

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 21 May 2007**

**BALCA Case No.: 2007-PER-00001**  
ETA Case No.: A-05174-09273

*In the Matter of:*

**VOODOO CONTRACTING CORP./  
UNIVERSAL CONTRACTING,**  
*Employer,*

*on behalf of*

**RYSZARD SZALA,**  
*Alien.*

Certifying Officer: Melanie Shay  
Atlanta Processing Center

Appearances: Premyslaw Jan Bloch, Esquire  
Brooklyn, New York  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Harry L. Sheinfeld, Counsel for Litigation  
R. Peter Nessen, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **Chapman, Wood and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations.<sup>1</sup>

## **BACKGROUND**

The Employer – a construction company – filed its application for alien employment certification on June 23, 2005 for the position of Heat Transfer Technician. (AF 46-56). This PERM application was a conversion from a pre-PERM application filed on April 16, 2001. (AF 36). The Certifying Officer (CO) denied the application on April 6, 2006 on the ground, *inter alia*, that the Notice of Filing of the Employment and Training Administration (ETA) Form 9089 did not contain the address for the appropriate CO at the National Processing Center with jurisdiction over the application, as required by 20 C.F.R. § 656.10(d)(3)(iii). (AF 8-10).

The Employer filed an appeal/motion for reconsideration on April 24, 2006. (AF 3-7). In the motion, the Employer's attorney argued:

The notice of filing, used in recruitment during the Permanent application was identical in format to the notice of filing used in prior, RIR application process, which did refer job applicants to local and federal Departments of Labor and Regional Certifying Officer of DOL, specifically. The inclusion of the actual address was never mandated by the pre-March 28, 2006 [sic<sup>2</sup>] rules. The requirement of "as identical as original" application, presumably including the original format of posting, is mandated by the Regulations at Section 656.17(d)(4).

The only official guidance, explanation or clarification in Permanent applications processing, other than the Regulations themselves, comes in the form of Frequently Asked Questions, or FAQs, which are regularly published on DOL's website. The first ever FAQ, dealing with notices of

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<sup>1</sup> The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

<sup>2</sup> The PERM rules went into effect on March 28, 2005.

posting, FAQ#7, was only published by DOL on February 24, 2006. In it, DOL gives a specific guidance as to the sample of notice of posting, published on USCIS website in connection with their adjudications of new Schedule A applications: "Yes, an employer may use the posting sample of a Notice of Filing issued by the USCIS and such posting will be honored by DOL ... "and "DOL worked with USCIS to develop the sample posting as a customer service convenience." Unfortunately for USCIS, DOL and their customers, the format of the USCIS sample posting does not have an actual address of the Certifying Officer, but rather refers job applicants to look for one on the Internet.

Given that the PERM program is in its infancy and riddled with its own systemic errors and confusion, to the point of being dysfunctional, it is surprising and contrary to the due process rules and administrative law procedures that the DOL would be so obstinate and inflexible to the minor and harmless errors of its customers. Especially in a case like this, where the employer, in good faith and through no fault of its own, pursued its labor certificate application for nearly five years and through changing standards and procedures.

(AF 6-7). A copy of the Notice of Filing, posted from March 28, 2005 to April 8, 2005, is found in the Appeal File. In regard to the CO's address, it states:

THIS NOTICE IS BEING POSTED IN CONNECTION WITH THE FILING OF AN APPLICATION FOR PERMANENT RESIDENT PETITION. ANY PERSON MAY PROVIDE DOCUMENTARY EVIDENCE BEARING ON THE APPLICATION TO THE LOCAL OFFICE OR THE STATE EMPLOYMENT COMMISSION AND/OR THE REGIONAL CERTIFYING OFFICER OF THE DEPARTMENT OF LABOR.

(AF 27).

The CO denied reconsideration on October 18, 2006, and then forwarded the case to BALCA. BALCA issued a Notice of Docketing on November 7, 2006. The Employer did not file a brief or statement of position. The CO filed an Appellate Brief urging that the CO's denial be affirmed. The CO argued that 20 C.F.R. § 656.17(d) does not require that the Notice of Filing be identical to the one used on a pre-PERM application that is being converted to a PERM application. Rather, the PERM regulation at 20 C.F.R. § 656.17(d)(3)(iii) requires the notice to include the address of the appropriate CO, which

is easily obtainable from ETA's web site. In the instant case, the Employer's notice provided no address whatsoever. The CO also observed that the sample Notice of Filing on the USCIS web site "apparently" did not include the address of any CO but directs the employer to find one on the Internet. Again, the CO noted that the address for the appropriate processing center can be found easily on its web site.

## **DISCUSSION**

The regulation at 20 C.F.R. § 656.10(d)(3) provides:

(3) The notice of the filing of an Application for Permanent Employment Certification must:

- (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

The purpose of section 656.10(d)(3) is to implement the statutory requirement provided by Section 122(b) of Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649, 104 Stat. 4978, effective October 1, 1991, that provided that "any person may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions with respect to the employment of alien workers and co-workers)." ETA, *Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 69 Fed. Reg. 77326, 77337-77338 (Dec. 27, 2004). Clearly, the regulatory requirement to provide the address of the appropriate CO is a reasonable means of implementing this statutory purpose.

The Appeal File establishes that the Notice of Filing used to support the Employer's PERM application did not include the address of the appropriate CO.

Therefore, the Employer was in violation of 20 C.F.R. § 656.10(d)(3)(iii). The Employer presents three defenses to excuse this violation.

First, the Employer observes that it was converting its pre-PERM application into a PERM application. It contends that the regulation at 20 C.F.R. § 656.17(d) mandates that the Notice of Filing be identical for both applications where an employer seeks to convert a pre-PERM application to a PERM application. This contention, however, is not borne out by the regulatory language. The regulation at 20 C.F.R. § 656.17(d) provides, in pertinent part:

(d) *Refiling Procedures.* (1) Employers that filed applications under the regulations in effect prior to March 28, 2005, may, if a job order has not been placed pursuant to those regulations, refile such applications under this part without loss of the original filing date by:

(i) Submitting an application for an identical job opportunity after complying with all of the filing and recruiting requirements of this part 656; and

(ii) Withdrawing the original application in accordance with ETA procedures. ...

\* \* \*

(4) For purposes of paragraph (d)(1)(i) of this section, a job opportunity shall be considered identical if the employer, alien, job title, job location, job requirements, and job description are the same as those stated in the original application filed under the regulations in effect prior to March 28, 2005. For purposes of determining identical job opportunity, the original application includes all accepted amendments up to the time the application was withdrawn, including amendments in response to an assessment notice from a SWA pursuant to § 656.21(h) of the regulations in effect prior to March 28, 2005.

As the CO noted in her Appellate Brief, this regulation requires that the "job opportunity" be identical as to the employer, alien, job title, job location, job requirements, and job description. It does not require that the Notice of Filing be identical. We also note that this regulation requires the new PERM application to comply with "all of the filing and recruiting requirements of this part 656." (emphasis added). The PERM regulation at 20 C.F.R. § 656.10(d)(3) requires that the Notice of Filing of the application be provided

between 30 and 180 days before filing the application. Thus, it is a requirement to post a notice in the months preceding the PERM application, and unlike the posting requirement in the pre-PERM regulation, the appropriate CO's must address be given. Unless a pre-PERM notice happened to meet the new requirements, it would not be sufficient to support the PERM application. Thus, we find that Section 656.17(d) does not excuse the Employer's failure to comply with Section 656.10(d)(3)(iii)

The Employer's second argument is that it was led to believe by an ETA FAQ and USCIS sample notice that it was not necessary to include the CO's actual address in the posting. The ETA FAQ states:

#### **USCIS POSTING SAMPLE**

**The United States Citizenship and Immigration Services (USCIS) has posted, or will soon post, a sample of a Notice of Filing for a Schedule A permanent labor certification on their website. Will the Department of Labor accept/honor such a posting as sufficient proof of the Notice of Filing for a non-Schedule A permanent labor certification?**

Yes, an employer may use the posting sample of a Notice of Filing issued by the USCIS and such a posting will be honored by the Department of Labor (DOL) provided that the Notice of Filing complies with all Department of Labor regulatory requirements. DOL worked with USCIS to develop the sample posting as a customer service convenience. DOL will honor the use of the sample, but is not requiring use of the sample. Employers may use other forms as long as they comply with the regulations.

[http://www.ows.doleta.gov/foreign/pdf/perm\\_faqs\\_2-21-06.pdf](http://www.ows.doleta.gov/foreign/pdf/perm_faqs_2-21-06.pdf) It is noted that this FAQ stated that ETA would honor a posting based on the USCIS sample "provided that [it] complies with all Department of Labor regulatory requirements."

The USCIS web site contains a redacted version of the Adjudicator's Field Manual, *Chapter 22 Employment-based Petitions, Entrepreneurs and Special*

*Immigrants*. (updated as Sept. 12, 2006). This Manual contains what appears to be the sample Notice of Filing referred to by the Employer:<sup>3</sup>

(v) Sample Notice of Posting.

There is no specific form that petitioning employers must use to comply with the notice of posting requirements for Schedule A petitions. The following is a sample notice of posting which petitioners may elect to use for their posting notices. USCIS worked with DOL to develop the sample as a customer service convenience. Adjudicators should accept posting notices that are modeled after the sample, but should not require use of the sample. Petitioning employers may use other forms as long as they comply with the DOL regulations. Petitions already approved should not be reopened and revoked for failure to comply with posting requirements.

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**SAMPLE NOTICE OF FILING OF APPLICATION UNDER THE  
U.S. DEPARTMENT OF LABOR'S PERMANENT LABOR  
CERTIFICATION PROGRAM**

An application concerning the employment of one or more alien workers for the following permanent position will be filed with the Department of Labor (for non-schedule A positions) or with the Department of Homeland Security (for Schedule A positions). This Notice of Filing will be posted for 10 consecutive business days, ending between 30 and 180 days before filing the permanent labor certification application.

**POSITION TITLE:**

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**POSITION DUTIES:**

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<sup>3</sup> This same sample posting is also found on the USCIS web in a Memorandum entitled "Guidance for Schedule A Blanket Labor Certifications effective February 14, 2006." [http://www.uscis.gov/files/article/afm\\_ch22\\_021406.pdf](http://www.uscis.gov/files/article/afm_ch22_021406.pdf) and [http://www.uscis.gov/files/article/afm\\_ch22\\_021406.pdf](http://www.uscis.gov/files/article/afm_ch22_021406.pdf) and in an Interoffice Memorandum dated September 12, 2006, and entitled "AFM Update: Chapter 22: Employment-based Petitions (AD03-01)." [http://www.uscis.gov/files/article/afm\\_ch22\\_091206R.pdf](http://www.uscis.gov/files/article/afm_ch22_091206R.pdf)

Memorandum for Regional Directors, et al. Subject: *AFM* Update:

Chapter 22: Employment-based Petitions (AD03\_01). 19

**RATE OF PAY:** \$ \_\_\_\_\_ per \_\_\_\_\_

The employer will pay or exceed the prevailing wage, as determined by the U.S. Department of Labor

**LOCATION OF EMPLOYMENT:**

\_\_\_\_\_  
This notice is provided in compliance with 20 CFR 656.10(d). Any person may provide documentary evidence bearing on the application to the Certifying Officer of the U.S. Department of Labor holding jurisdiction over the location of the proposed employment. Contact information for these offices can be found on the Internet at [www.foreignlaborcert.doleta.gov/foreign/contacts.asp](http://www.foreignlaborcert.doleta.gov/foreign/contacts.asp).

This notice is being provided to workers in the place of intended employment by the following means:

- Posting a clearly visible and unobstructed notice, for at least ten (10) consecutive business days, in conspicuous location(s) in the workplace, where the employer's U.S. workers can readily read the posted notice, including but not limited to locations in the immediate vicinity of the wage and hour notices.

***AND***

- Publishing the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.

**DATE POSTED:** \_\_\_\_\_

**DATE REMOVED:** \_\_\_\_\_

**LOCATIONS WHERE THE NOTICE WAS POSTED:**

\_\_\_\_\_  
**MEANS OF IN-HOUSE NOTICE, if applicable:**

\_\_\_\_\_  
**EXPLANATION OF ANY LACK OF IN-HOUSE NOTICE:**

\_\_\_\_\_  
\_\_\_\_\_

I attest, under penalty of perjury, that the above notice was provided as shown.

\_\_\_\_\_  
[PRINTED NAME AND TITLE] [SIGNATURE]

DATE: \_\_\_\_\_

[www.uscis.gov/propub/ProPubVAP.jsp?dockey=724ce55f1a60168e48ce159d286150e2](http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=724ce55f1a60168e48ce159d286150e2)

As the CO noted in her Appellate Brief, this sample Notice states: "Any person may provide documentary evidence bearing on the application to the Certifying Officer of the U.S. Department of Labor holding jurisdiction over the location of the proposed employment. Contact information for these offices can be found on the Internet at [www.foreignlaborcert.doleta.gov/foreign/contacts.asp](http://www.foreignlaborcert.doleta.gov/foreign/contacts.asp)." This link goes to a page on which the jurisdictional responsibilities for PERM processing are specified, and contact information is provided. There are only two PERM processing centers, so identifying which CO has jurisdiction over a case and the address for that CO is not onerous or obscure.

The Employer's posting in this case did not provide any address, or even a URL to the CO's contact information as provided for in the sample Notice. Moreover, the FAQ cited by the Employer was posted in February 2006. The posting relied upon by the Employer to support its PERM application occurred from March 28, 2005 to April 8, 2005. (AF 27). Accordingly, the Employer did not actually use this sample as a model for its posting, and its failure to provide the appropriate CO's address in its posting is not excused by reference to the USCIS sample notice in ETA's FAQ.

The Employer's third defense is a plea to forgive the error based on the fact that the PERM regulations were new when the Employer filed its application, and that it would be contrary to due process not to forgive the Employer's "minor and harmless" error. The Board has recognized that notions of fundamental fairness and procedural due process are applicable in PERM processing. *See generally HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc). However, as noted above, the Notice of Filing requirement is an implementation of a statutory notice requirement designed to assist interested persons

in providing relevant information to the CO about an employer's certification application. It is not a regulation to be lightly dismissed under a harmless error finding.<sup>4</sup> Nor does its enforcement offend fundamental fairness or procedural due process.

Based on the foregoing, we find that the CO properly denied certification.

## **ORDER**

**IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of Alien Labor  
Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis

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<sup>4</sup> We note that the pre-PERM regulations included a "harmless error" provision that permitted the CO to grant certification even if the Employer failed to meet all the regulatory requirements. *See* 20 C.F.R. § 656.24(b)(2) (2004). This provision was omitted from the new PERM regulations.

for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.