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UNTIL FURTHER NOTICE! WHY PERM APPLICATIONS MUST CONTINUE TO BE ERROR-FREE?

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In a recent decision, *Matter of Cisco Systems, Inc.* 2012-PER-01179 (June 9, 2016), the Board of Alien Labor Certification Appeals (BALCA) reaffirmed its hardline stance that modifications cannot be made to filed labor certification applications under Program Electronic Review Management (PERM). Although this decision hardly comes as a surprise as the mandate that PERM applications must be "letter-perfect" is commonly accepted, it serves as an important reminder to employers and practitioners alike, that the ETA Form 9089 must always be prepared with tremendous care and diligence.

Matter of Cisco Systems, Inc. involved a denied PERM application filed by the employer for a "software engineer" position. The PERM was denied on the grounds that the employer failed to state the position's actual requirements. As a brief background on the case, the employer had attested on the ETA Form 9089 that its minimum requirements included twenty-four months of relevant work experience. The employer failed to demonstrate in the description of the foreign national's work experience that the he actually possessed the twenty-four months of relevant experience at the time of hire. Subsequently, the Certifying Officer (CO) denied the application on the grounds that since the employer was willing to hire a foreign worker who did not possess the requisite twenty-four months of experience then this could not be the employer's actual minimum requirement. The employer had not presented any evidence of an applicable exception such as experience gained with the employer in a substantially different occupation or an infeasibility to train a worker for the position.

The employer appealed the denial on a number of grounds including an

argument that a typo-graphical error had caused some of the foreign national's pre-hire work experience to be omitted from the ETA Form 9089 and that the foreign national actually met the minimum requirements of the position, and therefore the CO should have allowed a modification to the application in light of procedural due process rights and fundamental fairness. Although BALCA upheld the CO's denial and rejected the numerous arguments advanced by the employer, it was BALCA's dismissal of the due process and fundamental fairness violations accompanied by an extensive discussion of its own litany of cases on this issue that was most troubling. In fact, in a rather nonchalant manner, the Board held, "It is well settled that an employer may not modify its application post-filing."

This blanket statement by BALCA denotes the relative inability for an employer to respond to the PERM audit or denial, including those denials arising from the "fatal" typographical error. A brief overview of the evolving nature of law on this topic may be appropriate at this stage. One of the most seminal decisions in this realm is the very first decision rendered by BALCA. Over ten years ago, BALCA issued its decision in *HealthAmerica,* 2006-PER-0001 (BALCA July 18, 2006) which posited the concept of "harmless error." In this case, BALCA held that the denial of the PERM application based on a typographical error was unwarranted but warned that its holding was applicable to the particular facts at hand. In 2007 however, the DOL's Employment and Training Administration amended the PERM regulations and issued a final rule codified at 20 C.F.R. § 656.11(b) which as of July 16, 2007, prohibited any requests for modifications to an application once it had been submitted. Since the issuance of the final rule in 2007, employment-based practitioners have tested the waters by attempting to save PERM applications that had been submitted with some type of error or discrepancy.

A review of the case law, as BALCA has delineated in *Cisco Systems*, would tend to support the proposition that harmless error has become less viable over time. Two of my colleagues have written on the changing legal landscape with respect to post-filing modifications in PERM applications since the Final Rule was implemented in in past blogs. In his 2010 blog, Cyrus Mehta explained how BALCA's decision *in Mater of Denzil Gunnels,* 2010-PER-00628 (BALCA Nov. 16, 2010) may allow for additional opportunities for an employer to provide supplemental evidence once the PERM has been denied. In this case, and as the Board also referenced in *Cisco Systems*, there may be an opportunity to

present additional evidence in response to a PERM denial. If the employer received a denial without first receiving an audit, then the Board has held that employers may provide supplemental evidence that supports a correction of the error at issue. As noted by the Board, this opportunity to present supplemental evidence is only applicable in a small set of circumstances. The employer must have maintained the supplemental evidence as part of their regular record-keeping file for PERM applications, it must have existed at the time the PERM was filed, and the employer was not provided with prior opportunity to provide this evidence through an audit response.

In addition, Cora-Ann Pestaina's 2013 blog expounded upon BALCA's narrowed acceptance of attempts to make post-filing modifications to PERM applications as posited by the PERM denial in *Matter of Sushi Shogun* 2011-PER-02677 (May 28, 2013). That case involved the denial of an application because of a 10-cent difference between the offered wage on the relevant prevailing wage determination and the corresponding ETA Form 9089. BALCA enforced the doctrine of strict compliance in that PERM applications adhere to the regulations and essentially be error-free and letter perfect and held that its hands were tied as a result of the final rule.

In *Cisco Systems*, BALCA pointed to decisions that have sometimes been used by practitioners in a strategic attempt to respond to a PERM denial. The Board distinguished them to further demonstrate that *HealthAmerica* is no longer viable. These cases have proven to be a source of hope in the past for those PERM applications that would otherwise appear to be doomed. Yet BALCA's insistence on being letter-perfect has been the prevailing viewpoint as articulated in *Cisco Systems*. For example, BALCA distinguished the decision in *Matter of Pa'Lante*, 2008 PER 00209 (May 7, 2009), a case that arguably dealt with an analogous fact pattern as *Cisco Systems* and in which BALCA forgave the error made by the employer. For a detailed discussion of Matter of Pa'Lante, please see Cyrus Mehta's blog here. The error omitted the foreign worker's prior work experience but BALCA allowed the employer's modification based on the fact that the underlying PERM application was filed prior to the effective date of the 2007 final rule. Other BALCA decisions were also carefully written off as inapplicable to support a post-filing modification to a PERM application including *Moreta & Associates, Int.* 2009-PER-00008 (August 6, 2009), *O'Connor Hospital*, 2011-PER-76 (Mar. 5, 2012), and *Subhashini Software Solutions* 2007-PER-00043 (Dec. 18, 2007). Through its holding in *Cisco Systems* BALCA has

effectively maintained its hardline stance against modifications and this once again serves as a warning to employers and practitioners to be letter-perfect and error free in their preparation of the ETA Form 9089.

Nonetheless, employers and practitioners should not be utterly discouraged in the event that a typographical error was made on a submitted ETA Form 9089. For example, in *Matter of Heso Electric,* 2010-PER-00670 (April 21, 2011), BALCA vacated and remanded a PERM that was issued a denial by the CO. In this particular case, the employer failed to make a selection for box M-1, which asked whether or not the application was completed by the employer. However, BALCA reasoned that the employer did provide the name and signature of the preparer later on in the ETA Form 9089, and therefore asked the CO to reconsider the issue.

Moreover, this author has also anecdotally had a positive experience with a labor certification denial. A Request for Reconsideration was filed on a PERM denial issued without having been issued an audit. The underlying typographical error on the ETA 9089 concerned the wrong box checked off on question H.13 which asked if knowledge of a foreign language was required to perform the job duties of the position. The employer inadvertently marked yes instead of no, and the CO denied the PERM on the grounds that it could not determine the actual minimum requirements of the position as there was no indication of the foreign national possessing knowledge of a foreign language. In the Request for Reconsideration, the typographical error was acknowledged and the employer stated that a foreign language requirement was never an actual minimum requirement for the position. The denial was clearly issued in error and fundamental fairness and good faith arguments won the day. Despite the reality of strict compliance being the de-facto rule of law that particular PERM application was subsequently approved by the CO. This experience demonstrates that fundamental fairness is not an argument that should ever be completely cast aside. Although the nature of the error and the existence of relevant evidence to rebut the error are important factors to consider, there are limited circumstances through which *HealthAmerica* lives on.

(This blog is for informational purposes only and should not be considered as a substitute for legal advice.)

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