

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 25 May 2012**

**BALCA Case No.: 2011-PER-00704**  
ETA Case No.: A-08029-18091

*In the Matter of:*

**AERO PARTS MANAGEMENT, LLC,**  
*Employer*

*on behalf of*

**INTRIAGO PENA, XAVIER,**  
*Alien.*

Certifying Officer: William Carlson  
Atlanta Processing Center

Appearances: Elaine F. Weiss, Esquire  
Weiss & Kahn, P.A.  
Coral Gables, Florida  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Stephen R. Jones, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **Colwell, Johnson and Vittone**  
Administrative Law Judges

**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

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 20 C.F.R. Part 656.

**BACKGROUND**

The Employer filed an Application for Permanent Employment Certification for the position of "Director of Sales." (AF 283-294).<sup>1</sup> The CO denied certification on three grounds, one of which was that the Notice of Filing ("NOF") (AF 208) did not include the Employer's name. (AF 170-172).

The Employer requested reconsideration, or in the alternative, appellate review of the denial, relying primarily on the panel decision in *Stone Tech Fabrication*, 2008-PER-187 (Jan. 5, 2008), to support its submission of supplementary documentation for the purpose of establishing that the NOF was adequate despite the omission of the Employer's name. (AF 3-169). The documentation included items such as a letter from the Employer's "managing member" (AF 24-27); articles of incorporation (AF 29-30); a partnership federal tax return (AF 32-48); photographs of the Employer's facility and bulletin posting area (AF 50-72); documentation showing that the facility has a security system installed (AF 74-77); certifications of accreditation (AF 79-80); a Florida Annual Resale Certificate for Sales Tax (AF 82); lease agreements (AF 84-100); Google maps printouts (AF 102, 103); and "miamidade.gov" property information (AF 105-108).

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

The CO reconsidered but found that the ground for denial based on the deficient NOF was valid.<sup>2</sup> The matter was then forwarded to BALCA. (AF 1).

## **DISCUSSION**

Under the PERM regulations, most employers who apply for permanent labor certification must provide notice of the filing of labor certification either by notifying the appropriate bargaining representative, or if there is no bargaining representative, by posting a notice at the facility or location of the employment. The regulation at 20 C.F.R. § 656.10(d) specifies the manner and substance of a “Notice of Filing” posting. One of the requirements is that when a PERM application is filed under the basic process described in 20 C.F.R. § 656.17, the notice must contain the information required for advertisements in newspapers of general circulation or in professional journals by § 656.17(f). 20 C.F.R. § 656.10(d)(4). Section 656.17(f)(1) mandates that the advertisements “[n]ame the employer.” In the instant case, the NOF did not name the Employer. Thus, on its face, the NOF did not comply with the regulations.

The Employer presented documentation with its motion for reconsideration/request for review to support an argument that omission of its name on the NOF would not have made a difference under the circumstances of the posting. The Employer’s argument is that it is a highly regulated commercial aviation parts company, and that as a critical parts supplier, public access to its premises is extremely limited. Consequently, it is highly probable that only the Employer’s three employees, one of whom is the Alien, would have had access to see the NOF, and there would have been no doubt or ambiguity as to the identity of the employer sponsoring the labor certification application. Whether that case can be proved is dependent on the submission of

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<sup>2</sup> Because we affirm the CO’s denial of certification based on the deficiency with the NOF, we have not reached a second ground for denial affirmed by the CO in his decision on reconsideration concerning the adequacy of documentation of recruitment using a third-party website.

supplementary documentation with the motion for reconsideration. In this regard, the Employer relies on the panel decision in *Stone Tech Fabrication*, 2008-PER-187 (Jan. 5, 2008).

In *Stone Tech*, the employer neglected to include its business name on the NOF, but argued that because the NOF had been posted within the job premises and contained the name of the president of the company and a phone number, it would be a mere technicality to deny certification. The panel in that case affirmed the CO's denial of certification on the narrow ground that it could not merely accept the employer's attorney's contentions that the posting was adequate because it contained the employer's president's name and telephone number.<sup>3</sup> The panel then proceeded to describe what kind of information would have needed to be submitted to make out a compelling case for equitable relief from the regulatory requirement that the employer's name be on the NOF. The panel made it clear that it could not merely accept the truth of generalized assertions; that it did not view the NOF as a mere technicality lightly dismissed under a harmless error finding; and that the regulatory requirement was neither obscure nor difficult to implement. The panel's discussion also included the statement that "[i]n some situations, the purpose of the Notice of Filing would be fully served without the name of the company on the Notice if it was nonetheless clear that the Notice applied to the petitioning [e]mployer...." *Stone Tech, supra*, slip op. at 4.

In later decisions, Board panels have found that much of the *Stone Tech* decision was dicta, notably *Robert Venuti Landscaping, Inc.*, 2009-PER-453 (Oct. 27, 2010) and *Comcast Cable Communications, LLC*, 2010-PER-421 (Apr. 7, 2011). In its appellate

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<sup>3</sup> The Board long ago ruled that statements of counsel in a brief or otherwise presented, unsupported by underlying party or non-party witness documented assertions do not constitute evidence, and are not entitled to evidentiary value, except that an attorney may be competent to testify about matters of which he or she has first-hand knowledge. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc); *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (en banc). Thus, this portion of the *Stone Tech* decision was clearly correct.

brief, the Employer argues that the portion of *Stone Tech* on which it relies cannot be lightly dismissed as dicta because it reflects that panel's careful consideration. The body of the caselaw that developed after *Stone Tech*, however, indicates that there has been no mere light dismissal of the portion of *Stone Tech* on which the Employer relies.

Few BALCA panels have followed the equitable relief analysis suggested by *Stone Tech*. The panel in *Direct Meds Inc.*, 2009-PER-319 (Mar. 3, 2010), granted certification based on the language from the *Stone Tech* decision regarding the possibility of equitable relief grounds for forgiving a NOF content omission. In *Innopath Software*, 2009-PER-153 (Sept. 2, 2009), the panel affirmed the denial of certification for the same reason as in *Stone Tech* – that an attorney's assertion that the posting was adequate despite an omission on the NOF is insufficient to compel equitable relief from a regulatory requirement. In two very brief decisions, *Case Farms*, 2009-PER-94 (Jan. 29, 2009) and *Netsuite*, 2009-PER-130 (Feb. 26, 2009), the Board remanded for a grant of certification despite a NOF content omission, where the CO conceded that *Stone Tech* applied.

In contrast, most BALCA panels have declined to adopt the portion of the *Stone Tech* decision that suggested that an employer might establish equitable grounds for relieving it from failing to comply with the regulatory content requirements for an NOF. See, e.g., *Chicago Sub Inc.*, 2011-PER-2399 (Apr. 12, 2012); *D & Z Trading Corp*, 2011-PER-630 (Feb. 27, 2012); *Enterprise VI, LLC*, 2011-PER-596 (Jan. 31, 2012) (“The regulations were designed to require employers to include several standard elements of information in its advertisements and NOF postings, principally to get information to persons who might view the advertisement or posting, but also to enable the CO to be able to assess on the face of the employer's documentation whether the required information was imparted to potential applicants or other interested persons.”); *ACC Builders, LLC*, 2011-PER-599 (Jan. 27, 2012); *L & B Operating, Inc. d/b/a Dunkin Donuts & Baskin*, 2011-PER-2200 (Jan. 27, 2012); *Mannings USA*, 2011-PER-618 (Jan.

27, 2012); *Renovation Masters, Inc. (Horizon Builders)*, 2011-PER-110 (Jan. 27, 2012) (failure to comply with NOF content requirements introduces uncertainty; CO not required to conduct an investigation of the circumstances of the posting); *Resnick Supermarket Equipment Corp.*, 2011-PER-603 (Jan. 27, 2012); *Bagel World, Inc.*, 2011-PER-149 (Jan. 4, 2012); *Chip's Evergreen, Inc.*, 2010-PER-1527 (Dec. 23, 2011); *Romart International, Inc.*, 2010-PER-1656 (Dec. 23, 2011); *The Emmes Corp.*, 2011-PER-226 (Dec. 23, 2011); *Peacock Apparel Group, Inc.*, 2011-PER-302 (Dec. 22, 2011), petition for en banc review den. (Feb. 13, 2012); *Capricorn Pharma, Inc.*, 2011-PER-12 (Dec. 12, 2011); *HRH Contractors, Inc.*, 2011-PER-412 (Dec. 12, 2011); *PG Tucker Investment Inc. d/b/a Frankie's Italian Ristorante*, 2010-PER-1396 (Sept. 26, 2011); *Washington Hispanic Inc.*, 2010-PER-1183 (Sept. 26, 2011) (specifically finding that more recent caselaw was more persuasive than *Stone Tech*, *DirectMeds*, *Case Farms*, and *Netsuite*); *Terrace Club*, 2011-PER-896 (Sept. 23, 2011); *Nino's Trattoria and Pizzeria*, 2010-PER-1454 (Aug. 25, 2011); *Swiss Re Life & Health America Inc.*, 2010-PER-1133 (Aug. 25, 2011), petition for en banc review den. (Aug. 25, 2011); *Lyceum Business Services, LLC*, 2010-PER-1004 (Aug. 4, 2011); *Comcast Cable Communications, Inc.*, 2010-PER-877 (June 29, 2011); *Proskauer Rose, LLP*, 2010-PER-972 (June 27, 2011); *Worldquant, LLC*, 2010-PER-1090 (June 27, 2011) (regulations neither contemplate nor compel the CO to conduct additional investigations where the employer has clearly failed to comply with the NOF regulation).

Three decisions in particular have discussed *Stone Tech* and explained why the panels deciding those appeals would not follow the language in *Stone Tech* suggesting that failure to comply with NOF content requirements might be found not to require denial of certification under the particular circumstances in which the posting occurred.

In *Alexandria Granite & Marble*, 2009-PER-373 (May 26, 2010), *pet. en banc review denied* (July 15, 2010), the employer's NOF did not contain the geographical location of the job opportunity as required by the regulation, and the employer cited

*Stone Tech* in an attempt to present grounds for equitable relief from that requirement. The panel stated that *Stone Tech* suggested a particular circumstance where an employer may be able to obtain equitable relief, but found that it did not create a rule or situation whereby an employer is entitled to such relief. The panel, while not rejecting *Stone Tech* outright, found that establishing equitable grounds for overlooking the regulatory requirement of including the geographical location of the job on the NOF would be difficult given that the PERM program was very much intended to be a streamlined process eliminating much of the back-and-forth that was the hallmark of the pre-PERM regulations. *Alexandria Granite & Marble, supra*, slip op. at 5-6.

In *Robert Venuti Landscaping, Inc.*, 2009-PER-453 (Oct. 27, 2010), the panel soundly rejected the portion of *Stone Tech* suggesting that it would be possible to document that the NOF was adequate despite omission of the employer's name. The panel stated:

.. *Stone Tech* was decided by an entirely different panel of judges and this panel is not bound by their mere suggestion of a hypothetical exception to the regulations. We hold today that the suggestion in *Stone Tech* that exceptions to the NOF requirements are possible is no longer viable under the current regulatory scheme. Regardless of the context in which it is posted, the NOF must contain the information outlined in Section 656.17(f), including the name and geographic location of the employer.

*Robert Venuti Landscaping, supra*, slip op. at 5. The panel moreover drew the conclusion that *Stone Tech* had been decided under the PERM regulations in effect prior to the 2007 amendments to 20 C.F.R. § 656.24.<sup>4</sup> The panel held that “the so-called *Stone Tech* exception is no longer an available means by which to offer this plea for relief” and that found that “it was fatal to Employer’s application to fail to include its business name on the NOF” *Robert Venuti Landscaping, supra*, slip op. at 6-7.

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<sup>4</sup> *Direct Meds* was decided under pre-2007 amendment of the reconsideration regulation. It is not possible to determine on the face of the *Case Farms* and *Netsuite* decisions whether they were filed prior to the effective date of that amendment.

In *Comcast Cable Communications, LLC*, 2010-PER-421 (Apr. 7, 2011), the panel further discussed why the “*Stone Tech* exception” is not viable under the current regulatory scheme. In *Comcast*, the Employer presented an affidavit from its Senior HR Manager to explain the circumstances of the posting, and the panel explained why the affidavit did not cure the deficiencies with the NOF posting.

... *Stone Tech* essentially invited employers to submit additional documentation *after* the employer’s application is denied for failure to comply with the NOF requirements.

In 2007, however, the Employment and Training Administration published amendments to the PERM program that clarify the restrictions on employers who wish to modify their applications after submission or to support a motion for reconsideration with supporting documentation. ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 28903 (May 17, 2007). The applicable regulations at 20 C.F.R. § 656.24(g)(2)(i)-(ii) provide that, for applications submitted after July 16, 2007, the request may include only:

- (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
- (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of § 656.10(f).
- (iii) Paragraphs (g)(1) and (2) of this section notwithstanding, the Certifying Officer will not grant any request for reconsideration where the deficiency that caused denial resulted from the applicant’s disregard of a system prompt or other direct instruction.

Thus, the *Stone Tech* dicta was based on a very wrong assumption – that an employer would be permitted under the regulations to supplement the record with newly created documentation once receiving notice of a denial.

*Comcast, supra*, slip op. at 4-6 (footnote omitted).

The Employer in the instant case filed a well argued appellate brief that pointed out some imprecision in language used by the CO in his decision on reconsideration about the *Stone Tech* decision, that the *Stone Tech* decision was consistent with the kinds of procedural due process concerns addressed by the Board in *HealthAmerica*, 2006-PER-1 (July 16, 2006)(en banc) and similar decisions, that by some criteria *Stone Tech* would not be considered dicta, and why the omission of the name of the employer would have been inconsequential under the “highly unusual circumstances in which the NOF was posted.” The Employer, however, did not address the evidentiary limitations imposed by the 2007 amendments to the PERM regulations. The bottom line is that none of the extensive documentation provided by the Employer with the motion for reconsideration/review can be used to support a motion for reconsideration under the current regulations.

Accordingly, we find that it was fatal to the Employer’s application to have failed to include its name on the NOF. The impact of the *Stone Tech* decision is now well-trodden ground. If it is not already clear, the great weight of the caselaw soundly rejects the suggestion in *Stone Tech* that an employer can overcome a failure to comply with a content requirement on a NOF by presenting documentation showing why it would not have mattered under the circumstances of its particular posting. The NOF must comply with the regulatory content requirements, and appeals attempting to explain away a failure to comply with those requirements based on the context of the posting are almost certainly destined to fail given the evidentiary limitations imposed by the 2007 amendments to the regulations.

## **ORDER**

Accordingly, **IT IS ORDERED** that the denial of labor certification in this matter is **AFFIRMED**.

For the panel:

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**WILLIAM S. COLWELL**

Associate Chief Administrative Law Judge

**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.