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BALCA'S NEW DECISION IN DENZIL GUNNELS OPENS THE DOOR TO SUBMIT MORE EVIDENCE FOLLOWING A LABOR CERTIFICATION DENIAL

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The Board of Alien Labor Certification Appeals (BALCA) has been extremely active recently issuing several important decisions. Since the PERM labor certification process is so exacting and unforgiving, there is very little opportunity for an employer to correct the record in the event of a mistake, or to supplement the record if the Department of Labor (DOL) objects to some aspect of the PERM application and issues a denial. BALCA recently issued an important decision, *Denzil Gunnels*, 2010-PER-00628 (BALCA Nov. 16, 2010), that may provide more opportunities for the employer to provide supplemental evidence following a denial. Indeed, BALCA has made itself relevant again by cutting down on processing times and issuing more decisions. This post is based on a larger article analyzing selected BALCA decisions that will be part of the 13th Annual AILA New York Chapter Immigration Law Symposium on December 1, 2010

As a background, over three years ago BALCA issued *HealthAmerica*, 2006-PER-0001 (BALCA July 18, 2006), a seminal decision, which rejected the certifying officer's (CO) denial of the labor certification based on a typographical error recording a Sunday advertisement on the form, although the employer possessed actual tear sheets of the advertisement. BALCA rejected the CO's position that no new evidence could be submitted as the advertisement tear sheets were part of the PERM compliance recordkeeping requirement and thus was constructively submitted by the employer.

However, not every mistake can be overcome by invoking *HealthAmerica*,

especially mistakes that are clearly in violation of the regulations. It should also be noted that the beneficial impact of HealthAmerica has been somewhat negated by 20 CFR §656.24(g)(2)(ii), which limits documents accompanying a motion for reconsideration to "ocumentation 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)." Still, we see BALCA continuing to rule in favor of applicants who have made errors based on fundamental fairness and in recognition of the fact that the PERM process is an exacting an unforgiving one. Indeed, even in *Federal Insurance Co.*, 2008-PER-00037 (BALCA Feb. 20, 2009), which involved a failure to state the magic language that an employer will accept any suitable combination of experience, training or education on the form, BALCA's decision was grounded in the fundamental fairness doctrine enunciated in *HealthAmerica*, especially since there was no place on the ETA-9089 that signaled to an employer to insert this language. However, as noted below, the trend is for BALCA to be far less forgiving and to apply *HealthAmerica* very narrowly.

BALCA's most recent decision, *Denzil Gunnels*, 2010-PER-00628 (BALCA Nov. 16, 2010) sets forth standards under which the CO must consider an appeal as a request to reconsider rather than treat is as a request for review. 20 CFR 656.24(g)(4) provides that "he Certifying Officer, may, in his or her discretion, reconsider the determination or treat it as a request for review." In *Denzil Gunnels* BALCA found that the CO abused his discretion by failing to consider the employer's request as a motion, and instead, treating it as a request for review. Even though the employer filed a "Request for Review of Denial of Form ETA 9089," it was attempting to submit supplementary evidence, a corrected ETA 9089, after the originally filed ETA 9089 failed to state "yes" or "no" in Section M1. The employer was thus attempting to request a motion for reconsideration, even though it did not say so clearly, and BALCA admonished the DOL indicating that its FAQs did not make clear that if the employer omits the magic word "reconsideration," it will result in the request being placed in the BALCA queue. Note that if the CO sends the file to BALCA, an employer is unable to correct or supplement the record under HealthAmerica as BALCA is unable to consider new evidence.

BALCA in *Denzil Gunnels* concluded by setting forth circumstances under which

the CO may exercise his discretion properly and the circumstances under which it will be found to be an abuse of discretion:

Step 1. Where an employer unambiguously requests BALCA review, the employer has made a tactical decision to appeal to BALCA and can no longer supplement the record. BALCA, however, left open the possibility that even where an employer uses the words “request for review,” but it is clear that the employer is seeking consideration or where there is ambiguity, BALCA will determine whether the CO abused his discretion by sending the file into the BALCA queue without first treating it as a request for reconsideration and reviewing the supplemental evidence.

Step 2. BALCA recognized that not all supplemental evidence can be accepted, and could be barred under 20 CFR §656.24(g)(2)(ii) where the employer did have a prior opportunity to submit evidence to the CO during an audit. This would be a case, labeled as Situation 1, where “Application is Filed - Audit - Audit Response - Final Determination - Reconsideration based on evidence submitted in audit response." Under Situation 1, BALCA will not find that the CO abused his discretion as the supplemental evidence was squarely barred under § 656.24(g)(2)(ii), and the CO was justified in treating the request for reconsideration as an appeal to BALCA. On the other hand, under Situation 2, "Application is Filed - Denial of Application - Reconsideration based on evidence that would have been submitted as part of the audit response," if a PERM application is denied without an audit, and the employer submits supplemental evidence that could be considered as part of the record under *HealthAmerica*, the CO should treat it as a request for reconsideration rather than a request for review. *See also CVS RX Services, Inc.*, 2010-PER-01108 (BALCA Nov. 16, 2010) (CO abused his discretion by referring file to BALCA when employer submitted supplemental evidence, after denial without audit, justifying that a professional journal was appropriate even though the position required a bachelor’s degree with no experience).

Step 3. BALCA further recognized that even in cases that fall squarely under Situation 1, the circumstances of an audit may not have been specific enough to put the employer on notice regarding a specific deficiency. Thus, these cases would be treated under Situation 2, even if an employer received an audit, but argues that it did not receive specific notice, the request for review should be treated as a request for reconsideration so that the employer has a fair opportunity to present supplemental evidence to the CO.

Denzil Gunnels, thus, opens the door for an employer to argue that it may not have received adequate notice of the deficiency and appears to provide a way around a strict application of the prohibition to present supplementary evidence that would otherwise be barred by 20 CFR §656.24(g)(2)(ii). Thus, as an example, in its denial CO objected to whether a Sunday newspaper was appropriate or whether a specific US worker was lawfully rejected or not, one can argue that the generic boilerplate audit notice, even if it asked for evidence of the employer's recruitment, did not adequately apprise the employer of these potential deficiencies, and can seek to supplement the record through a motion to reconsider. On the other hand, if an employer inadvertently submits an erroneous copy of an advertisement in response to an audit notification for evidence of recruitment, BALCA has held that this situation is the precise type of evidence barred by § 656.24(g). *SeeTechdemocracy LLC*, 2009-PER-00459, 2011-PER-00058 (BALCA Nov. 16, 2010).