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SAY WHAT? DID BALCA JUST SAY THAT HEALTHAMERICA HAS BEEN OVERRULED?

Posted on June 4, 2013 by Cora-Ann Pestaina

I hang onto every word of the Board of Alien Labor Certification Appeals (BALCA). It's the only way to make it through the preparation and filing of labor certification applications under Program Electronic Review Management (PERM) as not knowing what BALCA has said on a particular issue could be fatal to any PERM. This recent statement by BALCA stopped me in my tracks for a moment.

In *Matter of Sushi Shogun*, 2011-PER-02677 (May 28, 2013), BALCA said, "*HealthAmerica* has effectively been overruled by the promulgation of 20 C.F.R §656.11(b)." Practitioners who file numerous PERM applications can empathize with my initial panicked gasp at seeing *"HealthAmerica"* and "overruled" in the same sentence.

As a background, over six years ago, BALCA issued *HealthAmerica*, 2006-PER-0001 (BALCA July 18, 2006). In this important en banc decision, BALCA held that the Certifying Officer ("CO") should have reconsidered the denial of a PERM application where documentation held by the employer pursuant to the recordkeeping requirements of PERM conclusively established that the apparent violation was an unintentional typographical error on the ETA Form 9089. The Form 9089 contained an erroneous date indicating that the employer had placed a Monday ad instead of the required Sunday placement, when in fact the employer had acted to place the ad on Sunday and had the newspaper tear sheets of the advertisement to prove it. 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.

Since then, *HealthAmerica* has saved many PERM applications from certain doom and many employers from the Department of Labor's (DOL) hyper-

technical claws. BALCA even broadened *HealthAmerica* beyond typographical errors. In *Matter of Pa'Lante*, 2008 PER 00209 (May 7, 2009), the employer filed the ETA Form 9089 neglecting to list the alien's experience gained before joining the employer and upon which he qualified for the offered position. But the alien's substantial prior experience had been introduced in the employer's response to the DOL's audit notification through a September 2000 report of an Educational Consultant, who reviewed the alien's education and experience credentials. The report clearly established that the alien had the requisite qualifications for the job well before he started work for the employer. 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*.

After all this, does BALCA's statement in *Matter of Sushi Shogun* now mean that employers can no longer cite *HealthAmerica*? In *Matter of Sushi Shogun*, the employer filed a PERM labor certification for the position of "Cook Assistant, Japanese Cuisine." The application was audited and then denied because the ETA Form 9089 listed the prevailing wage as $10.04 per hour when the prevailing wage determination listed the prevailing wage as $10.14 per hour. The employer argued that this was a minor typographical error and a clerical mistake of minor importance; that the Notice of Filing listed the correct wage; that the offered wage was not listed in any advertisements or on the posting with the State Workforce Agency (SWA); and that no potential job applicant could possibly have been misled by the error. BALCA acknowledged that the error was likely just a result of someone mistyping the wage on the ETA Form 9089 and to deny the application essentially elevated form over substance (*HealthAmerica at* 19), but held that its hands were tied since the case was being considered after the promulgation of 20 C.F.R §656.11(b) which states that requests for modifications to an application will not be accepted for applications submitted after July 16, 2007. BALCA even went on to "reject the approach of the majority" in another case, *Jesus Covenant Church*, 2008-PER-200 (Sept. 14, 2009), in which case the employer listed a wage in the SWA job order that was the same as the prevailing wage determination, but 28 cents less than the wage offered to the alien. The majority found that this was a harmless typographical error that did not lead to a conclusion that the job was not clearly open to any U.S. worker. In *Matter of Sushi Shogun* BALCA stated that it is

"reluctant to second-guess the Secretary's policy determination requiring applications filed after July 16, 2007, to be error-free."

BALCA is taking a more firm stand in *Matter of Sushi Shogun*. But its holding can be limited to only preclude the use of *HealthAmerica* in situations involving a modification on the ETA Form 9089. This means that the employer in *HealthAmerica* and even in *Pa'Lante* whose harmless errors would essentially require a modification of the ETA Form 9089 would probably not be as successful in their appeals now. But *HealthAmerica* is still good law and can still be cited in cases where the denial of a PERM application is not consistent with notions of fundamental fairness and procedural due process; where the substantive integrity of the process was preserved; the test of the availability of US workers was valid; the Employer's good faith is evident; the error is harmless; and does not require a modification of the ETA Form 9089.

HealthAmerica lives on by way of cases like *Denzil Gunnels*, 2010-PER-00628 (BALCA Nov. 16, 2010) and *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009). Under *Denzil Gunnels* (which Cyrus Mehta has blogged about here) 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. But, even in cases where the circumstances of a generic audit may not have been specific enough to put the employer on notice regarding a specific deficiency, 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. For example, if the employer's labor certification was denied because the DOL determined that a particular newspaper was not adequate, an employer could argue that the generic audit did not provide adequate notice of the deficiency and thus find its way around a strict application of the prohibition to present supplementary evidence that would otherwise be barred under 20 C.F.R. §656.24(g)(2)(ii). *HealthAmerica* via *Denzil Gunnels* can be influential in such a case which does not involve a modification of the ETA Form 9089.

In *Federal Insurance Co*., 2008-PER-00037 (Feb. 20, 2009), the fact that certain mandatory language pertaining to an alternative requirement under *Matter of Francis Kellogg*, 1994-INA-465 (Feb. 2, 1998) (en banc), did not appear on the ETA Form 9089 was not fatal as there is no space on the Form for such language. BALCA held that a denial in that instance would offend fundamental fairness

and due process. A case with a similar type of issue, not involving a modification of the ETA Form 9089 can still be approved today despite BALCA's grand statement in *Matter of Sushi Shogun*.

HealthAmerica is still alive and is still important to the preservation of the integrity of the PERM process in cases where there has been no demonstration of bad faith or after the fact fabrication and a modification of the ETA Form 9089 is not required.