

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 14 November 2008**

**BALCA Case No.: 2008-PER-00073**  
ETA Case No.: A-06144-20778

*In the Matter of:*

**YASMEENA CORPORATION**  
**d/b/a**  
**PALACE OF ASIA,**  
*Employer,*

*on behalf of*

**MANOJ KUMAR DHRUVA JOSHI,**  
*Alien.*

Certifying Officer: Melanie Shay  
Atlanta Processing Center

Appearances: Stuart A. Yeager, Esquire  
Yeager & Etkind, Attorneys at Law  
Rockville, Maryland  
*For the Employer and the Alien*

Gary M. Buff, Associate Solicitor  
Frank P. Buckley, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

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

**PAMELA LAKES WOOD**  
Administrative Law Judge

## **DECISION AND ORDER**

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. The only issue on appeal is whether the failure of the Employer to date Section N-3 of the ETA Form 9089 renders the application incomplete, and therefore subject to denial under 20 C.F.R. § 656.17(a).

## **BACKGROUND**

The Employer is a restaurant which filed a labor certification application for the position of Restaurant Cook. (AF 25-34). The Employer mailed its ETA Form 9089 application rather than filing online. In Section L, the Alien signed and dated the application. In Section M, the Employer's attorney signed and dated the application. In Section N, the Employer signed, but did not date the application. Section N of the application contains an employer's certification of compliance with a number of conditions of employment, and a declaration under penalty of perjury that the information contained in the application is true and accurate. (AF 32-33). Below the signature box in Section N, the ETA Form 9089 states:

*Note* – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be complete when submitting by mail. If the application is submitted electronically, any resulting certification **MUST** be signed immediately upon receipt from DOL before it can be submitted to USCIS for final processing.

(AF 33).<sup>1</sup>

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<sup>1</sup> The Form 9089 instructions state:

**Section N  
Employer Declaration**

1. Enter the full legal name of the employer signing the application.
2. Enter the job title held by the employer.

The Certifying Officer (“CO”) date stamped the application as received on May 1, 2006, (AF 25), and accepted the application for processing on that same date. (AF 7).

On November 2, 2006, the CO issued a letter denying certification. (AF 7-9). The sole ground for denial was that the Employer’s declaration in Section N failed to indicate the date on which it was signed. (AF 9).

By letter dated November 28, 2006, the Employer’s attorney filed a motion for reconsideration on behalf of the Employer. (AF 5-6). The Employer argued that the omission of the date was a de minimus error and immaterial to the substance of the application.

The CO sent the Employer an e-mail denying reconsideration, apparently on January 2, 2008.<sup>2</sup> (AF 3-4). The e-mail did not provide any explanation of the grounds for the denial of reconsideration.<sup>3</sup>

The CO issued a formal letter denying reconsideration on June 18, 2008. (AF 1-2).<sup>4</sup> The CO reasoned that “[w]ithout the signature date, the Certifying Officer cannot

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3. The signature of the employer identified by question 1 and the date of signature are required.

The date of signature must be in *mm/dd/yyyy* format.

**Note** – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be completed when submitting by mail. If the application is submitted electronically, the certification **MUST** be signed immediately upon receipt from DOL before it can be submitted to USCIS for final processing.

*Instructions for ETA Form 9089* at 11 ([www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf](http://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf)).

<sup>2</sup> The copy of the e-mail in the Appeal File appears to show only the date that the e-mail was printed rather than the date that it was actually sent.

<sup>3</sup> The e-mail gave the Employer the option to withdraw the application or to continue with an appeal to BALCA. The e-mail stated that if no reply was received, the matter would automatically be forwarded to BALCA. (AF 3). According to the Employer’s brief on appeal, the Employer opted not to reply on the expectation that the matter would be sent on to BALCA. (Employer’s Brief at 3).

determine whether the employer is attesting to the declarations before or after recruitment and application preparation is complete.” Thus, the CO found that the date was required, and that the denial of labor certification was valid.<sup>5</sup>

The CO then forwarded an Appeal File to BALCA. BALCA issued a Notice of Docketing on June 25, 2008.

The CO filed an appellate brief dated August 7, 2008. The CO argued that it is customary to date a document when it is signed, especially when a certification or declaration is being made. In this regard, the CO cited the section of the United States Code addressing unsworn declarations under penalty of perjury (28 U.S.C. § 1746) for comparison. The CO reiterated that without the signature date, the CO cannot determine whether the employer is attesting to the declarations before or after recruitment and application preparation is complete. The CO distinguished the BALCA en banc decision in *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), on the ground that the error in the instant case was not a typographical error that masked an actual compliance with the regulation, but was omission that rendered the application incomplete. Under 20 C.F.R. § 656.17(a), incomplete applications are to be denied.

The Board received the Employer’s appellate brief on August 8, 2008. The Employer admitted that the Employer’s signature was not dated on the ETA Form 9089, Section N-3, but argued that the CO’s rationale for finding that this was a material omission – that without the date the CO could not determine whether the employer is attesting to the declarations before or after recruitment and application preparation is complete – was specious. The Employer pointed out that the bulk of PERM applications are filed electronically, and that electronically filed applications do not require the

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<sup>4</sup> The Employer’s Appellate Brief states that neither the Employer nor its attorney received the CO’s June 18, 2008 letter, and would not have been aware of it had it not been included in the copy of the Appeal File sent to the Employer’s attorney. (Employer’s Brief at 3).

<sup>5</sup> The denial letter also contains a paragraph “accepting” the Employer’s reasoning in its motion for reconsideration on Sections I-8, I-9, I-11, J-11 and J-19 of the application. But the Appeal File does not contain any citation of error for those portions of the application, and the Employer’s motion for reconsideration does not contain any argument about those Sections of the application.

employer to date the application at the time of filing. Thus, for electronic filings, the CO does not know whether the employer is attesting to the declarations before or after recruitment and application preparation is complete. The Employer argued that it would be nonsensical to impose a higher standard on those who file by mail. The Employer pointed out that in both electronic and paper filings, information about the timing of the recruitment steps is detailed, which should permit the CO to “independently determine whether the employer adhered to the recruitment timeframes set out in the PERM regulations.” (Employer’s brief at 5). The Employer noted that if the CO had concerns about the compliance with recruiting steps, an audit could be conducted.

The Employer also argued that the CO’s position suggests that the CO fears that the absence of a date in Section N could somehow relieve the Employer from being bound to the declarations made in that section. The Employer argued that the Employer’s signature alone legally binds him to the Section N declarations, and that the absence of a date would not absolve or hold harmless the Employer from the consequences of making misrepresentations or committing perjury.

In response to a suggestion by the CO that the Employer had taken no action to remedy the missing date, the Employer noted that it could not simply date the application and resubmit it with a motion for reconsideration because under the regulations, this would constitute new evidence that would not be permitted on reconsideration. *See* 29 C.F.R. § 656.24(g)(2).<sup>6</sup>

Finally, the Employer argued that “[t]he regulations seem to suggest that if the omission [from the application] is material, the application must be denied as incomplete under 20 C.F.R. § 656.17(a). If on the other hand, the omission is deemed immaterial, the regulations suggest that the CO has the option of either overlooking the omission and deeming the omission harmless error, or exercising its authority to conduct an audit under 20 C.F.R. 656.20 to further review the Employer’s recruitment efforts. *See also Michelle*

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<sup>6</sup> This section of the PERM regulations was amended after the instant application was filed. The changes are not material to this appeal. *See* 72 Fed. Reg. 27903 (May 17, 2007).

*Guevarra Pena PLLC*, 2008 WL 234155 (BALCA June 4, 2008) (holding that employer omissions on ETA Form 9089 which are extensive and material must result in a denial of the application under 20 C.F.R. § 656.17(a)).”

## **DISCUSSION**

The regulations at 20 C.F.R. § 656.17(a) require that an “employer who desires to apply for a labor certification on behalf on an alien must file a completed Department of Labor Application for Permanent Employment Certification form (ETA Form 9089).” 20 C.F.R. § 656.17(a). The regulations go on to say that “[i]ncomplete applications will be denied.” 20 C.F.R. § 656.17(a). The ETA Form 9089 and the instructions are unambiguously clear that Section N-3 must be both signed and dated, unless the application is filed electronically. Thus, if materiality of the omission is ignored, the failure to date a paper based ETA 9089 must be denied under section 656.17(a) because it is incomplete.

The Board has not previously specifically addressed whether an omission from an ETA Form 9089 is fatal to an application if the omission is not a material one. As Employer correctly noted in its appellate brief, this panel used the materiality of omitted information on the Form 9089 as a ground supporting affirmance of the denial of certification in *Michelle Guevarra Pena PLLC*, 2007-PER-116 (June 4, 2008). Materiality of omitted information was also a factor mentioned in *Bushman Associates, Inc.*, 2007-PER-14 (Mar. 8, 2007) and *Carmen Lee*, 2007-PER-104 (June 4, 2008). On the other hand, as Employer also noted, the Board’s en banc decision in *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc) recognized that simple typographic errors in applications may be corrected through a motion for reconsideration. That decision did not, however, address whether immaterial omissions may be addressed in such a manner.

The CO implicitly recognized the need to provide a rationale for the materiality of the date of the employer’s signature in Section N-3 when she stated her reasoning in the formal letter denying reconsideration, and her appellate brief – namely the purported

need to know whether the employer signed the application before or after recruitment and application preparation is complete. The CO did not further explain this rationale, but it appears to be grounded in a concern that if an employer attested to the certifications required in Section N prior to completing recruitment, the declarations would be premature and therefore untrustworthy.

It is difficult, however, to accept that the CO actually considers the date of the employer's signature in Section N-3 of the ETA 9089 to be material to the CO's substantive review of an application, given that electronically filed applications do not have to be signed and dated unless and until a certification is granted. The CO has not proffered any rationale for why the date of the signature would be important in review of a paper filing but not an electronic filing.<sup>7</sup>

We also note that, although most aspects of the application form are not directly addressed in the body of the regulations, the question of signing the form is. The very same subsection of the PERM regulation that states the "completeness" requirement also addresses the employer signature requirement. That subsection only states that an application must be signed – not signed and dated:

**§656.17 Basic labor certification process.**

(a) *Filing applications.* (1) Except as otherwise provided by §§ 656.15, 656.16, and 656.18, an employer who desires to apply for a labor certification on behalf of an alien must file a completed Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089). The application must be filed with an ETA application processing center. Incomplete applications will be denied. Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the

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<sup>7</sup> In the case of an electronically filed application, unlike mailed applications, the Section N declarations are not signed by the Employer until labor certification has been granted. Thus, by definition the declarations are made after the recruitment steps are completed. That distinction does not lend support to the CO's position because in the case of an electronically filed application, the CO when reviewing the application would have to take it on faith that the Employer will make the declarations in order to continue the processing with USCIS. In other words, the CO will have no signed assurances from the Employer when deciding whether to grant an electronically filed Form 9089. The CO has articulated no rationale for holding mailed in applications to a higher standard.

employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

Thus, the drafters of the regulations believed that having the employer sign the form was important enough to specifically address in the regulation. Dating the signature was not.

We concur with the Employer's argument that the body of the ETA Form 9089 provides the CO with the essential information concerning the timing of the recruitment steps, employer job requirements, the alien's qualifications, and other information relevant to the substance of the application necessary for the CO to determine whether to grant, audit, or deny the application. Again, if affirmation of the date of the employer's declaration was essential to this determination, electronically filed applications could not be approved until a signature page was mailed to the CO.

We also concur with the Employer's argument that the absence of a date would not absolve or hold harmless the Employer from the consequences of making misrepresentations or in committing perjury in relation to the declarations in Section N of the Form 9089 or the truth and accuracy of the remainder of the Form. Arguably, an employer could avoid a perjury prosecution on certifications 8 and 9, which go to consideration of U.S. applicants, if it made the declaration prior to completing recruitment. Such a potential problem could, however, be easily remedied by requiring the employer to re-affirm the declarations once a certification was granted, similar to the way that an employer who filed electronically is instructed to sign the application immediately upon receipt of a certification.

Nor are we persuaded by the CO's citation to the U.S. Code section relating to unsworn affidavits as an example of a declaration requiring both a signature and a date for the signature. It is true that 29 U.S.C. § 1746 sets forth a format that contemplates that the declarant date the signature. But in *E.E.O.C. v. World's Finest Chocolate, Inc.*, 701 F.Supp. 637 (N.D.Ill.1988), a Federal district court found that a civil rights plaintiff's

failure to date her EEOC charge did not render it invalid where extrinsic evidence demonstrated the period in which the charge was signed. The court wrote that “[t]he statute requires verification in *substantially* the prescribed form. The crucial aspect of the form provided in the statute is that the person write his or her signature under penalty of perjury.... [B]ecause a statement may be true if made on one date but perjurious if made on another, it does not follow that the signor must write the date. Rather, it is simply essential that the date or approximate date (depending on the situation) be demonstrable....” 701 F.Supp. at 639 (emphasis as in original). In the instant case, we find that the fact that the Employer filed the application on May 1, 2006, and did not indicate that it signed the declaration earlier, demonstrates that as of May 1, 2006 it was making the certifications and attesting to the truth and accuracy of the application as of that date, or at least was reaffirming such on that date.

The leading case concerning the effect of technical or clerical errors in labor certification applications is the Board’s en banc decision in *HealthAmerica*, cited above. Although *HealthAmerica* involved a typographical error as opposed to an omission, we find that its reasoning is equally applicable to the scrivener’s error involved here. In *HealthAmerica*, the en banc Board ruled that ETA’s inclusion of procedures for reconsideration, audits, and supervised recruitment indicated that applications might be corrected during processing and that the PERM rules do not necessarily prohibit correction of submitted applications. *HealthAmerica, supra*, slip op. at 18. As we noted in *HealthAmerica*, the CO’s policy not to consider mistakes made by employers is arbitrary and capricious and not supported by any regulatory language, regulatory history or decisional law. *HealthAmerica* at 22. Significantly, as in *HealthAmerica*, the omission of the date on the PERM application involved here was susceptible to correction and there was no demonstrated misrepresentation of any facts. Likewise, denial of the instant application would give rise to an injustice, as the CO has articulated no rationale for requiring a dated signature for applications filed by mail when there is no such requirement for electronically filed applications.

In some respects, this case is similar to the appeal in *Subhashini Software Solutions*, 2007-PER-43 (Dec. 18, 2007). In that case, the employer had submitted several applications for permanent alien employment that did not bear an official DOL logo. The CO declined to accept the applications and returned them to the employer. By the time that the employer re-submitted the applications using forms bearing the logo, its recruitment was no longer timely under the PERM regulations. Upon review, the BALCA panel applied *HealthAmerica, supra*, to hold that fundamental fairness mandated that the employer be permitted to have the applications processed as if they were filed when first received by the CO, and therefore to preserve the timeliness of its recruitment efforts. In *Subhashini Software Solutions*, we held that “To deny labor certification for such an error would be to elevate form over substance, to lose perspective of the relative weight of the offense compared to the consequences to the petitioning Employer, and to offend the concept of fundamental fairness.” As in *Subhashini Software Solutions*, we again decline to elevate form over substance. The CO has not articulated a sufficient reason for finding that the absence of the date in Section N-3 of the application was material to the review of the substance of the application. Accordingly, we find that denial of reconsideration was arbitrary and capricious, and must be reversed. We wish to emphasize, however, that the regulations clearly require that petitioning employers submit complete applications. This appeal involves a rare exception and the holding in this decision should be strictly limited to the circumstances presented.

Because the CO did not raise any other issues concerning the application, we find that labor certification should be granted.

## **ORDER**

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of certification is **REVERSED**. The CO shall issue a labor certification. Upon receipt of the certification, the Employer shall date Section N-3 of the application to reaffirm its certification of compliance with the conditions of employment listed in Section N.

For the panel:

**A**

**PAMELA LAKES WOOD**  
Administrative Law Judge

**JOHN M. VITTONI, Chief Administrative Law Judge, concurring.**

The lead opinion cites in partial support for the decision in the instant appeal *Subhashini Software Solutions*, 2007-PER-43 (Dec. 18, 2007), which excused an employer who had filed applications that did not include the official DOL seal. I dissented in *Subhashini Software Solutions*, 2007-PER-43 (Dec. 18, 2007), on the ground that the DOL logo is an integral part of the application, that applications without the logo are incomplete under 20 C.F.R. § 656.17(a), and thus properly automatically denied. I agreed with the CO's concern that permitting an employer to apply using a non-official form would place an unwarranted burden on the CO to review non-official forms to ensure that they accurately duplicate the official ETA 9089 form. Moreover, in that case, one of the concerns I expressed was that if such an error was forgiven, it would be difficult to define what departures from the required form will be permitted.

It is not unreasonable for ETA to design a form that requires a signed declaration to be dated. I agree with the CO's contention that dating declarations is a standard practice in business and legal documents. Nonetheless, in the instant case I concur with

the lead opinion that the CO has not adequately explained why a dated signature is not essential when reviewing electronically filed applications, but is when reviewing a mailed application. I remain concerned that BALCA should not be in the business of excusing departures from ETA's forms. However, in the instant case the CO's practice for review of electronically filed applications, which undoubtedly constitute the bulk of applications filed, completely undermines any contention that the date of the signature is actually a material consideration for review of mailed applications. Thus, I join the lead opinion in this matter.

**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 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.