U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 April 2013

BALCA Case No.: 2010-PER-01250
ETA Case No.: A-07317-95346

In the Matter of:

SAP AMERICA, INC.,
Employer,

on behalf of

RAJANIKANTH KRISTAM,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Rahul M. Shah, Esquire
Fragomen, Del Rey, Bernsen & Loewy, LLP
Mattawan, New Jersey
For the Employer

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Washington, DC
For the Certifying Officer

Scott D. Pollock, Esquire
Chicago, Illinois
For Amicus Curiae, American Immigration Lawyers Association

Before: **Colwell, Johnson, McGrath, Price, and Sarno**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER GRANTING CERTIFICATION

This matter is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1182(a)(5)(A), and the implementing regulations promulgated by the U.S. Department of Labor ("the Department") at 20 C.F.R. part 656. The Employer, SAP America, Inc. ("SAP"), seeks administrative review of the Certifying Officer's ("CO") decision to deny the *Application for Permanent Employment Certification* that SAP filed on behalf of Mr. Rajankanth Kristam. The sole issue on appeal is whether SAP's failure to timely submit a copy of its request for a prevailing wage determination warranted the denial of certification under 20 C.F.R. § 656.20(b). Because this issue was interpreted inconsistently by several of the Board's panels, we *sua sponte* granted *en banc* review to resolve the dispute. For the reasons set forth below, we find that the CO erred in denying certification. Accordingly, we vacate the CO's denial and remand this matter to the CO for certification.

BACKGROUND

On December 31, 2007, SAP filed an *Application for Permanent Employment Certification* with the Department's Employment and Training Administration ("ETA"). AF 154-166.[1] Thereafter, on February 7, 2008, the CO issued an audit notification letter instructing SAP to submit certain specified documentation, including "[a] copy of the Prevailing Wage Determination received from the State Workforce Agency (SWA) and if not included in the Prevailing Wage Determination, a copy of the request for the determination as originally submitted to the SWA." AF 151. SAP submitted its response to the audit notification letter on March 6, 2008. AF 45-150. This response included, *inter alia*, a copy of the Prevailing Wage Determination ("PWD") that SAP had obtained from the Pennsylvania Bureau of Workforce Development Partnership ("Pennsylvania SWA"); it did not, however, include a copy of its request for a prevailing wage as originally submitted to the Pennsylvania SWA. AF 100.

On February 2, 2010, the CO issued a decision denying certification. AF 43-44. The only basis cited in support of the denial was SAP's "fail[ure] to provide documentation as requested in the Audit Notification letter." AF 44. "Specifically," the CO stated, "the employer failed to provide a copy [of] the prevailing wage request for the prevailing wage determination." *Id*. As authority for the denial, the CO cited a subsection of the regulation governing audit procedures, 20 C.F.R. § 656.20(b), which states: "A substantial failure by the employer to provide required documentation will result in that application being denied." *Id*.

On February 26, 2010, SAP petitioned the CO for reconsideration and, in the event reconsideration was denied, BALCA review. AF 12-42. In the petition, SAP maintained that it inadvertently omitted the PWD request form from its audit response materials since, unlike most SWAs, the Pennsylvania SWA does not issue a PWD on the original request form or return a copy of the original request form with its final determination. AF 13-14. As a result, SAP

[1] Citations to the Appeal File in this matter will be abbreviated "AF" followed by the page number.

asserted, it erroneously assumed that the PWD included with its audit response was sufficient. *Id*. SAP maintains that after learning of the omission, it located a copy of the prevailing wage request it had submitted to the Pennsylvania SWA. AF 14. Accordingly, SAP attached a copy of this request to its petition. AF 24-27.

On July 16, 2010, the CO issued a decision reaffirming the denial. AF 1. Although the CO acknowledged that SAP's petition for review included a copy of SAP's request for a prevailing wage as originally submitted to the Pennsylvania SWA, he nevertheless found that SAP did not overcome the deficiency stated in the denial. Specifically, the CO noted that per 20 C.F.R. § 656.24(g)(2)(i), "a request for reconsideration submitted on behalf of an application may include only documentation received from the employer in response to a request from the Certifying Officer." *Id*. Accordingly, the CO refused to consider any newly submitted evidence and reaffirmed the denial based on SAP's "substantial failure . . . to provide required documentation." *Id.* (citing 20 C.F.R. § 656.20(b)).

The case was forwarded to BALCA, and on September 1, 2010, the Board issued a Notice of Docketing and Order Requiring Submission of Statement of Intent to Proceed. SAP confirmed its intent to proceed on September 15, 2010; the CO filed a statement of position on October 20, 2010. Before this matter was assigned for decision, however, the Board discovered a conflict had developed among its panels regarding the CO's authority to deny certification when an employer fails to submit a copy of its request for a PWD as originally submitted to the SWA.[2] Accordingly, the Board *sua sponte* voted to grant *en banc* review to resolve the conflict and maintain uniformity among its panels.

The Board issued a Notice of *En Banc* Review on April 20, 2012, informing the parties that the case would be reviewed *en banc*. In this Notice, the Board provided the parties an opportunity to file supplemental briefs and invited interested parties to participate as *amici curiae*. Both parties filed supplemental briefs, and the American Immigration Lawyers Association ("AILA") filed an amicus brief urging us to adopt the reasoning put forth by the panels in *SAP Labs, LLC*, 2010-PER-1233 (Nov. 15, 2011), and *Schnabel Engineering, Inc*., 2010-PER-1125 (Nov. 9, 2011).

DISCUSSION

The regulation governing prevailing wage determinations is found at 20 C.F.R. § 656.40. At the time SAP filed its application, Section 656.40(a) provided:

The employer must request a prevailing wage determination from the SWA

[2] Two separate BALCA panels affirmed the CO's denial of certification when the petitioning employer failed to provide a copy of its request for a PWD as originally submitted to the SWA. *See JDA Software*, 2010-PER-932 (July 12, 2011); *Misoya, Inc.*, 2010-PER-200 (Feb. 28, 2011). But one of these panels later reversed course and vacated the CO's denial of certification in a case with similar facts. *See Schnabel Engineering, Inc.*["*Schnabel*"], 2010-PER-1125 (Nov. 9, 2011) ("There is nothing in the regulations requiring that the original request to the SWA be provided, or stating that it is necessary for the CO to verify an employer's attestation of the PWD."). A third BALCA panel agreed with *Schnabel* and held that the CO may not deny certification based on a petitioning employer's failure to submit a copy of its PWD request form. *See SAP Labs, LLC*, 2010-PER-1233 (Nov. 15, 2011).

> having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

20 C.F.R. § 656.40(a) (2007).[3] The "Definitions" section of the regulations specified that a "[*p*]*revailing wage determination* (PWD) means the prevailing wage provided by the State Workforce Agency." 20 C.F.R. § 656.3 (2007).

Even though Section 656.40 only stated that an employer needs to "maintain[] the SWA PWD in its files" and submit "the determination . . in the event it is requested in the course of an audit," Counsel for the CO asserts that an employer must also submit a copy of its request for a prevailing wage as originally submitted to the SWA if this document is requested in the course of an audit. According to Counsel for the CO, the PERM regulations authorize the CO to determine which documentation "an employer needs to submit in order for the CO to fully review that employer's application," and correspondingly, the authority to deny an employer's application when an employer fails to provide the requested documentation. (CO's May 18, 2012 Statement of Position at 2). To justify this authority, Counsel for the CO relies on the placement and use of the term "required documentation" in the regulation governing audit procedures, 20 C.F.R. § 656.20.

Section 656.20 provides, in pertinent part:

> (a) If an application is selected for audit, the Certifying Officer shall issue an audit letter. The audit letter will:
>
> (1) State the documentation that must be submitted by the employer;
>
> (2) Specify a date, 30 days from the date of the audit letter, by which the required documentation must be submitted; and
>
> (3) Advise that if the required documentation has not been sent by the date specified the application will be denied.
>
> (i) Failure to provide documentation in a timely manner constitutes a refusal to exhaust available administrative remedies; and
>
> (ii) The administrative-judicial review procedure provided in § 656.26 is not available.
>
> (b) A substantial failure by the employer to provide required documentation will result in that application being denied under § 656.24 and may result in a

[3] As of January 1, 2010, the Department of Labor assumed responsibility for the issuance of PWDs to employers seeking permanent labor certifications on behalf of foreign workers. Employers are now directed to submit a standard Prevailing Wage Determination Request form to ETA's National Processing Center. *See* 69 Fed. Reg. 77386 (Dec. 27, 2004), as amended at 73 Fed. Reg. 78020, 78068 (Dec. 19, 2008).

determination by the Certifying Officer pursuant to § 656.24 to require the employer to conduct supervised recruitment under § 656.21 in future filings of labor certification applications for up to 2 years.

…

(d) Before making a final determination in accordance with the standards in § 656.24, whether in course of an audit or otherwise, the Certifying Officer may:

(1) Request supplemental information and/or documentation; or

(2) Require the employer to conduct supervised recruitment under § 656.21.

20 C.F.R. § 656.20. Counsel for the CO asserts that the term "required documentation" in subsection (b) "refers not to documentation broadly required by the PERM regulations, but rather to the documentation required to be produced in response to the audit notification." (CO's May 18, 2012 Statement of Position at 3). As Counsel for the CO explains:

> Section 656.20(a)(1) clearly authorizes the CO to require "the documentation that must be submitted by the employer." 20 C.F.R. § 656.20(a)(1). The reference to "required documentation" in Section 656.20(b) relates back to the documentation that employers are required to submit in response to an audit under subsection (a), not to any documents mentioned or referenced in other sections of the regulations. That this phrase refers to the documentation required via the audit notification is supported by the use of [sic] same phrase in § 656.20(a)(3), which requires the audit letter to "[a]dvise that if the required documentation has not been sent by the date specified the application will be denied." 20 C.F.R. § 656.20(a)(3) (emphasis added). In (a)(3) it is clear that "required documentation" refers to the documents required to be submitted by the "date specified"—that is, the date specified by the audit letter. Giving the same phrase found in (a)(3) and (b) two meanings, which the Board's decision [in *Schnabel*] implicitly does, is illogical given the relationship between subsections (a) and (b) of Section 656.20.

(CO's May 18, 2012 Statement of Position at 3).

SAP and AILA dispute the CO's broad interpretation of Section 656.20(b). In their view, the CO may only deny certification when a petitioning employer fails to produce documentation that is "specified" in the regulations. To support this narrower interpretation of the CO's authority under Section 656.20(b), SAP and AILA cite to the Board's decision in *A Cut Above Ceramic Tile* [*A Cut Above*], 2010-PER-224 (Mar. 8, 2012) (*en banc*). In particular, they cite to the Board's holding that "[w]hen a regulation does not require an employer to retain a particular type of evidence to document compliance with a recruitment step, such evidence is not 'required documentation,' and the CO may not deny certification based on a failure to produce such documentation." *Id*., slip op. at 11. In *A Cut Above*, the Board vacated a denial based on the petitioning employer's "fail[ure] to provide proof of publication of the job order from the State Workforce Agency (SWA) containing the content of the job order, as requested in the Audit Notification letter." *Id*. at 3. After examining the plain language of the regulation governing SWA job orders, which stated that "the start and end dates of the job order entered on the

application serve as documentation of this step," as well as the regulatory history preceding the Department's implementation of the PERM program, the Board held: "[P]roof of publication of the SWA job order is not 'required supporting documentation,' and therefore, the CO's denial of certification under Section 656.20(b) was improper." *Id.* at 12-13.

Upon further examination, we find that *A Cut Above* conflated the "supporting documentation" an employer must retain under Sections 656.10(f) and 656.17(a)(3) with the "required documentation" an employer must produce in response to an audit under Section 656.20(b). For the reasons stated in *A Cut Above*, we agree that the "supporting documentation" an employer must retain under Sections 656.10(f) and 656.17(a)(3) is limited to the documentary evidence specified in the regulations. However, after reviewing the plain language of the audit provision, we agree with Counsel for the CO that the "required documentation" referenced in subsection (b) relates back to the documentation in subsection (a), *i.e.*, the documentation identified for production in an audit notification letter. Significantly, the required documentation referenced in subsection (a) is not necessarily limited to the "supporting documentation" specified in the regulations, since the CO may also request certain "supplemental information and/or documentation" in the course of an audit. *See* 20 C.F.R. § 656.20(d) ("Before making a final determination in accordance with the standards in § 656.24, whether in course of an audit or otherwise, the Certifying Officer may . . . Request supplemental information and/or documentation . . ."). But it is also clear that the CO may not deny an application for just any failure to provide "required documentation." By its very terms, Section 656.20(b) limits the denial of certification to a "*substantial failure* by the employer to provide required documentation." Although the regulation itself does not specify what types of omissions constitute a "substantial failure . . . to provide required documentation," the use of the word "substantial" indicates that not every failure to provide "required documentation" will necessarily result in a denial. The meaning of "substantial violation" is thus critical to the resolution of this case.

The regulatory history indicates that the documentation an employer must maintain and produce in response to an audit is, for the most part, the "supporting documentation" specified in the regulations. For instance, in the Notice of Proposed Rulemaking ("NPRM") published prior to the implementation of the PERM program, the Department stated: "the proposed regulation would provide, in virtually all instances where an employer could be required to submit documentation in support of its attestations, the type of documentation the employer would be required to maintain and furnish in the event of an audit." 67 Fed. Reg. 30466, 30475 (May 6, 2002). And in the preamble to the Final Rule, the Department confirmed that "the regulations indicate what documentation employers are required to assemble, maintain, and submit to respond to an audit letter." 69 Fed. Reg. 77326, 77358-59 (Dec. 27, 2004). In fact, in guidance issued after the PERM program was implemented, the Department reiterated that "the documentary evidence the regulations require the employer to maintain in its compliance file is what is sought in an audit request." *See* www.foreignlaborcert.doleta.gov/pdf/perm_faqs_5-9-07.pdf (FAQ Round 10).

The regulatory history also suggests that requests for "supplemental documentation" are not subject to the CO's unbridled discretion. For instance, in the NPRM, the Department described a request for "supplemental documentation" as follows:

> Before making a final determination in accordance with the standards in § 656.24 of this part, the Certifying Officer could request supplemental documentation or require the employer to conduct supervised recruitment. A request for supplemental documentation could include a request for certain limited information not specified in the regulations, but that should be readily available to the employer. For example, if an application under review involves a job opportunity for a specialty chef, the Certifying Officer could request a copy of the restaurant's menu to aid in determining whether there was a bona fide job opening available for a specialty chef.

67 Fed. Reg. at 30475. Thus, even though the Department anticipated that there would be requests for "certain limited information not specified in the regulations," it intended to limit such requests to information or documentation "that should be readily available to the employer." And, as the example of a request for a restaurant menu illustrates, the Department intended to limit such requests to situations where it is necessary to verify an attestation that is not easily subject to a universal documentation requirement (and not to require the production of a document—such as a prevailing wage determination request form—that is common to all applications but not specified in the regulations as evidence that an employer must retain).

BALCA has consistently affirmed denials under Section 656.20(b) when the "required documentation" an employer fails to produce is specifically identified in the regulations as the evidence necessary to document a particular attestation, *i.e.* the "supporting documentation" an employer is required to retain under Sections 656.10(f) and 656.17(a)(3)). *See, e.g., Yakima Steel Fabricators,* 2011-PER-1289 (July 5, 2012) (failure to provide proof of print advertisements, as required by Section 656.17(e)(1)); *Gotham Distribution*, 2011-PER-1352 (Aug. 2, 2012) (failure to provide a Notice of Filing, as required by Section 656.10(d)); *Marlenny's Haircutters*, 2009-PER-13 (Jan. 29, 2009) (failure to produce a recruitment report, as required by Section 656.17(g)). Notably, under these circumstances, the Department spoke to the important nature of the omitted documentation when it promulgated the PERM regulations, and the regulations place the employer on notice that documentation needs to be retained and produced in the event of an audit. It is thus not unfair to presume that the omission of "supporting documentation" constitutes a "substantial failure by the employer to provide required documentation." This is not the case, however, when omitted "required documentation" is merely "supplemental documentation" that is not specified in the regulations. In this latter situation, absent a sufficient explanation by the CO, we are left to guess why the omission constitutes a "substantial failure by the Employer to provide required documentation." We thus decline to summarily affirm denials issued under Section 656.20(b) when the documentation an employer fails to produce is "supplemental documentation." Rather, in such cases, we must find that (1) the CO reasonably requested the omitted documentation (*i.e.*, the documentation should have been readily, or at least reasonably, available to the employer, and tailored to the CO's review of the employer's application); and (2) the omission of this documentation is material enough to constitute a "substantial failure . . . to provide required documentation."

In the instant case, the CO denied certification based on SAP's failed to provide "a copy [of] the prevailing wage request for the prevailing wage determination." As discussed above, the

PERM regulations in place at the time that SAP filed the application required an employer to "maintain[] the SWA PWD in its files" and submit "the determination . . . to an ETA application processing center in the event it is requested in the course of an audit." *See* 20 C.F.R. § 656.40(a) (2007). The CO does not dispute that SAP maintained the PWD it was issued by the Pennsylvania SWA in its files. Nor does the CO dispute that SAP timely submitted the determination to the CO after it was requested in the course of an audit. Rather, the CO asserts that SAP's failure to submit a copy of the prevailing wage request originally submitted to the Pennsylvania SWA constitutes a substantial failure to provide required documentation.

As proof that the Department intended a PWD request form to be included among the documentation sought in an audit, Counsel for the CO cites to a comment in the preamble to the PERM regulations, wherein the Department states: "The state workforce agency PWDR form must be retained by the employer, and will be submitted only if the application is selected for an audit or as requested by the CO." Final Rule, 69 Fed. Reg. 77326, 77365 (Dec. 27, 2004). But this comment is not consistent with the Department's representations in earlier sections of the preamble, and it fails to provide employers with adequate notice that they must retain a copy of the prevailing wage request form that they submit to the SWA. *See, e.g.*, 69 Fed. Reg. at 77341 (stating employers will be "expected to provide the PWD they received from the SWAs in the event of an audit or other request from the CO," without mentioning a duty to retain the request for a PWD submitted to the SWA); 69 Fed. Reg. at 77333 ("The employer will be expected to retain the state prevailing wage determination form to furnish to the CO if requested to do so in the event of an audit or otherwise.").[4]

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[4] In fact, as explained in this footnote, the reference to a "PWDR" may have been made in error. When the Department initially announced its intent to revise the permanent labor certification program in the Notice of Proposed Rule Making ("NPRM"), the application was to be comprised of two standardized forms: (1) a *Prevailing Wage Determination Request* ("PWDR"), referred to as ETA Form 9088; and (2) an *Application for Permanent Labor Certification*, referred to as ETA Form 9089. 67 Fed. Reg. 30466 (May 6, 2002). Prior to filing, a petitioning employer would complete the standardized PWDR and submit it to the appropriate SWA for issuance of a prevailing wage determination. *Id*. at 30466-67. The SWA would enter its determination on the employer's PWDR form and return the form to the employer with its endorsement. *Id.* The employer would then submit both the endorsed PWDR and the *Application for Permanent Labor Certification* to an ETA servicing office for processing. *Id*. at 30470. But the Department later abandoned its proposal for a standardized PWDR form (ETA Form 9088). In the Final Rule published in 2004, the Department consolidated the information on the proposed *Application for Permanent Employment Certification* and standardized PWDR into a single, revised *Application for Permanent Labor Certification* (ETA Form 9089). *See* 69 Fed. Reg. at 77333. Employers still needed to obtain a PWD from the appropriate SWA prior to filing an application, but instead of using the standardized PWDR form, but they were instructed to "us[e] the form required by the state in which the job is being offered." As the Department explained:

> This final rule does not require a particular form for employers to submit request for wage determinations to SWAs or for SWAs to use in responding to requests for wage determinations. Employers will, however, be expected to provide <u>the PWD they received from the SWAs</u> in the event of an audit or other request from the CO.

69 Fed. Reg. at 77341 (emphasis added). The Department thus acknowledged that employers would use various forms to request a PWD, and that SWAs would use various forms to respond to requests for PWDs, but only noted that employers would be expected "to provide <u>the PWD</u> they received <u>from the SWAs</u> in the event of an audit or other request from the CO." *Id.* (emphasis added). The reference to a PWDR to which the CO cites is located in a later section of the preamble, which states, in pertinent part:

In our opinion, Section 656.40(a)'s explicit requirement that employers maintain the PWD issued *by* the SWA implies that employers need not maintain a copy of the prevailing wage request submitted *to* the SWA. It is unreasonable for the CO to assume that the latter document "should be readily available to the employer" at the time of an audit when the regulations provide employers with no notice that this form must be copied before it is submitted to the SWA.[5] If the CO needs to review this request form in every case he audits—as Counsel for the CO appears to suggest—then the Department should have drafted the regulations to provide employers with adequate notice that the form must be copied and retained.

Moreover, even if we found that a copy of the prevailing wage request constitutes a reasonable request for "supplemental documentation," there is no indication that the omission of this document constitutes a "substantial failure . . . to provide required documentation." In his denial, the CO provided no explanation as to why this omission materially affected his review of SAP's application. Upon appeal, Counsel for the CO argues that when auditing an application—seemingly any application—the CO must "review the information submitted on the PWDR to determine whether the prevailing wage included on the employer's application and advertisements is appropriate and accurate for the job opportunity for which the employer seeks certification." (CO's May 18, 2012 Statement of Position at 1.) According to Counsel for the CO: "Without this information, the wage determination is largely meaningless." *Id.* But, as noted by AILA, the CO could have alternatively assessed whether the prevailing wage listed on SAP's application "was appropriate and accurate for the job opportunity for which the employer seeks certification" by comparing the job title, job requirements, job duties, and job location that SAP provided on the ETA Form 9089 with the PWD instructions that the Department issued to the SWAs. The information on the PWD request form was thus not imperative to the CO's inquiry of whether the prevailing wage included on the employer's application and advertisements was appropriate and accurate for the job opportunity for which the employer seeks certification.

In light of the foregoing, we find that SAP's failure to produce "a copy [of] the prevailing wage request for the prevailing wage determination" did not constitute a "substantial failure by the employer to provide required documentation" under Section 655.20(b). Accordingly, we

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> As explained in our discussion to consolidate the ETA 9088 and ETA 9089 into a single application form, under this final rule, the employer will request a prevailing wage determination using the form required by the state where the job opportunity is located. Information from the proposed PWDR form, such as the prevailing wage, occupational code and level of skill, job title, state prevailing wage tracking number, and the date the determination was made will be included on the ETA Form 9089. The state workforce agency PWDR form must be retained by the employer, and will be submitted only if the application is selected for an audit or as requested by the CO.

Id. at 77365. Notably, this section refers back to the earlier discussion discussed above, wherein the Department stated that it expected employers to retain "the PWD they received from the SWAs," without mentioning an employer's duty to retain a copy of the request for a PWD that they submitted *to* the SWA. *See* 69 Fed. Reg. at 77341. Accordingly, the reference to a PWDR may be a mistaken vestige of the form that was initially proposed.

[5] We recognize that SAP actually retained a copy of the request that it submitted to the Pennsylvania SWA; however, we decline to place SAP in a worse position than an employer who reasonably did not think to make a copy of its request before submitting it to the SWA.

find that the CO erred in denying SAP's application. We thus reverse the CO's denial and remand the matter to the CO for certification.

ORDER

IT IS HEREBY ORDERED that the denial in this matter is REVERSED and REMANDED for certification.

For the Board:

Digitally signed by WILLIAM COLWELL
DN: CN=WILLIAM COLWELL,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge