require, that the CO request missing documentation, pursuant to the audit regulation at 20 C.F.R. § 656.20(d)(1), when other evidence in the record indicates that such documentation was in existence at the time the application was filed and maintained by the employer to support the PERM application.

DISCUSSION

Requirement of Discrete Recruitment Report Describing Recruitment Steps Undertaken

The Employer argues that its audit response contained a complete recruitment report because, even though its recruitment report did not describe the recruitment steps undertaken, those steps could easily be verified through the other documentary evidence provided with the audit response and from the attestations made on the Form 9089 application. The Employer contends that the regulations only state what information is to be contained in the report, not the form in which the information must be provided. This argument is untenable.

Pursuant to 20 C.F.R. § 656.24(b), the CO will make a determination either to grant or deny the labor certification on the basis of whether or not:

> (1) The employer has met the requirements of this part.
> (2) There is in the United States a worker who is able, willing, qualified, and available for and at the place of the job opportunity.
> . . .
> (3) The employment of the alien will not have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. …

One of the requirements of the Part 656 regulation governing the basic labor certification process set forth at 20 C.F.R. § 656.17 is preparation of a recruitment report.[5] Specifically, Section 656.17(g)(1) (emphasis added) provides:

> (g) *Recruitment report*. (1) The employer must prepare a recruitment report signed by the employer or the employer's representative noted in § 656.10(b)(2)(ii) ***describing the recruitment steps undertaken*** and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections. The Certifying Officer, after reviewing the employer's recruitment report, may request the U.S. workers' resumes or applications, sorted by the reasons the workers were rejected.

BALCA panels interpreting Section 656.17(g)(1) have uniformly concluded that the regulation requires an employer to prepare a discrete report that, inter alia, describes the recruitment steps undertaken.[6] We agree. The plain language of the regulation requires an

[5] Little regulatory history exists to explain why the Employment and Training Administration ("ETA") requires a recruitment report describing the recruitment steps undertaken. Prior to the December 1980 amendments to 20 C.F.R. Part 656, the State Employment Security Agency ("SESA," now known as a State Workforce Agency) just sent an employer's application and information to the CO after the supervised recruitment was completed. The regulations contain no mention of a recruitment report. In January 1980, ETA proposed revisions to Part 656 reflect ETA's experience in administering the program. 45 Fed. Reg. 4918 (Jan. 22, 1980). Although a recruitment report prepared by the employer was not part of the proposed rule, ETA added a requirement in the Final Rule published in December 1980, that an employer provide the SESA with a written recruitment report that identifies each recruitment source by name. 45 Fed. Reg. 83926, 83940 (Dec. 19, 1980), publishing as a final rule 20 C.F.R. § 656.21(j)(1)(i). ETA did not state in the preamble to the Final Rule why it added this requirement. All subsequent versions of the Part 656 regulations, including the current PERM regulations, included the recruitment report requirement without elaboration in the regulatory history.

[6] *See Addessi Fencing, LLC*, 2011-PER-246 (July 10, 2014) ("The regulation clearly requires an employer to prepare a discrete recruitment report, and clearly delineates the elements required for inclusion in the report. The Employer's position, that the information for the report would be evident from the supporting documentation, places the burden on the CO to fish through the audit response documentation to decipher what recruitment steps were taken. The Employer's position places the burden on the CO to write the report for the Employer, and would render the regulation superfluous."); *Florida Brasil, Inc.*, 2011-PER-2844 (Jan. 16, 2013) (panel was not persuaded by employer's argument that the CO could gather the needed information himself from the multiple documents included within the audit response; such a procedure contravenes the regulatory requirement of a recruitment report); *Linares Construction Inc*., 2011-PER-1551 (Dec. 27, 2012) (affirming denial where recruitment report did not describe recruitment steps undertaken); *Nasser Eskendri, M.D., LLC*, 2011-PER-459 (Dec. 26, 2012) ("The evidence of the required recruitment steps is present, but the actual report of these recruitment steps is not. Section 656.17(g) requires a signed report of describing recruitment steps that is separate from the evidence of those steps themselves."); *R & K Services, Inc*., 2011-PER-1546 (Nov. 29, 2012) (affirming denial where recruitment report did not describe recruitment steps undertaken); *Basonas Construction Corp*., 2011-PER-2382 (Oct. 11, 2012) (affirming denial where recruitment report did not include SWA job order in discussion of recruitment steps undertaken); *CVS RX Services, Inc.*, 2011-PER-1005 (Aug. 7, 2012) (certification denied where the recruitment report referenced applicants received outside the relevant recruitment report, preventing the CO from making "a determination as to the recruitment steps undertaken, the results achieved and the number of hires during the relevant recruitment period"); *Choice Builders of CT, LLC*, 2011-PER-1234 (Aug. 6, 2012) (affirming denial of certification because the recruitment report was completed five days prior to end of SWA job order; therefore the recruitment report logically could not have described the recruitment steps undertaken and the results achieved); *St. Rose Church*, 2011-PER-175 (Mar. 26, 2012) ("The regulation is clear as to the required contents of the recruitment report and the CO

employer to "prepare" a signed report "describing the recruitment steps undertaken." Merely providing recruitment documentation is not the equivalent of describing – that is, giving an account of – the recruitment steps undertaken. Section 656.17(g)(1) clearly requires an employer to create a discrete recruitment report giving an account of the recruitment steps.

Submission of Missing Documentation with Motion for Reconsideration

The Employer sought to cure its failure to submit a recruitment report describing the recruitment steps undertaken by supplying a document with a motion for reconsideration that the Employer argues was the first page of the recruitment report. The Employer contends that this page, which had been inadvertently omitted from the audit response, described the recruitment steps undertaken.

The regulation at 20 C.F.R. § 656.24(g) governs motions for reconsideration of the denial of certification by the CO. Section 656.24(g)(2) of that regulation places limitations on the documentation that may be used to support a motion for reconsideration:

> (2) For applications submitted after July 16, 2007, a request for reconsideration may include only:
>
> (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
>
> (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of §656.10(f).

The evidentiary bar of Section 656.24(g)(2) applies in this case. The application was submitted after July 16, 2007. The additional page of the recruitment report was not submitted in response

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required no more detail in the recruitment report than the regulation calls for."); *Dak, Inc.*, 2011-PER-739 (Mar. 15, 2012) ("The regulation anticipates a complete recruitment report that will not compel the CO to review the Form 9089 and other documentation to learn what steps were taken."); *International Reinsurance Managers, LLC*, 2011-PER-1280 (Jan. 27, 2012) (affirming denial based on failure of recruitment report to describe recruitment steps undertaken, and other elements of report; employer's assertion that it misunderstood what was required to be in the recruitment report found not to be a convincing argument to excuse the failures); *Greener Acres Landscape Artistry*, 2010-PER-470 (May 13, 2011) (affirming denial where recruitment report listed none of the recruitment steps undertaken); *Astir IT Solutions, Inc.*, 2010-PER-480 (Apr. 20, 2011) (meeting one requirement for the recruitment report did not overcome failure to describe recruitment steps undertaken); *Postworks*, 2010-PER-537 (Apr. 14, 2011) (denied affirmed where, although the recruitment report listed the applicants and the reasons for their rejection, it failed to describe the recruitment steps undertaken); *N Wexler PE PC (Wexler & Associates)*, 2010-PER-420 (Mar. 29, 2011) (denial of certification affirmed where recruitment report listed none of the recruitment steps undertaken or the results achieved by each); *Oral Arts Prosthetics, Ltd*., 2010-PER-389 (Mar. 17, 2011) (denial affirmed where, inter alia, the description in the recruitment report of the recruitment steps undertaken was vague).

to a request from the CO.[7] And, although the Employer argued that the additional page of the recruitment report was part of its document retention file and was in existence at the time the application was filed, the Employer had the opportunity – and in fact was under the direction – to present a recruitment report compliant with Section 656.17(g)(1) in response to the Audit Notification letter. Thus, Section 656.24(g)(2) barred the Employer from supporting its motion for reconsideration with a document that it contends was part of the original recruitment report.

Discretion to Request Additional Information

Amici Curiae ask the Board to rule that a CO cannot deny a PERM application for failure to comply with the recruitment report requirements in 20 C.F.R. § 656.17(g)(1), when the employer's compliance with recruitment requirements is evident from the record. Amici contend that the regulatory framework governing the application process permits, and due process and fundamental fairness require, that the CO request missing documentation, pursuant to the audit regulation at 20 C.F.R. § 656.20(d)(1), when other evidence in the record indicates that such documentation was in existence at the time the application was filed and maintained by the employer to support the PERM application.

Section 656.20(d)(1) states (emphasis added):

> (d) Before making a final determination in accordance with the standards in §656.24, whether in course of an audit or otherwise, the Certifying Officer ***may***:
>
> (1) Request supplemental information and/or documentation

The plain language of Section 656.20(d)(1) vests the CO with discretion to request supplemental information and/or documentation. There is nothing in this regulation, however, to suggest that the CO is compelled to request that an employer provide a more complete recruitment report if the one supplied with the audit response does not contain a description of the recruitment steps undertaken. Moreover, we find nothing in the instant record to suggest that it was an abuse of discretion by the CO under the facts of this case not to request submission of a more complete recruitment report prior to determining whether to grant certification based on the audit response. *See Miaofu Cao*, 1994-INA-53 (Mar. 14, 1996) (en banc), USDOL/OALJ Reporter at 5 ("The CO is not required to provide a detailed guide to the employer on how to achieve labor certification. The burden is placed on the employer by the statute and regulations to produce enough evidence to support its application."); *California Webbing Mills, Inc.*, 2009-PER-207 (Aug. 7, 2010) (CO is not obligated to request documentation to enable an employer to correct a deficiency).

Sufficiency of Notice of Required Documentation

The Employer argued that the instructions in the Audit Notification letter were contradictory and confusing because the first page refers to the recruitment report required

[7] By the time the Employer submitted the additional page of the recruitment report, it was no longer a timely response to the Audit Notification letter.

pursuant to Section 656.17(g)(1), whereas the third page describes a recruitment report that requires different information. The Audit Notification letter issued by the CO in this matter directed in the basic boilerplate portion of the letter that the Employer submit "[t]he recruitment report for this position as described in § 656.17(g)(1) signed by the employer or the employer's representative describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, summarized by the lawful job-related reasons for such rejections." (AF 75-76). The letter's boilerplate also stated: "Be advised, the Office of Foreign Labor Certification Certifying Officer, after reviewing the employer's recruitment report, may request U.S. workers' resumes or applications, sorted by the reasons the workers were rejected." (AF 76). Later in the non-boilerplate portion of the Audit Notification letter, the CO stated in pertinent part:

> *In addition to information requested in the body of the letter*, please provide the following:
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> * * *
>
> Please provide the resumes and applications for all U.S. workers who applied for the employer's job opportunity listed on the Form 9089. In addition, please provide a report that lists the following information for each U.S. worker rejected for the job opportunity: If appropriate, the date(s) the employer contacted each U.S. worker; the date(s) the employer interviewed the U.S. worker; if appropriate, the reason(s) the employer did not interview the employee; the specific lawful job related reason(s) the U.S. worker was rejected; and how the U.S. worker was informed he or she did not qualify for the job opportunity.

(AF 77) (emphasis added).

The Board has recognized that ambiguous instructions from the CO may be grounds for permitting an employer an additional opportunity to supply information or documentation requested by the CO. *See Miaofu Cao*, *supra*.[8] In the instant case, the Audit Notification letter's directives required the submission of two types of recruitment reports. Those directives, however, were not so ambiguous as to have misled the Employer into believing that it did not need to present a recruitment report that described the recruitment steps undertaken. Rather, the Audit Notification clearly indicated that the Employer was required to submit its § 656.17(g)(1) report, and a report listing additional information about how each U.S. applicant was handled.

[8] In *Miaofu Cao*, the Board stated: "Once the CO provides specific guides, he/she must be careful not to mislead the employer into believing that the specific evidence requested is all that is needed to rebut the NOF and for the application for labor certification to be granted. Often it is necessary for the CO to request specific information that he/she has a particular interest in obtaining in light of the deficiencies of the application. However, when the CO requires more than the specific information requested to find that the deficiency has been remedied, he/she must clearly state this fact in the Notice of Findings to avoid any ambiguity." *Id*. at 5.

Fundamental Fairness

Finally, the Employer argues generally that fundamental fairness mandates that the Board reverse the denial of certification. The Employer's extended argument in its en banc brief on fundamental fairness pointed out, *inter alia*, that the record showed compliance with the recruitment steps even though not described in the recruitment report; that the CO failed to exercise any discretion to look at the Employer's information and documentation about its compliance with the recruitment steps; that the adjudication of the application was marked by delays and impliedly retaliatory procedural anomalies such as a request for information followed by an audit notification;[9] and language and regulatory interpretation used by the CO suggests that the CO was biased. The Employer argued that "[t]he denial of labor certification rests solely on the form of recruitment report which allegedly did not meet the CO' s exacting, indeterminate, and/or *ultra vires* requirements, and like *HealthAmerica*, elevates form over substance." Employer's En Banc Brief at 4.

The Board declines to invoke the concept of fundamental fairness to reverse a denial of certification where the Employer failed to submit a compliant recruitment report with its audit response, and the regulations clearly barred the Employer from correcting that failure by submitting additional audit response documentation for the first time with a motion for reconsideration. Concededly, if the Employer in fact merely inadvertently forgot to include the first page of its recruitment report with its audit response, the defaulting of the entire application is a severe consequence. But BALCA cannot substitute its judgment for that of the Employment and Training Administration and judicially re-write the regulations to produce the result sought by the Employer. Although there was undoubtedly a very long adjudication of this application, the length of the proceedings did not cause the Employer to submit an incomplete recruitment report with its audit response. *See AG Forte, LLC*, 2010-PER-148 (May 26, 2010) (laches not applied where delay had no impact on the employer's ability to respond to the CO's audit notification). Although the Employer pointed out an instance where the CO mischaracterized the Employer's argument,[10] and argued that the CO's actions in this case indicated that the CO would "only consider documentary evidence provided by way of disproving but not proving compliance with the regulations," we are not persuaded by the Employer's suggestion that possible bias on the part of the CO supports a reversal of the denial of certification. It is the combination of the Employer's error in not submitting a compliant recruitment report at the time of its audit response, together with the PERM regulations' unforgiving rule concerning what evidence may support a motion for reconsideration, which caused denial of this application rather than any purported bias on the part of the CO.

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[9] In its En Banc brief, the Employer characterized this procedure as two audits. Employer's En Banc Brief at 13. The first "audit," however, was actually the CO's request for information about the Employer's "infeasibility to train" contention. *See* n.3, *supra*.

[10] The CO had characterized the Employer's argument as being that the other documentation provided with the audit response "constructively" established the recruitment steps undertaken by the Employer in lieu of a complete recruitment report. The Employer's actual argument, however, was that the audit response "conclusively" established the recruitment steps undertaken by the Employer. *See* Employer's En Banc Brief at 5-7.

The Employer also cites *Denzil Gunnels*, 2010-PER-628 (Nov. 16, 2010), in support of its argument that it would be unfair to deny certification in a case like this, where the Employer has "successfully shown, on reconsideration, that the application represented a recruitment effort that actually complied with the regulations, and the only remaining objection concerns form rather than substance…." Employer's En Banc Brief at 4. The Employer's citation to *Gunnels* apparently is in reference to that decision's recitation of the regulatory history of the 2007 "no-modification" amendment to the PERM regulations in which the panel concluded that ETA indicated in the preamble to the final rule that the Department has the ability "to *waive* the letter-perfect requirement for applicants who successfully show, on reconsideration, that the application represented a recruitment effort that actually complied with the regulations." *Gunnels, supra* at 10, citing 72 Fed. Reg. at 27917-18.[11] The *Gunnels* panel pointed out the CO does occasionally waive regulatory requirements, even after the 2007 amendments. *Id*. at 10.n.5.

The Employer reads too much into the panel's decision in *Gunnels*. That decision was focused on instances in which the CO's decision to treat a motion for reconsideration as a request for Board review had the effect of preventing an employer from getting into the record documentation that was necessary to rebut the ground for denial, where submission of such documentation is permitted by the regulations. The panel in *Gunnels* noted that "for cases in which the supplementary argument or evidence is squarely barred by the proper application of Section 656.24(g), the CO will not be held to have abused his discretion to treat a motion for reconsideration as a request for BALCA review on grounds that exercise of the discretion denied the employer an opportunity to present relevant argument or evidence because, under the rule, an employer must present that argument or evidence at the first opportunity." *Id*. at 15. Accordingly, the panel's decision in *Gunnels* does not support a finding that an employer's submission of evidence on reconsideration showing actual compliance with the regulations somehow defeats the evidentiary bar imposed by Section 656.24(g)(2). When ETA added Section 656.24(g)(2) to the regulations, it barred an employer from correcting certain errors through a motion for reconsideration that is dependent on submission of certain evidence, and thereby limited the CO's opportunity to waive a failure to timely submit compliant documentation. To the extent that the Employer's argument is that, regardless of the Section 656.24(g)(2) evidentiary bar, the CO should have waived the requirement that the recruitment report describe the recruitment steps undertaken given all the other documentation submitted with the audit response, we find no abuse of discretion by the CO. It is not an abuse of discretion to require compliance with the regulations.

[11] In this regard, the *Gunnels* panel cited language in the preamble stating that ETA "understands that human error occurs in limited circumstances" and that "the Department believes it is capable of distinguishing between typographical or inadvertent errors and willful false statements." It is not clear, however, that the *Gunnels* panel was correct in concluding that this this passage indicated that ETA contemplated the CO's ability to waive some errors where the application represented a recruitment effort that actually complied with the regulations. Rather, in the context of the entire paragraph, ETA seems to have been merely saying that it would not charge an employer with perjury for attesting to the accuracy of an application merely because that application contained a typographical or inadvertent error. *See* 72 Fed. Reg. at 27917.

ORDER

Based on the foregoing, **IT IS ORDERED** that the three-judge panel's May 1, 2013 Decision and Order is **VACATED,** and that the Certifying Officer's **DENIAL** of certification in this matter is **AFFFIRMED**.

Entered at the direction of the Board by:

Digitally signed by TODD R. SMYTH
DN: CN=TODD R. SMYTH, OU=LEGAL COUNSEL, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

Todd R. Smyth
Secretary to the Board