



**Issue Date: 12 May 2016**

**BALCA Case No.: 2016-PER-00074**  
ETA Case No.: A-13221-87300

*In the Matter of:*

**INFOSYS LTD,**

*Employer,*

*on behalf of*

**MEMON, IMRAN EBRAHIM,**

*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearance: Jeffrey L. Nesvet, Associate Solicitor  
Vincent C. Costantino, Senior Trial Attorney  
Office of the Solicitor Employment and Training Legal Services  
For the Certifying Officer

Pia Kappy, Esquire  
Fragomen, Del Rey, Bernsen & Lowey, LLP  
New York, New York  
*For the Employer*

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and  
Morris D. Davis, *Administrative Law Judges*

**DECISION AND ORDER**  
**DIRECTING GRANT OF CERTIFICATION**

This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the “PERM” labor certification regulations at 20 C.F.R. Part 656.<sup>1</sup>

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<sup>1</sup> “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

## **BACKGROUND**

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States for the position of “Technical Test Lead – U.S.” (AF 328-339)<sup>2</sup> The Application described the primary worksite as Plano, Texas. “and various unanticipated locations throughout the U.S.” (AF 329). The Certifying Officer (“CO”) audited the application and with respect to the work location specifically asked:

Is the employee permitted and/or expected to perform the duties of the job opportunity listed on the ETA Form 9089 from his residence and/or place of his/her choosing? Please respond with a “Yes” or “No” and provide complete details in your response.

Is the employee permitted and/or expected to perform the duties of the job opportunity from some place other than the employer’s headquarters or the worksites listed on the ETA Form 9089? Will the employee be expected to work multiple worksites in this job? Please respond with a “Yes” or “No” and provide complete details (to include details regarding the worksite locations) in your response.

(AF 327)

The Employer responded to the audit request on May 30, 2014. (AF 74-321) With respect to the question concerning work location, the Employer indicated that the employee would not be permitted to perform the job from home or at a place of his choosing. With regard to the second half of the question, the Employer indicated that the job would be performed at client sites and there might be multiple such sites. The Employer also noted that employees might be redeployed to various unanticipated worksites throughout the U.S. according to business need. (AF 77)

On May 18, 2015, the CO issued an “Additional Audit Request” asking the Employer to submit a signed statement indicating that it wished to continue to pursue the application and, if so, to provide the following additional information.

- Is there a relocation requirement for the job opportunity listed on the ETA Form 9089? Please respond with a "Yes" or "No" and provide complete details in your response.
- Is the employee permitted and/or expected to perform the duties of the job opportunity listed on the ETA Form 9089 from a location other than that

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<sup>2</sup> Citations to the Appeal File are abbreviated as “AF” followed by the page number.

listed in Section H of the ETA Form 9089? Please respond with a "Yes" or "No" and provide complete details in your response.

- If yes, will the employee be required to relocate to multiple worksites and/or will the employer pay or reimburse all travel expenses? Please respond with a "Yes" or "No" and provide complete details in your response.

(AF 66)

Regarding question one, the Employer responded that the willingness to relocate was a condition of employment and such a possibility was “consistent with our business model.... To this end, employees are assigned to work at a client facility and may be redeployed at various unanticipated worksites.... In any IT consulting engagement involving technical implementation, physical on-site placement is always a condition of employment.” (AF 45)

The Employer further observed that its approach was consistent with ETA Field Memorandum 48-94 (May 16, 1994), which addresses where employers with job opportunities entailing unanticipated work locations should file their applications. The Employer additionally attached a letter from Professor David Bellehsen of the City University of New York, who it represented as an expert in the IT consulting field. He opined that the various unanticipated worksite language “would apprise applicants in the IT consulting field that relocation is a condition of employment” (AF 49)

As to the second question, the Employer responded in the negative “because the worksite will be either headquarters or various unanticipated locations in throughout the U.S. as reflected in Section H of the ETA Form 9089 and in all advertisements.” (AF 46)

Regarding the third question concerning reimbursement for relocation expenses, the Employer stated that “relocation expenses maybe reimbursed by the employer pursuant to internal policy and consistent with the IT consulting business model requiring employees to work at various unanticipated locations throughout the U.S. (AF 46)

The CO subsequently denied the application. (AF 40-42). In the denial letter, the CO observed that while the Employer acknowledged in its response to the Additional Audit Request that the job entailed a relocation requirement, “the 9089 failed to identify that an employee may relocate to different client worksites.” (AF 41) The CO noted that the employer had marked “yes” to Section D.a 7 (Will travel be required to perform the job duties). “For this reason the Certifying Officer has determined the phrase ‘various unanticipated locations throughout the U.S.’ is indicative of a travel and not a relocation requirement.” (AF 41)

The CO went on to describe that travel entails going from place to place as representative of the employer “regardless of the duration of the project.”

Expenses for travel to client sites are usually paid by the employer and begin when the representative leaves his or her residence or regular worksite and end upon his or her return. Relocation, however, implies the representative must physically move to a new area or location to conduct the work or assignment.

Relocation, which is typically a one-time event, is generally an expensive process and the associated costs may be subsidized by the employer. It is more permanent in nature and is a more excessive requirement than travel for short and long term projects.

(AF 41)

The CO further observed that the employer's recruitment efforts must "fully and accurately apprise the U.S. workers of the job opportunity (e.g.; benefits terms and conditions)..." The CO noted that the Employer's

[F]ailure to include the 'relocation requirement' in Section H of the 9089 or the advertisements submitted to the Department of Labor (Department) prevents the Department from effectively evaluating this application. Additionally, failing to list all the requirements of the job opportunity on the 9089 prevents the Department from assessing the employer's actual minimum requirements for the job opportunity and determining whether the job opportunity is bona fide and open to all U.S. workers.

(AF 41)

The CO further noted that because of the Employer's failure to disclose the relocation requirement:

U.S. workers were adversely impacted and we are unable to grant labor certification of this application. Furthermore, omitting the relocation requirement in the advertisements prevents potentially qualified applicants from making an informed decision on whether s/he would be interested in the actual job opportunity. Because the employer failed to disclose to the Department all the requirements of the job opportunity, the CO cannot grant certification of this application.

(AF 42)

The denial was based on the Employer's failure to comply with three specific regulatory requirements: 20 C.F.R. § 656.17(f)(3)—the obligation to "[p]rovide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought;" 20 C.F.R. § 656.17(f)(4)—the requirement that advertisements "must indicate the geographic are of employment with enough specificity to apprise applicants of any travel requirements; and 20 C.F.R. § 656.17(i)(1)—the requirement that the job be described with the employer's actual minimum requirement. In addition, the CO referenced 20 C.F.R. § 656.24(b)(2), which provides that the CO will make certification decisions based on the availability of qualified domestic workers.

The Employer filed a lengthy motion for reconsideration. (AF 17-23). First, it contended that the relocation was "an inherent condition of employment in the IT consulting industry. In

fact the Employer carefully and strictly adhered to the only guidance available from DOL where worksites are unpredictable, the Farmer Memo.” (AF 17) The Employer characterized the Farmer Memo (i.e., ETA Field Memorandum 48-94 (May 16, 1994))<sup>3</sup> as “provid[ing] instructions to employers filing labor certification applications where the alien will be working at various unanticipated sites, such as the instant application and, therefore, applies to positions that require travel if there is no primary worksite as well as to positons require relocation.” (AF 18)

The Employer argued that the denial reflected a “newly created standard, which was previously unpublished and unknowable to the Employer, announced only in retrospect upon denial of its labor certification application...” The Employer found this approach especially troublesome because it claimed that multiple unsuccessful efforts had been made by stakeholders in discussions with OFLC to secure greater clarification concerning how applications of this type should be filed. The Employer claims that OFLC’s response to that those inquiries was that “any change in policy will be made clear with notice to stakeholders, such as an FAQ or Federal Register notice that will provide additional guidance and clarification.” (AF 19)

In response to the CO’s determination that the Employer’s action in checking yes to Section D.a.7 represented a concession that the application involved a travel rather than a relocation requirement, the Employer argued: “The Employer answered ‘Yes’ in Section D.a.7, the only question available regarding the unfixed work location in a good faith attempt to accurately disclose the roving nature of the job opportunity understanding that this is generally grounds for an increased wage.” (AF 19) The Employer further observed that “DOL recently certified over 520 of the Employer’s PERM applications, almost all of them after audit, with the identical approach to the one used in this application.” (AF 20)

The Employer then addressed the specific regulatory provisions relied upon by the CO. With respect to 20 C.F.R. § 656.24(b)(2), the Employer contended that the possibility of relocation would not discourage workers from applying since that contingency was commonly understood within the industry as reflected in the opinion of its expert. The Employer also observed that failing to explicitly reference relocation likely would induce more domestic applicants. Lastly, it argued that DOL could not deny on this ground “without documentary evidence.” (AF 21)

Concerning the job specificity requirements of 20 C.F.R. § 656.17(f)(3), the Employer contended that its disclosures were sufficient in the context of the preamble to the regulations and BALCA decisions which indicate that advertising merely needs to demonstrate a logical nexus with the position and does not need to specify every job requirement and duty. (AF 21) Regarding the disclosure of travel requirements mandated by 20 C.F.R. § 656.17(f)(4), the Employer argued that the job opportunity did not actually involve travel and the “unanticipated worksite” language was commonly used in the industry and adequately described the nature of nature of the job. It also asserted that this language had been accepted by the BALCA as satisfying this requirement. *Technology Consultants-Ma*, 2011-PER-1288 (June 14, 2012).

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<sup>3</sup> ETA Field Memorandum No. 48-94 is commonly referred to as the “Farmer” memo because it was issued by Barbara Ann Farmer, Administrator for Regional Management.

Lastly, regarding the CO's concerns about actual minimum job requirements under 20 C.F.R. § 656.17(i) (1), the Employer contended that "[t]he fact that the Employer requires its employees to be willing to work in different, unanticipated work locations based on business needs as a result of its IT consulting model is not 'requirement' from a minimum qualifications perspective, but rather is a condition of employment well understood within the IT consulting industry." (AF 22)

After reviewing the Employer's reconsideration request, the CO determined that the Employer had failed to overcome the deficiencies and affirmed the denial. (AF 12-15)

The CO concluded that:

By omitting its relocation requirement, the employer failed to state its actual minimum requirements on the application form, and also failed to adequately apprise U.S. workers of the specifics of the job opportunity in recruitment advertising, including where they must reside. Therefore, failure to disclose a relocation requirement in the application form and in recruitment advertising violates the Department's regulations at 20 CFR §§ 656.17(i)(1) and 656.17(f)(3) and (4).

(AF 13) The CO concluded that this failure rendered him unable to grant the certification in accordance with 20 C.F.R. § 656.24(b)(2).

The CO rejected the Employer's reliance on the Farmer Memo noting that:

However, the pre-PERM Farmer Memo requires an employer to use its headquarters' location for roving employees to prevent an employer from using a job location with a lower prevailing wage or a smaller potential pool of applicants. The employer further contends that in the Farmer "unanticipated job locations" refers to both travel and relocation. The Farmer Memo does not mention relocation, nor does it anticipate PERM regulations on the content of advertising. (Even assuming, *arguendo*, that the Memo refers to both travel and relocation, the employer stipulates in its audit response that there is no travel involved, so that its use of the term "unanticipated job locations" is misleading.)

(AF 14)

With regard to the Employer's contention that the phrase "unanticipated locations" would be understood by applicants to encompass relocation, the CO was unconvinced, concluding that the Employer had provided no proof for that contention. Concerning the Employer's argument that the advertising was not required to describe all job duties and requirements and that the regulatory reference to actual minimum requirements did not apply to relocation, the CO concluded that relocation was in special category.

Relocation is a material aspect of a job opportunity significant to potential applicants. When assignments are so long term that an employee must establish a

residence near the client, the disruption to an individual's life is substantial, and the associated costs can be significant—especially when they are not subsidized by the employer.

(AF 15)

Finally, the CO concluded that the Employer's failure to disclose its relocation requirement deprived him of critical information needed to evaluate the application.

When a job opportunity requires relocation to unanticipated locations throughout the U.S., the Certifying Officer must be apprised of the relocation requirement. The Certifying Officer has an obligation to further investigate relocation requirements, to determine who is responsible for paying the relocation costs. If workers are required to pay their own relocation costs, the requirement for relocation can adversely affect the wages of U.S. workers similarly employed. When workers are required to pay significant costs for relocation expenses, in a position that could require multiple relocations within a year, and are required to relocate to retain employment, the expenses associated with relocation has a direct effect on the salary earned by the employee, which can have an impact on an applicant's willingness to accept the job offer. If the employer pays for the employee to relocate from one work site to another, this information needs to be disclosed to the Certifying Officer to ensure U.S. workers are offered the same term of employment and are appropriately apprised of the employer's willingness to pay the relocation expense, in addition to the salary offered. This makes relocation a material requirement of a job opportunity that must be disclosed in the ETA Forms 9089 and 9141 and to potential applicants in recruitment advertising.

As a result of the employer omitting the relocation requirement on the ETA Form 9089 and in the recruitment media, including its Sunday print ads and Notice of Filing, the Certifying Officer could not determine the employer's actual minimum requirements for the position offered to ensure the employer's recruitment efforts appropriately apprised U.S. workers of the job opportunity's actual terms and conditions of employment, so that U.S. workers could make an informed decision whether or not they would be interested in applying for the position. Therefore, the Certifying Officer is unable to determine whether there are able, willing, qualified and available U.S. workers to perform the job opportunity, in accordance with the Department's regulations at 20 CFR § 656.24(b)(2). Consequently, the Secretary of Labor cannot certify to the Secretary of State and the Secretary of Homeland Security that there are not sufficient U.S. workers available for the employment offered and that the employment of foreign workers will not adversely affect the wages of United States workers similarly employed.

Therefore, the Certifying Officer has determined this reason for denial to be valid, in accordance with the Department's regulations at 20 CFR 656. §§ 17(i)( 1), 656. 17(f)(3) and (4), and 656.24(b)(2).

(AF 14-15)

## DISCUSSION

This case presents essentially two questions. 1) Did the CO correctly determine that the possibility that workers might be required to relocate was not subsumed in the Employer's description of the work locations as "various unanticipated locations through the U.S.?" 2) Assuming the CO reasonably concluded that relocation was not subsumed in that language, did it violate due process or fundamental fairness to apply that determination to cases already in process where no guidance on that question had been issued and hundreds of essentially identical applications had previously been certified? We answer both these questions in favor of the Employer.

### The Possibility of Relocation Can be Reasonably Found in the Application

The discussion here begins with the CO's observation that "the phrase 'various unanticipated locations throughout the U.S.' is indicative of a travel and not a relocation requirement." (AF 27) The CO offers no support for this assertion and is not self-evident.<sup>4</sup> As the CO correctly points out, the Farmer Memo<sup>5</sup> is narrowly focused on the question of where an employer who chooses to use the unanticipated location formulation should file its application. It says nothing about how that phrase may impact case

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<sup>4</sup> We do not agree with the CO's conclusion that the Employer conceded this point by checking "yes" to Section D.a.7 on the Form concerning whether the job opportunity involves any travel and accept the Employer's explanation. In the absence of any OFLC guidance reflecting the CO's concerns about relocation, or the distinction being drawn between relocation and travel, (see discussion, infra.), the Employer's affirmative answer to this question provides no meaningful insight. At the time the Employer filled out the Form 9089, it had no reason to believe that the CO had any particular relocations concerns.

<sup>5</sup> The relevant section of the Farmer Memo provides:

10. LABOR CERTIFICATION APPLICATIONS WHERE ALIENS WILL BE WORKING AT VARIOUS UNANTICIPATED WORK SITES

Applications involving job opportunities which require the beneficiary to work at various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located.

In Item 7 (address where the alien will work) of part A of the Application for Alien Employment Certification, the employer should indicate that the alien will be working at various unanticipated locations throughout the U.S. A short explanation should also be included explaining why it is not possible to predict where the work sites will be at the time the application is filed.

adjudication in other areas.<sup>6</sup> Even if there were a clear, well-understood, distinction between a travel requirement and a relocation requirement, there is nothing in the Farmer Memo that addresses the question of whether either, neither or both these concepts are necessarily subsumed in that phrase.

While the Farmer Memo is silent on the question of relocation versus travel, an analysis of the unanticipated location language in the context of the PERM process supports a conclusion different from the one posited by the CO. In our view, the possibility of relocation seems more readily associated with the unanticipated work locations language. PERM applications are tied to a specific alien beneficiary; a beneficiary who is normally already employed by the company seeking certification. That is true in this case where the alien beneficiary was, at the time of filing, already employed by the Employer in Irvine, California. (AF 334) Despite that fact, the Form 9089 answered the question of where the work will be performed as “Plano Tx. and various unanticipated locations throughout the U.S.” (AF 329) This supports the Employer’s contention that the possibility of relocation is subsumed in the use of the unanticipated worksite language. We surmise that the possibility of relocation was precisely why employers initially sought, and received approval from DOL in the Farmer memo, to use this language in their applications. If employers were not anticipating that the alien beneficiaries might be relocated to another work location before the labor certification/visa petitioning process were completed, they would not have included such language in the application. Certainly a travel requirement (which under the CO’s definition does not involve the need to relocate) would not seem to have necessitated use of that formulation.<sup>7</sup>

In support of his position, the CO’s appellate brief relies on a number of BALCA decisions where the relocation issue was discussed. For example, in *Patel Consultants Corp.*, 2011-PER-535 (Feb. 27, 2012), the Form 9089 identified the work location as Union, New Jersey “and various **unanticipated** locations throughout the U.S.” The employer’s job description also included the statement “Travel to **unanticipated** locations to interact with clients and train end users for short and long term assignments.” The CO denied the application because the job order and newspaper advertising contained a relocation requirement not contained in the 9089. The panel affirmed the denial:

We agree with the CO that the Employer’s description of the duties on the Form 9089 “travel to various unanticipated locations to interact with clients and train end users for short and long term assignments” – connotes only that the job opportunity would require travel for short and long term

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<sup>6</sup> For this reason, the Employer’s brief reads too much into OFLC’s continued reliance on the Farmer Memo. “By using the Farmer Memo language, the Employer has, therefore provided a sufficient description of the position and indicated the geographic are of employment with sufficient specificity in both the pre-filing advertisements and the ETA Form 9089.” Employer’s Brief (“EB”) at 3. Nothing in the Memo supports such a broad assertion. See, *Software Professional Services Corp.*, 2011-PER-2299 (Sept. 10, 2013).

<sup>7</sup> Since we reject the CO’s conclusion that the possibility of relocation cannot be reasonably encompassed by the unanticipated location language, we do not address the import of the opinion letter provided by Professor Bellehsen.

assignments. Travel for a long term assignment is not the same as relocation. Relocation implies that the Employer will be requiring the incumbent to move to a new location rather than just travel to it.

*Id.* at 3

*Patel* and a number of similar cases,<sup>8</sup> are distinguishable since all of them involve inconsistencies between the language in the Form 9089 and the advertising. The employers in those cases chose to introduce the concept of relocation into the application process and ultimately suffered for not addressing the concept consistently in both the application and advertising and/or the NOF and thus violating 20 C.F.R. § 656.10(d) and 17(f). Those cases are fundamentally different from the instant one in which there is no inconsistency between the application and the advertising. Rather, the CO is now contending that the Employer was affirmatively obligated to announce its relocation requirement in both the Form 9089 and the advertising even in the absence of any guidance suggesting such an obligation.

#### Fundamental Fairness Precludes the CO from Denying the Application

The Employer contends that the CO approved over 500 applications largely identical to this one before abruptly, and without warning, choosing to deny subsequent applications because of a failure to disclose the possibility of relocation. It contends that this allegedly retroactive change in approach was fundamentally unfair and a violation of due process. (EB 4-5) The CO responded that “the Department’s decisions are made on a case-by-case basis and are not determined by precedent. Here the employer’s audit response specified that relocation not travel is required. That response conflicts with the employer’s ETA Forms 9089 and 9141, and with its recruitment advertising, that contains no relocation requirement.” (AF 2-3)

While it is generally true that prior certifications do not bind the CO in future similar cases, *Paralegal Priorities*, 1994-INA-117 (Feb. 1, 1995), *AL & L Industries*, 1999-INA-39 (May 13, 1999), *Barber’s Landscape Maintenance*, 2008-INA-49 (Jan. 6, 2009) the situation here is different. The PERM process is unusual in that not only must the employer complete all of its regulatory obligation before it files its application, but after filing, the employer is precluded from changing the application in any way to address concerns raised by the CO. 20 C.F.R. § 656.11(b). If the application is wrong, the employer must start all over. The employer must get it right the first time.

While this system places heavy burden on employers to be careful in preparing their applications, it puts a related burden on the CO to ensure that employers have adequate guidance on what will be demanded of them. That guidance is contained in the regulation, along with its

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<sup>8</sup> See *Nova Software*, 2012-PER-518 (Dec. 23, 2014); *31 Infotech*, 2012-PER-129 (May 21, 2014); *Ebusinessware*, 2011-PER-900 (May 1, 2013); *Everest Consulting Group*, 2010-PER-1443 (May 11, 2012); *Diverse Lynx*, 2010-PER-1147 (June 21, 2012); *Marlabs*, 2010-PER-1577 (Oct. 21, 2011); *Ventura Corp.*, 2010-PER-948 (Aug. 12, 2011); *Iconsoft*, 2010-PER-798 (May 25, 2011).

preamble, in addition to sub-regulatory issuances such as FAQs. We note ETA has issued no guidance whatsoever alerting employers to the CO's position that the possibility of relocation needed to be specifically disclosed in the application and advertising.<sup>9</sup> Thus, even assuming that the CO could reasonably demand that the possibility of relocation be explicitly disclosed, the need for such a disclosure is hardly self-evident and nothing would have informed this Employer of its responsibility in regard. Neither the CO's decision, nor his brief to the Board, offers any theory addressing how the employer was expected to know that relocation needed to be specifically discussed. In the absence of any guidance on that point, and in the face of 500+ applications having been approved before the CO even thought to inquire about the issue, it was fundamentally unfair for the CO to impose this new approach to pending applications. Therefore this denial must be reversed.<sup>10</sup>

The need to provide adequate notice to employers of their responsibilities has been addressed by the Board in analogous situations where the CO has denied applications based on the employer's failure to produce documentation where the regulations provided no notice that such documentation needed to be maintained. *SAP America*, 2010-PER-1250 (Apr. 18, 2013) (en banc). Similarly, the Board has reversed denials based on the employer's failure to properly contact domestic applicants where the CO had provided insufficient notice concerning the scope of the employer responsibility in this regard. See *Fort Myer Construction*, 2003-INA-117 (June 22, 2004); *Norma Diamond*, 2003-INA-122 (Sept. 4, 2003); *Joyful Manner*, 2001-INA-157 (Mar. 27, 2002); and *Raleigh Lanehart Electric*, 2008-INA-71 (Oct. 28, 2008)

These decisions are in line with well-established authority holding that due process is violated when an agency imposes obligations on employers without proper notice.

We have previously cited with approval the line of cases enunciating "ascertainable certainty" as the applicable standard for fair notice. See *Dravo Corp. v. Occupational Safety and Health Review Comm'n*, 613 F.2d 1227, 1232 (3d Cir.1980) (citing *Diamond Roofing*, 528 F.2d at 649). But, as the Court of Appeals for the First Circuit explained in *United States v. Lachman*, that line of cases do[es] not stand for the proposition that any ambiguity in a regulation bars punishment. Rather, they are addressed only to situations in which: (1) the agency had given conflicting public interpretations of the regulation, or, (2) the regulation

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<sup>9</sup> The need for clear guidance is reinforced by the language in the preamble to the regulations suggesting that employers are not expected to provide much detail in their advertising. "[t]he regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment . . . As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity. . . ." 69 Fed. Reg. 77326, 77437 (Dec. 27, 2004). It is also impossible to ignore the fact that the unanticipated location language had been in use for over two decades before the CO began to question whether that phrase encompassed relocation.

<sup>10</sup> The impact of this lack of guidance is illustrated by some inconsistencies in the CO's position. For example, the CO criticizes the Employer for a lack of specificity in the application: "By omitting its relocation requirement, the employer failed to state its actual minimum requirements on the application form, and also failed to adequately apprise U.S. workers of the specifics of the job opportunity in recruitment advertising, including where they must reside." (AF 13) A lack of specificity, of course, is inherent in the "unanticipated location" language, yet the CO continues to allow employers to use that formulation.

is so vague that the ambiguity can only be resolved by deferring to the agency's own interpretation of the regulation (i.e., a situation in which the ambiguity is resolved by something comparable to a step-two analysis under *Chevron*), and the agency has failed to provide a sufficient, publicly accessible statement of that interpretation before the conduct in question. 387 F.3d 42, 57 (1<sup>st</sup> Cir. 2004)

*Secretary of Labor v. Beverly Healthcare-Hillview*, 541 F. 3d 193 (3<sup>rd</sup> Cir. 2008) (emphasis added). See also *Corbesco, Inc., v. Dole*, 926 F.2d 422, 427 (5<sup>th</sup> Cir. 1991), *Wal-Mart Distribution Center #6016*, \_\_\_F.3d\_\_\_, No. 15-60462 (5<sup>th</sup> Cir. Apr. 6, 2016).

As noted above, OFLC has issued neither formal nor informal guidance concerning the relocation question. There is simply nothing in the record suggesting how this Employer could have known that the CO expected it to disclose the possibility of relocation. While the Employer's due process concerns were raised in its Request for Reconsideration (AF 18), that issue is not addressed in either the CO's denial of reconsideration or the CO's brief to the Board.

This case offers an additional dimension to the notice question. The Employer contends (EB at 4-5) that the organized immigration bar had been pressing OFLC for years to issue clarification on how to handle a variety of issues relating to "roving" employees. It cites liaison meetings where the issue was allegedly discussed and quotes OFLC as saying "any change in policy will be made clear with notice to stakeholders, such as an FAQ or Federal Register notice that will provide additional guidance and clarification." (EB at 5)

Traditionally, the Board has been reluctant to give credence to such assertions. The minutes of these meetings are not cleared by OFLC, are normally not part of administrative record and are not subject to official notice. See *Infosys Technologies*, 2012-PER-417 (Nov. 16, 2012); *Albert Einstein Medical Center*, 2009-PER-379 (Nov. 21, 2011) (*en banc*). The instant case is different. The allegations concerning the immigration bar's unsuccessful efforts to secure guidance from OFLC are contained both in the Employer's audit response (AF 46-47) and in the Request for Reconsideration. (AF 18-19) This matter has clearly been placed in the record. The CO had two opportunities to challenge the Employer's characterization of the content of these meetings and did not to do so. Nor is the issue addressed in the CO's brief to the Board. The CO's apparent concession reinforces our conclusion that due process concerns compel a reversal.<sup>11</sup>

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<sup>11</sup> The obvious need for OFLC to issue on guidance on this matter is reinforced when one considers the breadth of the CO's concerns regarding relocation. The CO makes clear in his denial (AF 9) that his interest goes far beyond the mere disclosure of the possibility of relocation; it appears he intends to scrutinize the employer's policies regarding reimbursement of relocation costs presumably to judge the reasonableness of those policies.

## ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2).

Entered at the direction of the panel by:

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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.