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BALCA DISREGARDS SEPARATE ENTITY IN MATTER OF PA'LANTE

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This post is about a small bore issue. It is about a quibble that I have about a footnote in a decision of the Board of Alien Labor Certification Appeals (BALCA) in *Matter of Pa'Lante*, 2008 PER 00209 . But I think it is worth pointing out so that a future appellant can remind BALCA that it got it wrong.

I have no dispute with *Matter of Pa'Lante* in general. It resulted in a good outcome for the employer who was snared by PERM's hyper-technical rules. The labor certification, filed in 2006, was for an executive pastry chef, and the position required a bachelor's degree in culinary arts and one year of experience in the job offered. In the alternative, the position required a combination of education and experience, amounting to two years of experience. The sponsored employee had the requisite degree, and only needed to demonstrate one year of experience in the offered position. According to the decision, the labor certification did not list the employee's prior experience, and the labor certification was denied as the pastry chef did not qualify for the job for which he had been sponsored. It only listed his experience with the employer who was sponsoring him. If one reads carefully, the decision states that "the only jobs listed in Section K. involved prior experience by the Alien in the job offered with the restaurant at which he currently works for the petitioning Employer, or what appears to be other restaurants owned by the Employer it only listed his experience with this employer or with restaurants owned by the same employer from 2002 to 2006." With respect to experience gained with the same employer, 20 C.F.R. 656.17(i) clearly requires the employer to state its actual minimum requirements and that it has not hired people below these actual minimum requirements. So if the employer hired someone at an entry level, it cannot list one year as a minimum requirement as the sponsored employee was not hired

with that experience.

But in *Pa'Lante* the pastry chef had substantial prior experience before 2002, which was introduced in response to the audit notification by way of a detailed evaluation of an educational consultant that was prepared in 2000. BALCA correctly applied *HealthAmerica*, 2006-PER-1, which held that a mere typographical error on the form should not result in a denial if there was actual evidence of compliance and reversed the CO's denial. In *HealthAmerica*, an incorrect date on the application as to when the Sunday advertisement ran was not fatal when it could be proved that the actual advertisement ran on a Sunday. According to BALCA, *Pa'Lante* involved more than a typographical error as there was a wholesale omission of the required experience. On the other hand, BALCA reasoned that since the employer was able to introduce detailed evidence in its audit response and motion for reconsideration that was not fabricated or prepared after the filing, it would forgive the omission of experience and applied HealthAmerica.

Pa'Lante is essentially a good decision as it broadened the *HealthAmerica* doctrine beyond typographical errors. But in footnote 2 of its decision, BALCA stated:

"The record is not clear whether the restaurants listed in Section K of Form 9089 are all owned by he same business entity. They appear to be, possibly making that experience (from March 2002 to the date of filing of the PERM application) ineligible for consideration as experience gained prior to hire by the sponsoring employer. See generally Inmos Corp., 1988-INA-326 (June 1, 1990) (en banc). The Employer seems to acknowledge that it in its reply brief. Nonetheless, the audit documentation clearly establishes that the Alien had the requisite qualifications for the job as early as 2000 - well before he started work for one of the Employer's restaurants."

BALCA cited law that has been overturned. Current 20 C.F.R. 656.17(i)(5)(i) refers to "employer" as an entity with the same Federal Employer Identification Number (FEIN). Thus, if two entities, even if owned by the same person, or where one is a subsidiary and the other a parent, have two FEINs, then experience with one entity can be used as a job requirement by another entity. This change was brought about by the new Program Electronic Review Management (PERM) rule (see 69 Fed. Reg. at 77354 (Dec. 27, 2004)), which rejected the pre-PERM law that considered entities owned by identical shareholders or a parent-subsidiary as the same employer even if they had

different FEINs. Pre-PERM, if the sponsored employee gained experience with one restaurant and was sponsored by another, and both had identical shareholders and corporate officers, that experience was considered on-the-job experience and could not be used as a job requirement in the labor certification. *See e.g. Salad Bowl Restaurants,* 90-INA-230 (BALCA June 12, 1990). BALCA in *Salad Bowl Restaurants* held that for the DOL to consider on-the-job experience gained with the other employer, the sponsoring employer "must demonstrate that its ownership and control are separate and distinct from the company where the employee gained his qualifying experience," and if distinction can be shown, it must also show that the two employers have "distinct operational independence."

Pa'Lante involved a filing after the PERM rule took effect, and any experience gained at a different entity may have still qualified. It appears that the experience of the pastry chef listed from March 2002 may have been eligible for consideration as experience gained prior to hire by the sponsoring employer, contrary to BALCA's assertion in footnote 2. BALCA itself acknowledged that some of the experience may have been gained by other restaurants owned by the same entity. To be fair, nothing in the BALCA decision indicates whether these restaurants had different FEINs. They may not have been separate entities and may have been branches or divisions of one entity. Yet, BALCA did not analyze it this way by distinguishing between the rule prior to PERM and after. BALCA instead cited *Immos Corp*, supra, which held along the same lines as *Salad Bowl Restaurants* that experience gained by an employee at a parent corporation was counted as on-the-job experience when it's wholly owned US subsidiary filed the labor certification. *Immos* along with *Salad Bowl Restaurants* have been overturned after PERM and should not have been relied upon by BALCA.

While many of the rules under PERM have complicated the labor certification process further, one exception was 20 C.F.R. 656.17(i)(5)(i), which elegantly and simply suggests that two entities with different FEINs are not the same employer for purposes of on-the-job experience prohibition. With this rule, there is no longer any need to analyze whether two entities owned by the same shareholder or shareholders had "distinct operational independence." The rule also reflects modern day realities involving corporate reorganizations. To illustrate, if the worker was working for an employer with a different FEIN number that was acquired or merged into the sponsoring employer, the

experience gained by this worker for the predecessor entity would not be considered prohibited "on-the-job" experience, as the experience was gained with an entity with a different FEIN. There was no need for BALCA in *Pa'Lante* to resurrect old ghosts that have long since been exorcised.