



Issue Date: 29 June 2018

BALCA Case No.: 2018-PED-00001

ETA Case Nos.: ¹	A-16085-89039	A-16224-41533	A-16307-67487*
	A-16085-89043	A-16229-43016	A-16307-67554*
	A-16085-89514	A-16229-43023	A-16316-70559
	A-16086-89584	A-16229-43040	A-16316-70703
	A-16086-89596	A-16229-43102	A-16316-70705*
	A-16086-89597	A-16231-43963	A-16333-75009
	A-16089-90620	A-16235-44792	A-16334-75240
	A-16089-90663	A-16241-47098	A-16340-77463
	A-16089-90672	A-16243-48006	A-16341-77912
	A-16102-95662	A-16245-48907	A-16342-78369
	A-16119-03637	A-16252-50552	A-16344-79131
	A-16165-21317	A-16252-50555*	A-16348-80208
	A-16215-38532	A-16263-53872*	A-16354-82326
	A-16215-38534	A-16263-54013*	A-16354-82655
	A-16216-39000	A-16265-55086*	A-16355-82936
	A-16217-38975*	A-16272-57377	A-16355-82950
	A-16222-40746	A-16272-57380	A-16355-83061
	A-16223-41220	A-16306-67293	A-16363-85217
	A-16223-41222	A-16306-67303	A-16363-85232
	A-16224-41493	A-16307-67476	

*In the Matter of:***HARRISON POULTRY, INC.,***Employer.*

Before: Alan L. Bergstrom
Administrative Law Judge

DECISION AND ORDER OF DEBARMENT

This matter arises from a request for review of a determination issued by the Administrator of the Office of Foreign Labor Certification (“OFLC”) against respondent Employer, advising the Employer that the Administrator had determined that Employer should be debarred from participating in the permanent employment certification program for a period of three years. On January 23, 2018, the Employer filed a “Request for Review of Debarment” based on a “Notice

¹ For those cases marked with an *, see footnotes #3 and #4 herein.

of Debarment” issued by the Deputy Administrator for OFLC on December 19, 2017. The “Notice of Debarment” was issued under 20 C.F.R. § 656.31(f)(iv) for a pattern or practice of failure to comply in the audit response process as required by 20 C.F.R. § 656.20. The action was based on Employer’s actions related to 59 applications for labor certification for permanent employment of aliens in the United States filed during the period from March 25, 2016 through December 28, 2016.

This matter was assigned to this presiding Judge on March 12, 2018 pursuant to 20 C.F.R. § 656.27(a) and (e). On March 15, 2018 a prehearing conference call was held with the attorney of record for each Party in attendance. Following the prehearing conference call a “Notice of Assignment and Scheduling Order” was issued to the Parties. Pursuant to the Scheduling Order, Employer’s counsel filed a “Request for On-Record Determination” in which he averred “The Certifying Officer and the Employer have reached an agreement in the within matter to request an on-record determination. Counsel for the Certifying Officer has been advised of the filing of this request and has no objection to granting the request.”

Employer’s “Request for On-Record Determination” was granted by Order issued May 4, 2018. Pursuant to Federal regulations at 20 C.F.R. § 656.26(c)(3), the Employer was granted leave to file “any [relevant] documentation that is not in the Appeal File” by Tuesday, May 15, 2018. Counsel for Solicitor was granted leave to file relevant documentation in rebuttal or clarification of Employer’s additionally filed documentation, if any, by Tuesday, May 29, 2018. The Parties were granted leave to file written argument/brief/statement of position on the issues involved in this matter by, Tuesday, June 5, 2018. Each Party submitted their respective argument/brief on June 7, 2018. The Appeal File (“AF”) and legal arguments of the Parties have been considered in this case.

REGULATORY STANDARDS

Federal regulations at 20 C.F.R. § 656.31(f)(iv) provide for a “Notice of Debarment” to be issued to an employer, attorney, agent, or any combination thereof, based upon any action that was prohibited at the time the action occurred, upon finding that the employer, attorney or agent has participated in or facilitated “a pattern or practice of failure to comply in an audit process pursuant to § 656.20”, provided such Notice is issued by the Administrator, OFLC, no later than six years after the date of filing of the last labor certification application which constitutes a part of the pattern or practice of failure to comply with an audit process.

The provisions of 20 C.F.R. § 656.31(f) were revised to impose stricter remedial measures in order to promote the PERM² program integrity and assist the Department in obtaining compliance with the proposed amendments and existing program requirements for PERM applications filed after March 28, 2005. “The Final Rule revises the provision on failure to comply with the terms of the [application] form, failure to comply with the audit process, and failure to comply with the Certifying Officer-ordered supervised recruitment by adding a requirement that, for there to be a basis for debarment, there must be a pattern or practice of misconduct.” *Labor Certification for Permanent Employment of Aliens in the United States*;

² “PERM” is an acronym for the “Program Electronic Review Management” system established by the Regulations that went into effect on March 28, 2005.

Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, 72 Fed. Reg. 27904, 27927 (May 17, 2007). “In order to encourage compliance, the regulatory scheme for PERM relies on attestations, audits and ... the remedial measures of suspension and debarment proceedings to assure compliance ... Essential to maintain the integrity of the new, streamlined [PERM attestation-based] process is a need for audit compliance, already included in the regulations, and a remedial measure for continued and serious non-compliance, which is included in this Final Rule. A system of attestation and audit, relying heavily on the veracity of employer submissions, requires a system for ‘effective enforcement.’” Id. at 27929. The Department “views debarment as an extraordinary remedy and does not intend to invoke it except under the most serious of circumstances ... The Department acknowledges that not all debarment triggers should be treated equally and will, therefore, take steps to ensure that any debarment is reasonable and proportionate to the improper activity ... debarment procedures are appropriate to apply to conduct under the streamlines PERM processes because that system depends on ensuring employers furnish the required documentation within the required timeframes, as required by §§ 656.20 and 656.21 [citing 29 FR 77396 (Dec. 27, 2004)]. Further, a repeated failure to comply with core program requirements signals not only disregard for the process, but an intentional abuse of valuable, limited administrative resources, a practice the Department cannot tolerate ... There are, however, cases in which the persistent failure to cooperate in the audit or supervised recruitment processes is evidence of an intent to avoid the discovery of serious violations of the regulations.” Id at 27930. “The Department has added the requirement that there must be a pattern or practice with respect to failure to comply with the terms of the labor certification application (either Form ETA 9089 or Form ETA 750). A similar requirement for a pattern or practice has been added to § 656.31(f)(1)(iv), failure to comply in the audit process, and to § 656.31(f)(1)(v), failure to comply with the Certifying Officer-ordered supervised recruitment process.” Id. at 27930.

The provisions of 20 C.F.R. § 656.20 governing the audit process of applications for labor certification for permanent employment of aliens in the United States state –

“§ 656.20 Audit procedures.

- (a) Review of the labor certification application may lead to an audit of the application. Additionally, certain applications may be selected randomly for audit and quality control purposes. 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 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.

- (c) The Certifying Officer may in his or her discretion provide one extension, of up to 30 days, to the 30 days specified in paragraph (a)(2) of this section.
- (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.”

POSITIONS OF THE PARTIES

Position of the Administrator

The Administrator submits that between March 25, 2016 and December 28, 2016 the Certifying Officer (“CO”) the Employer filed 56³ applications for permanent labor certification for the position of “Poultry Processing Worker”; all of which were audited and all of which were denied between October 24, 2016 and August 16, 2017 because the Employer “(1) failed to provide requested documentation, namely U.S. workers’ resumes and applications, in response to Audit Notification letters [in 52 applications] ... and (2) ... failed to respond to Audit Notification letters by a specified date [in 4 applications⁴].” He submits that each Audit Notification letter requested the Employer “provide OFLC with copies of the resumes and completed employment application for all U.S. workers who applied for the job opportunity that was subject of its PERM applications ... [and] gave [the Employer] thirty days to submit the required documentation.”

The Administrator submits that in 52 applications, the Employer “did not submit workers’ resumes or employment applications in response to the Audit Notification letters. Instead [the Employer] submitted a ‘screenshot’ of alleged inputted data from the U.S. workers’ applications listing only the workers’ names and contact information.” He states that in the remaining 4 applications, the Employer “failed to submit any response to the Audit Notification letters. He argues that the objectives of debarment from the PERM program include, foremost, maintaining the integrity of the labor certification program.; and, that the Employer’s “individual acts of non-compliance constituted a pattern or practice of failure to comply in the audit process in the audit process, warranting a temporary debarment under 20 CFR §§ 656.20 and 656.31(f)(1)(iv)” for a period of three years.

The Administrator submits that employers are required by regulation at 20 C.F.R. § 656.10(f) to retain copies of U.S. worker applicants’ resumes and/or applications and that failure to submit such documentation when directed to do so in an Audit Notification is a presumptive substantial failure to provide required documentation in response to an audit request under 20 C.F.R. § 656.20(b), also citing *JYACC, Inc.*, 2013-PER-00610 (Jun. 29, 2017).

³ In footnote #2 of the June 7, 2018 “Administrator’s Brief”, the Administrator withdrew reference to those applications involving ETA case numbers A-16307-67487, A-16307-67554, and A-16316-70705 because “those applications were denied for other substantive reasons unrelated to failure to comply in the audit process.”

⁴ In footnote #4 of the June 7, 2018 “Administrator’s Brief”, the Administrator identifies the 4 applications as ETA case numbers A-16252-50555 (AF 2487), A-16263-53872 (AF 2506), A-16263-54013 (AF 2525), and A-16265-55086 (AF 2554). It is noted that application A-16217-38975 also does not contain an audit response (AF 1292-1294, 1349-1362).

The Administrator argues that the Employer admitted to accepting applications from U.S. workers, inputting data from the respective applications into a data base, and subsequently shredding the applications submitted by the U.S. workers. He argues that the Employer merely submitted screen shots of the data base which “only contain secondhand information that is merely purported to be the complete and accurate information contained in the U.S. workers’ application and they are not the actual resumes or applications that the U.S. workers provided.” He submits that the application form U.S. workers completed contained more information than the scree shot of names and contact information.

The Administrator argues that “Without the U.S. workers’ resumes and applications, the Certifying Officer did not have the information necessary to make an informed evaluation of whether the U.S. workers who applied for the job opportunity were able, willing, qualified, and available for the job, as it is required by 20 CFR § 656.24(b).” He argues that the Employer’s claim “in its Request for Reconsideration that it was unaware that it needed to keep workers’ resumes and applications and that all of the PERM applications that are the subject of the debarment were filed before it became aware of this requirement” lacks credibility because of the notice given by regulations 20 C.F.R. §§ 656.10(f), 656.17(g)(1) and 656.20 and notice to the Employer in the denial letters issued on and after October 24, 2016, after which the Employer continued to file 22 PERM applications involved in the debarment action.

The Administrator submits that the Employer failed to respond to Audit Notification letters involving four additional PERM applications during the time period involved. He argues that the Employer’s claim to never having received the respective Audit Notification letters is not credible because “OFLC issued Audit letters for each of the PERM applications in question and [the Employer] failed to provide a response ... [and] had ample opportunity to request review of those cases upon receiving the denial letters, and could have preserved any argument about lack of notice of the Audit letter in such an appeal ... [but] did not request review of those denials within thirty days of the date of the determinations and the denials became the final determinations of the Secretary of Labor.” The Administrator argues that the Employer cannot now collaterally attack those denial determinations.

The Administrator argues that the term “pattern or practice” is meant to encompass a repeated and persistent failure to comply with core PERM program requirements which signal a disregard for the PERM program. He submits it is more than the mere occurrence of an isolated event and arises when the conduct is an employer’s “regular, rather than unusual, practice.” The Administrator argues that the Employer “consistently failed to comply with the audit regulations” over the course of one year and “became [the Employer’s] routine and standard operating procedure.” He argues that the Employer’s “apparent disregard for the requirements of the PERM process made it impossible for the CO to make an informed determination ... [and] significantly undermine the integrity of the PERM program, particularly in relation to the recruitment of U.S. workers.”

Position of the Employer

The Employer submits that during the period between March 25, 2016 and December 28, 2016 the record identified “59 cases deemed to have failed to comply with the process” and that this

number constituted 65% of all audited cases for the employer during the relevant period. The Employer “accepts that the 53 cases denied for ‘failing to respond sufficiently with the requested information’ were properly denied.”

The Employer argues that the required element of “pattern or practice” is not defined by regulation nor clarified in the preamble to the PERM regulations. The Employer submits that in order to establish a “pattern or practice” the Administrator “must establish that the [Employer] systematically engaged in the condemned practice” and that mere numbers of denied Audits, especially given the virtually identical and repetitious grounds on which the Audits were denied, can hardly meet the rigorous standards of a ‘systemic’ practice.” The Employer submits that “all the cases selected for audit and denied stem from a very small number of Prevailing Wage Determinations and recruitments, each for multiple foreign workers. Thus the recruitment for each was the same ... What this means is that all of the Forms ETA 9089 filed using the same limited number of recruitments, and all of the Recruitment Reports submitted in response to Audit Requests, would all, collectively, have precisely the same characteristics that the Certifying Officer found merited denial on each individual ETA 9089.”

The Employer argues that the “large number of cases does not reflect any ‘systemic’ pattern of failure to comply, but rather the fact that when Audit Notices exposed problems that could be rectified ... there were already so many identical cases in process that, cumulatively, they could be mistaken for what the Certifying Officer categorized them ... Had the recruitment been spaced out, as it would be in individual recruitments, the traffic jam of cases would never have happened.”

The Employer argues that the “only evidence of any ‘pattern or practice’ is the mere volume of the cases denied, most for the same reasons. There is no evidence that this was any kind of ‘pattern’, still less that it was a ‘systemic’ or systematic’ practice. There is no evidence that the failures of [the Employer] were willful, or anything other than inadvertent and correctable.”

The Employer “requests that the proposed ‘death penalty’ of debarment not be imposed, and that the Court consider alternative sanctions that would achieve the purpose of compliance with PERM regulations.”

ISSUES

The following issues remain to be addressed:

1. Did the Employer’s failure to submit the resumes/applications of U.S. workers who applied to the job opportunities with its response to Audit Notifications constitute a “pattern or practice of failure to comply with the audit process pursuant to 20 C.F.R. § 656.20, within the meaning of 20 C.F.R. § 656.31(f)(1)(iv) ?
2. If, so is debarment from the permanent labor certification program for a period of three years a reasonable period ?

SUMMARY OF RELEVANT EVIDENCE

I. Administrator’s Notice of Debarment.

On December 19, 2017, the Administrator issued a “Notice of Debarment” to the Employer which barred the Employer “from further participation in the permanent labor certification program ... pursuant to Department of Labor (Department) regulations at 20 Code of Federal Regulations (CFR) Part 656.” The rationale stated was that the Employer –

“failed to respond, or fully and timely respond to Audit Notification letters OFLC issued in connection with 59 applications for permanent employment certification decided by OFLC during Fiscal Year 2017 (FY 17) that [Employer] filed with OFLC’s Atlanta National Processing Center. These individual acts of noncompliance, when combined, constitute a ‘pattern or practice of failure to comply in the audit process’ warranting debarment from the program under 20 CFR §§ 656.20 and 656.31(f)(1)(iv). This debarment is for a period of three years, commencing on the date of this notice.

Basis for debarment: Pattern or practice of failure to comply in the PERM audit process (20 CFR §§ 656.20, 656.31(f)(1)(iv))

An employer receiving an Audit Notification letter must comply with the audit request and submit the required documentation to the Department within 30 days of the date of the letter (20 CFR § 656.20). OFLC will deny an application for an employer’s “substantial failure” to provide documentation required to satisfy an audit (20 CFR § 656.20(b)). After a significant number of denials are issued to the same employer, OFLC will determine that the employer has engaged in a pattern or practice of noncompliance in the audit process ...

In this instance, [Employer] has engaged in a pattern or practice of failure to comply in the audit process in FY 17 in connection with 59 applications, conduct that warrants debarment. The audited applications were filed between March 25, 2016 and December 28, 2016. These applications named 59 foreign beneficiaries. The Certifying Officer sent an Audit Notification letter for each application, advising [Employer] of the information or documentation required for further processing and certification, and further notifying the employer of the 30-day deadline for [Employer] to respond. In FY 17, the Certifying Officer decided 91 of [Employer’s] application through the audit process. Of those 91 applications, 6 were denied for failure to respond to the Audit Notification letter and 53 applications were denied for failing to respond sufficiently with the requested information. Thus 65% of the audited cases failed to comply with the audit process as required by the regulation (FN #1: The remaining 32 audited applications decided in FY 17 were denied for other reasons, yielding a 100% denial rate for audited cases in FY 17) ...

OFLC records indicate the [Employer] did not request an extension of the audit deadline ... for any of its responses. Following these denials, [Employer] did not request reconsideration by the Certifying Officer ... or administrative review by the Board of Alien Labor Certification Appeals.

Appeal Rights (20 CFR §§ 656.26, 656.31(f)(2))

This debarment is for a period of three years, commencing on the date of this notice, except that debarment will be stayed in the event [Employer] files a timely request for review by BALCA in accordance with 20 CFR § 656.26 ...”

The Administrator attached a list of the applications involved by case number, date filed and basis of denial. The “Basis of Denial” for all applications listed were “Insufficient Response to Audit”, except for applications numbered A-16217-38975, A-16263-54013, A-16263-53872, A-

16265-55086, A-16215-38532, and A-16252-5055. These applications stated the basis of denial as “Non-response to Audit.” (AF 1-5).

II. Employer’s Request for Review.

On January 18, 2018, Employer’s attorney on appeal, P.D. Cass, Esq., posted Employer’s appeal of the “Notice of Debarment issued against it December 19, 2017, barring it from participating in the Alien Labor Certification process for a period of three (3) years.” (AF 6-291). Employer’s attorney submits –

- (a) The failure to respond to the 6 cases designated as denied for “non-response to audit” was inadvertent and not willful, and will not be repeated.
- (b) The basis for denying applications for failure to list drug testing and/or physical in recruitment as requirements for employment in Denial Reasons #1 became known to the Employer after the 53 ETA applications had all been filed and the Employer “has learned from this experience and has subsequently on its own changed its recruitment practices to include the drug testing requirement prior to the debarment notice and has no reason to include a non-existent physical requirement, only the ability to do the work physically.
- (c) The basis for denying applications for failure to provide the resumes/applications for U.S. workers who applied for the job opportunity is correct since [Employer] “did not provide copies of resumes/applications for those 53 cases, a fact for which it apologizes ... was not willful or deliberate, nor did it bespeak an intent to avoid the discovery of serious violations of the regulations. It stemmed instead from a misunderstanding of document retention requirements ... the company did not realize that it also had to physically retain the hard copy job applications ... before [Employer] became aware that it should have retained the hard copy resume/applications ... Once [Employer] got the earliest denial on this ground, it was too late to save the resumes/applications for the other cases, as they had all been filed and the documents destroyed in the ordinary course of business ... It has changed its policies in that regard even before receiving [the debarment notice] and that ground will never recur.”
- (d) Debarment is a remedy that is both premature and unnecessarily draconian at this time since Employer proactively took steps to rectify those problems once it understood them and they are unlikely to reoccur.
- (e) “It is appropriate and in the interest of substantial justice to give [Employer] a second chance (actually, a first chance) to show that it has learned from its errors via appropriate efforts to rectify problems identified in the Denial Notices it received, which it could not have rectified between March 25, 2016 and December 28, 2016, because all recruitment for those cases had already been completed and any errors could not have been reversed.”

(AF 6-12). Employer’s counsel attached a Declaration by D. Wood, Employer’s Head of Human Resources which is the basis of fact set forth in counsel’s submissions (a) through (e), above. (AF 15-17). Employer’s counsel attached copies of denial notices already contained in the AF (AF 19-244) as well as a copy of the *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. 27904 – 27947 (May 17, 2007) (AF 246-290).

III. Summary of applications.

The following table summarizes the relevant events involved in the above-captioned applications for labor certification in which the Employer failed to submit the resumes and applications of U.S. workers who applied for the job opportunity and were not hired following issuance of an

Audit Notification letter. The respective denial determinations are final determinations of the Department of Labor and are not subject to further review. 20 C.F.R. §§ 656.24(e)(4) and 656.26(a)(2).

ETA Application #	Date Denied	Date Filed	Date Audit Notification Issued	Date Audit Response Filed	Job Order Posted Dates	Notice of Filing Posted Dates	AF pages
A-16085-89039	10/24/2016	3/25/2016	7/20/2016	8/12/2016	11/13/2015 – 12/13/2015	11/16/2015 – 11/30/2015	292-362
A-16085-89043	10/24/2016	3/25/2016	7/20/2016	8/12/2016	11/13/2015 – 12/13/2015	11/16/2015 – 11/30/2015	363-426
A-16085-89514	10/24/2016	3/25/2016	7/20/2016	8/12/2016	11/13/2015 – 12/13/2015	11/16/2015 – 11/30/2015	427-488
A-16086-89594	10/24/2016	3/26/2016	7/20/2016	8/12/2016	11/13/2015 – 12/13/2015	11/16/2015 – 11/30/2015	489-552
A-16086-89596	10/25/2016	3/26/2016	7/21/2016	8/12/2016	11/13/2015 – 12/13/2015	11/16/2015 – 11/30/2015	553-614
A-16086-89597	10/24/2016	3/26/2016	7/20/2016	8/12/2016	11/13/2015 – 12/13/2015	11/16/2015 – 11/30/2015	615-676
A-16089-90620	10/24/2016	3/29/2016	7/25/2016	8/12/2016	11/13/2015 – 12/13/2015	11/16/2015 – 11/30/2015	677-738
A-16089-90663	10/24/2016	3/29/2016	7/25/2016	8/12/2016	11/13/2015 – 12/13/2015	11/16/2015 – 11/30/2015	739-800
A-16089-90672	10/24/2016	3/29/2016	7/25/2016	8/12/2016	11/13/2015 – 12/13/2015	11/16/2015 – 11/30/2015	801-864
A-16102-95662	11/9/2016	4/11/2016	8/22/2016	9/12/2016	11/13/2015 – 12/13/2015	11/16/2015 – 11/30/2015	865-930
A-16119-03637	11/9/2016	4/28/2016	8/31/2016	9/16/2016	11/13/2015 – 12/13/2015	11/16/2015 – 11/30/2015	931-993
A-16165-21317	3/24/2017	6/13/2016	10/12/2016	11/8/2016	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	994-1066
A-16215-38532	3/24/2017	8/2/2016	12/28/2016	1/24/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1067-1141
A-16215-38534	3/23/2017	8/3/2016	12/29/2016	1/25/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1142-1216
A-16216-39000	3/31/2017	8/3/2016	12/29/2016	1/24/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1217-1291
A-16217-38975	3/24/2017	8/4/2016	12/29/2016		3/15/2016 – 4/13/2016		1292-1294 1349-1362
A-16222-40746	3/23/2017	8/9/2016	1/6/2017	2/13/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1363-1437
A-16223-41220	3/24/2017	8/10/2016	1/6/2017	1/31/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1438-1512
A-16223-41222	3/23/2017	8/10/2016	1/6/2017	1/31/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1513-1587
A-16224-41493	3/24/2017	8/11/2016	1/6/2017	1/31/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1588-1662
A-16224-41533	3/30/2017	8/11/2016	1/6/2017	1/31/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1663-1737
A-16229-43016	3/30/2017	8/16/2016	1/12/2017	1/30/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1738-1812
A-16229-43023	3/30/2017	8/16/2016	1/12/2017	1/30/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1813-1887
A-16229-43040	3/30/2017	8/16/2016	1/6/2017	2/2/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1888-1962
A-16229-43102	3/30/2017	8/16/2016	1/6/2017	1/25/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	1963-2037
A-16231-43963	3/30/2017	8/18/2016	1/6/2017	1/30/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	2038-2112

A-16235-44792	3/23/2017	8/22/2016	1/6/2017	1/30/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	2113-2187
A-16241-47098	3/23/2017	8/28/2016	1/6/2017	2/2/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	2188-2262
A-16243-48006	3/23/2017	8/30/2016	1/6/2017	1/30/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	2263-2337
A-16245-48907	4/14/2017	9/1/2016	2/1/2017	2/17/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	2338-2403
A-16252-50552	4/14/2017	9/8/2016	2/7/2017	3/7/2017	3/15/2016 – 4/13/2016	3/21/2016 – 4/8/2016	2014-2486
A-16252-50555	6/9/2017	9/8/2016	2/14/2017		3/15/2016 – 4/13/2016		2487-2505
A-16263-53872	6/2/2017	9/19/2016	2/10/2017		7/14/2016 – 8/13/2016		2506-2524
A-16263-54013	6/2/2017	9/19/2016	2/10/2016		7/14/2016 – 8/13/2016		2525-2553
A-16265-55086	6/5/2017	9/21/2016	2/13/2017		7/14/2016 – 8/13/2016		2554-2572
A-16272-57377	5/1/2017	9/28/2016	2/16/2017	3/7/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	2573-2661
A-16272-57380	5/1/2017	9/28/2016	2/16/2017	3/7/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	2404-2413 2662-2749
A-16306-67293	5/30/2017	11/1/2016	3/21/2017	4/10/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	2750-2820
A-16306-67303	5/30/2017	11/1/2016	3/21/2017	4/6/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	2821-2889
A-16307-67476	5/30/2017	11/2/2016	3/22/2017	4/10/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	2890-2961
A-16307-67487	5/30/2017	11/2/2016	3/22/2017	4/10/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	2962-3032
A-16307-67554	5/30/2017	11/2/2016	3/22/2017	4/10/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	3033-3105
A-16316-70559	5/30/2017	11/11/2016	3/28/2017	4/10/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	3106-3178
A-16316-70703	5/30/2017	11/11/2016	3/28/2017	4/7/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	3179-3248
A-16316-70705	5/30/2017	11/11/2016	3/28/2017	4/6/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	3249-3319
A-16333-75009	5/31/2017	11/28/2016	3/28/2017	4/7/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	1295-1348 3320-3391
A-16334-75240	5/31/2017	11/29/2017	3/28/2017	4/10/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	3392-3464
A-16340-77463 ⁵	8/14/2017	12/6/2016	3/31/2017	4/12/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	3465-3561
A-16341-77912 ⁶	8/14/2017	12/6/2016	3/31/2017	4/21/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	3562-3656
A-16342-78369 ⁷	8/14/2017	12/7/2016	3/31/2017	4/21/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	3657-3836

⁵ In response to a July 11, 2017 Request for Information, Attorney responded that “we could not continue [H.T.K.H’s] processing of Labor Certification application.” (AF 3474)

⁶ In response to a July 11, 2017 Request for Information, Attorney responded that T.T.H “doesn’t want to continue his employment-based immigration processing anymore, and refused to write a statement. Accordingly, we could not continue his processing of Labor Certification application.” (AF 3571)

⁷ In response to a July 10, 2017 Request for Information, Attorney reported T.T.T.L. “paid \$2,000 to JA Immigration only for its initial services – introducing Harrison Poultry as employer including working conditions, providing information about each step of employment-based immigrations process, assistance with required document preparation for I-140 petition and visa processing, and for too many Q&A communications with JA Immigration’s staff or its lawyer – and she did not pay to Harrison Poultry for its job offer or for its processing of the PERM labor certification.” (AF 3663-3666). Employer stated “I am informed and believe that [T.T.T.L.] also paid nothing to any attorney for the PERM process.” (AF 3676-3678) T.T.T.L. Declaration dated July 24, 2017, indicates “I made a decision to apply for this poultry processing worker job and paid totaling of \$2,000 JA

					8/13/2016	8/5/2016	
A-16344-79131 ⁸	8/14/2017	12/9/2016	3/31/2017	4/21/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	3837-3933
A-16348-80208 ⁹	8/15/2017	12/13/2016	3/31/2017	4/21/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	3934-4122
A-16354-82326 ¹⁰	8/14/2017	12/19/2016	3/31/2017	4/21/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	4123-4201
A-16354-82655 ¹¹	8/15/2017	12/19/2016	4/14/2017 ¹²	5/4/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	4203-4380
A-16355-82936 ¹³	8/15/2017	12/20/2016	4/14/2017 ¹⁴	5/9/2017	7/14/2016 –	7/20/2016 –	4381-4563

Immigration up to today for its initial services introducing the sponsor company as employer including working conditions, providing information about each step of employment-based immigration process, and assistance with required document preparation for I-140, visa processing, and too many Q&As communications with JA Immigration staffs or its lawyer.” (AF 3680-3683) JA Recruitment & Immigration November 21, 2016 Receipt for T.T.T.H.L. \$2,000 payment to JA Immigration Services, Inc., at AF 3685.

⁸ In response to July 10, 2017, Request for Information, Attorney responded T.Q.N. “would go back to Vietnam soon because his F-1 status was terminated. Therefore he did not want to continue his immigration processing any more, accordingly, we could not continue processing of Labor Certification application.” (AF 3846)

⁹ In response to a July 11, 2017 Request for Information, Attorney reported M.Y.C. “paid \$4,000 to Sungjoo Co. only for its initial services – introducing Harrison Poultry as employer including working conditions, providing information about each step of employment-based immigrations process, assistance with required document preparation for I-140 petition and visa processing, and for too many Q&A communications with JA Immigration’s staff or its lawyer – and she did not pay to Harrison Poultry for its job offer or for its processing of the PERM labor certification. Sungjoo Co. which is an immigration consulting company in Seoul, Korea entered into an agency contract with JA Immigration Inc.” (AF 3940-3943). Employer stated “I am informed and believe the [M.Y.C.] also paid nothing to any attorney for the PERM process.” (AF 3950-3951) M.Y.C. Declaration dated July 17, 2017, indicates “I have never paid Harrison Poultry Inc. anything ... The fees that are shown in my contract with Sungjoo Co., Ltd, are only between me and Sungjoo Co., Ltd, for services they are performing for me, and not between me and Harrison Poultry, Inc.” (AF 3954-3955) The contract submitted indicates that “Sung Joo, as a company possess[es] the authority to select applicants whom U.S. employers require through advertisements in various media and job fair, personal counseling, document submitting and reviewing and that M.Y.C. would pay a total of \$19,000 to Sungjoo Co, Inc. for services to obtain work with a U.S. employer including guidance for immigration visas and interviews with the Embassy, interpreter and guidance for arrival and commencement of work, and “U.S. Settlement Services.” (AF 3961-3965).

¹⁰ Denial Reason #4 was based on Employer failing to respond to July 11, 2017 Request for Information regarding its desire to continue processing the application. (AF 4127).

¹¹ In response to a July 12, 2017 Request for Information, Attorney reported H.T.N. “paid \$3,000 to JA Immigration only for its initial services – introducing Harrison Poultry as employer including working conditions, providing information about each step of employment-based immigrations process, assistance with required document preparation for I-140 petition and visa processing, and for too many Q&A communications with JA Immigration’s staff or its lawyer – and he did not pay to Harrison Poultry for its job offer or for its processing of the PERM labor certification.” (AF 4207-4208). Employer stated “I am informed and believe that [H.T.N.] also paid nothing to any attorney for the PERM process.” (AF 4219-4220) H.T.N. Declaration dated July 18, 2017, indicates “I made a decision to apply for this poultry processing worker job and paid totaling of \$3,000 JA Immigration up to today for its initial services introducing the sponsor company as employer including working conditions, providing information about each step of employment-based immigration process, and assistance with required document preparation for I-140, visa processing, and too may (sic) Q&As communications with JA Immigration staffs or its lawyer.” (AF 4223-4226) JA Recruitment & Immigration December 15, 2016 Receipt for H.T.N. \$3,000 payment to JA Immigration Services, Inc., at AF 4228.

¹² The initial Audit Notification was issued on March 31, 2017. (AF 4367-4370).

¹³ In response to a July 10, 2017 Request for Information, Attorney reported N.P. “paid \$3,000 to JA Immigration only for its initial services – introducing Harrison Poultry as employer including working conditions, providing information about each step of employment-based immigrations process, assistance with required document preparation for I-140 petition and visa processing, and for too many Q&A communications with JA Immigration’s staff or its lawyer – and he did not pay to Harrison Poultry for its job offer or for its processing of the PERM labor certification.” (AF 4387-4390). Employer stated “I am informed and believe that [N.P.] also paid nothing to any

					8/13/2016	8/5/2016	
A-16355-82950 ¹⁵	8/16/2017	12/20/2016	4/14/2017	5/4/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	4564-4743
A-16355-83061 ¹⁶	8/16/2017	12/20/2016	4/14/2017	5/8/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	4744-4922
A-16363-85217 ¹⁷	8/16/2017	12/28/2016	3/31/2017	4/21/2017	7/14/2016 – 8/13/2016	7/20/2016 – 8/5/2016	4923-5106
A-16363-85232 ¹⁸	8/16/2017	12/28/2016	4/14/2017	5/9/2017	7/14/2016 –	7/20/2016 –	5107-5296

attorney for the PERM process.” (AF 4401-4402) N.P. Declaration dated July 19, 2017, indicates “I made a decision to apply for this poultry processing worker job and paid totaling of \$2,500 JA Immigration up to today for its initial services introducing the sponsor company as employer including working conditions, providing information about each step of employment-based immigration process, and assistance with required document preparation for I-140, visa processing, and too many Q&As.” (AF 4405-4408). JA Recruitment & Immigration December 13, 2016 Receipt for N.P. \$2,500 payment to JA Immigration Services, Inc., at AF 4410.

¹⁴ The initial Audit Notification was issued on March 31, 2017. (AF 4550-4553).

¹⁵ In response to a July 11, 2017 Request for Information, Attorney reported M.T.N. “paid \$3,000 to JA Immigration only for its initial services – introducing Harrison Poultry as employer including working conditions, providing information about each step of employment-based immigrations process, assistance with required document preparation for I-140 petition and visa processing, and for too many Q&A communications with JA Immigration’s staff or its lawyer – and he did not pay to Harrison Poultry for its job offer or for its processing of the PERM labor certification.” (AF 4569-4572). Employer stated “I am informed and believe that [M.T.N.] also paid nothing to any attorney for the PERM process.” (AF 4581-4583). M.T.N. Declaration dated July 19, 2017, indicates “I made a decision to apply for this poultry processing worker job and paid totaling of \$2,500 JA Immigration up to today for its initial services introducing the sponsor company as employer including working conditions, providing information about each step of employment-based immigration process, and assistance with required document preparation for I-140, visa processing, and too many Q&As.” (AF 4585-4588). JA Recruitment & Immigration December 31, 2016 Receipt for M.T.N. \$2,500 payment to JA Immigration Services, Inc., at AF 4590.

¹⁶ In response to a July 10, 2017 Request for Information, Attorney reported Q.H.L. “paid \$3,000 to JA Immigration only for its initial services – introducing Harrison Poultry as employer including working conditions, providing information about each step of employment-based immigrations process, assistance with required document preparation for I-140 petition and visa processing, and for too many Q&A communications with JA Immigration’s staff or its lawyer – and he did not pay to Harrison Poultry for its job offer or for its processing of the PERM labor certification.” (AF 4750-4753). Employer stated “I am informed and believe that [Q.H.L.] also paid nothing to any attorney for the PERM process.” (AF 4763-4765). Q.H.L. Declaration dated July 18, 2017, indicates “I made a decision to apply for this poultry processing worker job and paid totaling of \$3,000 JA Immigration up to today for its initial services introducing the sponsor company as employer including working conditions, providing information about each step of employment-based immigration process, and assistance with required document preparation for I-140, visa processing, and too may (sic) Q&A communications with JA Immigration’s staff on (sic) its lawyer.” (AF 4767-4770). JA Recruitment & Immigration December 20, 2016 Receipt for N.P. \$3,000 payment to JA Immigration Services, Inc. (AF 4772).

¹⁷ In response to a July 12, 2017 Request for Information, Attorney reported C.D.N. “paid \$3,000 to JA Immigration only for its initial services – introducing Harrison Poultry as employer including working conditions, providing information about each step of employment-based immigrations process, assistance with required document preparation for I-140 petition and visa processing, and for too many Q&A communications with JA Immigration’s staff or its lawyer – and he did not pay to Harrison Poultry for its job offer or for its processing of the PERM labor certification.” (AF 4928-4931). Employer stated “I am informed and believe that [C.D.N.] also paid nothing to any attorney for the PERM process.” (AF 4942-4944). C.D.N. Declaration dated July 18, 2017, indicates “I made a decision to apply for this poultry processing worker job and paid totaling of \$3,000 JA Immigration up to today for its initial services introducing the sponsor company as employer including working conditions, providing information about each step of employment-based immigration process, and assistance with required document preparation for I-140, visa processing, and too may (sic) Q&As.” (AF 4946-4949). JA Recruitment & Immigration December 23, 2016 Receipt for N.P. \$3,000 payment to JA Immigration Services, Inc., at AF 4951.

¹⁸ In response to a July 10, 2017 Request for Information, Attorney reported T.N.A.L. “paid \$3,000 to JA Immigration only for its initial services – introducing Harrison Poultry as employer including working conditions, providing information about each step of employment-based immigrations process, assistance with required document preparation for I-140 petition and visa processing, and for too many Q&A communications with JA

					8/13/2016	8/5/2016	
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IV. Declaration of D. Wood, Employer’s Director of Human Resources. (AF 15-17)

On January 15, 2018, D. Wood made a written declaration as Employer’s Director of Human Resources. He reported –

“I am the company official responsible for overseeing and administering the company’s PERM process and activities ... All 53 Denials for ‘Insufficient response to Audit’ also had as an additional ‘denial reason’ the fact that we did not submit actual hard copies of resumes/applications received from applicants. We cannot deny that this is true, but can provide assurance that we took steps to rectify this issue even before we received the Notice of Debarment.

At the time we did the recruitment reflected in the 53 denied cases listed, we understood that we needed to keep records of ‘the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejection’ for purposes of creating, maintaining and supporting the recruitment report required by 20 CFR section 656.17(g)(1). We did this by inputting all data from job applications we received in response to PERM recruitment, and creating a database that reflected the data on the forms. We then provided ‘screen shots’ of those data. We did not realize that we had to retain the forms themselves, and so we would destroy them after a time in compliance with our regular document retention policy. The data remained (and remains) in our data base.

Our failure to preserve the hard copies of resumes/applications received was not willful or intentional, nor was it motivated by any intent to violations (sic) of regulations, since we had preserved and provided the data from those resumes/applications. Once we were alerted by the 53 denial notices that we also had to retain hard copies of the resumes/applications we received, we changed our document retention policy to require that we maintain all those documents, so that we can produce them in case of an Audit. Unfortunately, we had already done all of the recruitment for those 53 cases long before we received the Audit Notices, and no longer had those documents. We can, however, provide assurances that we have learned from our errors, and the situation will not repeat itself in future.”

V. Employer’s sample application and ‘screen shots’

a. “Standard Applicant Data Sheet” (AF 397-398 typical)

The Employer submitted with its audit response a “Standard Applicant Data Sheet” purported to be the application U.S. workers completed in order to be considered for the respective job opportunities. The form provided space for applicants to enter the following information –

Immigration’s staff or its lawyer – and she did not pay to Harrison Poultry for its job offer or for its processing of the PERM labor certification.” (AF 5113-5116). Employer stated “I am informed and believe that [T.N.A.L.] also paid nothing to any attorney for the PERM process.” (AF 5126-5128). T.N.A.L. Declaration dated July 19, 2017, indicates “I made a decision to apply for this poultry processing worker job and paid totaling of \$3,000 JA Immigration up to today for its initial services introducing the sponsor company as employer including working conditions, providing information about each step of employment-based immigration process, and assistance with required document preparation for I-140, visa processing, and too may (sic) Q&A communications with JA Immigration’s staff on (sic) its lawyer.” (AF 5130-5133). JA Recruitment & Immigration October 24, 2016 Receipt for T.N.A.L. \$3,000 payment to JA Immigration Services, Inc. (AF 5135).

1. Full name with social security number, address, telephone number, aliases
2. Indication of whether applicant had the legal right to work in the U.S.
3. Indication of whether applicant had ever worked for Employer
4. Indication of any relatives employed by Employer
5. Indication of special skills
6. Educational history from elementary school to college
7. Present and past work history including company name, address and telephone number, title, work duties, pay rate, dates of employment and reason for leaving
8. Reference list of persons who have known the applicant for three years, not including relatives, by name, occupation and address
9. Indication if applicant had ever been convicted of or pled guilty, nolo contendere, or no contest to a crime which has not been annulled, expunged, or sealed by a court; with explanation of number of convictions, nature of offense(s) and types(s) or rehabilitation.

The form then provided for the applicant to declare the information was true and correct, grant the Employer permission to verify the answers provided prior to hiring and to conduct an investigation after hiring if an answer is discovered to be false, and release “all parties from liability whatsoever” for providing information about the applicant. The applicant also acknowledged that all job offers are contingent upon satisfactory results of a medical history review and drug test following acceptance of a contingent job offer. The form provided for a company representative to record dates and information regarding review of the application and interview, if any.

b. Standard screen shot (AF 399-401 typical)

The Employer submitted “screen shots” in lieu of actual applications or resumes of U.S. applicants that were rejected for the respective job opportunities. The “screen shot” provided the following information –

1. Full name with social security number, address, telephone number
2. Gender, ethnic origin, age
3. Disability and veteran status
4. Application date
5. Registration number
6. Company division, department, position, location
7. Application status, reject reason, reject comment (such as “Drug Test”)
8. Indication of relocation involved
9. Referral source, description
10. Color code
11. Date reply letter sent
12. Date last changed and name of person making entry change

The screen shot did not reflect the following information contained in the Standard Application Data Sheet –

1. Indication of whether applicant had the legal right to work in the U.S.
2. Indication of whether applicant had ever worked for Employer
3. Indication of any relatives employed by Employer
4. Indication of special skills
5. Educational history from elementary school to college
6. Complete present and past work history including company name, address and telephone number, title, work duties, pay rate, dates of employment and reason for leaving

7. Reference list of persons who have known the applicant for three years, not including relatives, by name, occupation and address
8. Indication if applicant had ever been convicted of or pled guilty, nolo contendere, or no contest to a crime which has not been annulled, expunged, or sealed by a court; with explanation of number of convictions, nature of offense(s) and types(s) or rehabilitation.

DISCUSSION

I. The Employer's failure to submit the resumes/applications of U.S. workers who applied to the job opportunities with its response to Audit Notifications constituted a "pattern or practice of failure to comply with the audit process pursuant to 20 C.F.R. § 656.20", within the meaning of 20 C.F.R. § 656.31(f)(1)(iv).

Program regulations at 20 C.F.R. §656.17(a)(3) provide that "Documentation supporting the application for labor certification should not be filed with the application, however in the event the Certifying Officer notifies the employer that its application is to be audited, the employer must furnish the required supporting documentation prior to a final determination." Pursuant to 20 C.F.R. § 656.10(f), "Copies of applications for permanent employment certification filed with the Department of Labor and all supporting documentation must be retained by the employer for 5 years from the date of filing the *Application for Permanent Employment Certification*."

For the non-professional occupations of unskilled "Poultry Processing Worker," which is the job opportunity of each of the denied applications, the Employer was required to prepare and sign a Recruitment Report describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections. 20 C.F.R. § 656.17(g)(1). This regulation also provides that during an audit, the Certifying Officer may request the U.S. workers' resumes or applications sorted by the reasons the workers were rejected. Accordingly, the Employer was required to retain copies of each respective recruitment report and the resumes/applications submitted by U.S. workers who applied for the respective job opportunities for five years from the date the respective applications were filed. See *David Barnes Co.*, 2014-PER-01037 (Mar. 27, 2018) (The resumes of U.S. workers who applied for the job opportunity are supporting documentation of the application and, as such, are required to be retained by the employer for five years from the date of filing the application); *Magna Infotech, Ltd.*, 2012-PER-01915 (Feb. 17, 2017) (An employer is required to maintain U.S. applicants' resumes or applications and produce copies if requested by the certifying officer in an audit; however, there is no requirement under current regulations to maintain resumes of non-U.S. workers); *JYACC, Inc.*, 2013-PER-00610 (Jun. 29, 2017) (Resumes are a type of documentation that the regulations require an employer to maintain and failure to submit resumes in response to an audit request is not an excusable inadvertent omission but rather a presumptive substantial failure to respond warranting denial of the application); *Liberty Environmental Contractor*, 2012-PER-00475 (May 9, 2014) (resumes are supporting documentation required to be maintained in the event of audit and failure to submit a resume in response to an audit request was a substantial failure within the meaning of Section 656.20(b)); *Mario Forgione, Ltd.*, 2012-PER-03726 (Feb. 27, 2018) citing *SAP America, Inc.*, 2010-PER-01250 (Apr. 18, 2013)(en banc) (Failure to submit supporting documentation specifically identified by the Regulations as required to be maintained in the

event of an audit constitutes a substantial failure to provide required documentation under Section 656.20(b)).

The Employer acknowledges that that it did not submit actual hard copies of the resumes/applications received from applicants for the respective PERM job opportunities upon which the debarment action is based. The Employer reports that it used the applications for the respective job opportunities submitted in response to PERM recruitment for recording data from the respective applications into a company database before the applications were destroyed “after a time in compliance with our regular document retention policy.” The Employer reported that “Unfortunately, we had already done all of the recruitment for those 53 cases long before we received the Audit Notices, and no longer had those documents.”

The summarized table set forth above indicates that the earliest mandatory job order was placed with the state workforce agency (“SWA”) on November 13, 2015; and that the earliest Notice of Filing (“NOF”) was posted on November 16, 2015. The mandatory two Sunday newspaper advertisements associated with the job order and NOF were placed on November 29, 2015 and December 6, 2015. (AF 292-864). The respective applications were filed between March 25 and 29, 2016; the audit notice letters were issued July 20, 2016; the audit responses were filed August 12, 2016; and the denial notices were issued October 24 and 25, 2016.

For the last batch of PERM applications summarized above, the mandatory job order was placed with the SWA on March 15, 2016; the NOF was posted on July 20, 2016; the mandatory two Sunday newspaper advertisements associated with the job order and NOF were placed on July 14, 2016 and August 13, 2016. (AF 3465-5296). The respective applications were filed between December 6 and 28, 2016; the audit notice letters were issued between March 31 and April 14, 2017; the audit responses were filed between April 21 and May 9, 2017; and the denial notices were issued August 14 to 16, 2017.

The Employer alleges that it had completed all PERM recruitment and destroyed all the applications before it received the first denial notices. The first denial notices were issued October 24 and 25, 2016. The last batch of PERM applications were filed between December 6 and 28, 2016. The Employer acknowledges receipt of the denial notices sent after its audit responses were submitted; however, it is not credible that the last 14 PERM applications were submitted on and after November 28, 2016 without knowledge that applications received during PERM recruitment must be retained for 5 years by Federal regulation. The Employer’s claim that all PERM recruitment applications had been destroyed in accordance with its own document retention policy prior to notice from the Certifying Officer that retention was required, is only plausible if the Employer had destroyed the responsive application from U.S. workers prior to early November 2016. This extrapolates to an Employer in-house practice of destroying PERM recruitment applications within four months of posting the NOF and placing mandatory newspaper advertisements.

The Employer submitted copies of its November 19, 2004 Agreement with JA Immigration Consulting Company, Inc., subsequently known as JA Immigration, Inc., after it moved to Los Angeles, California in December 2015. (AF 3663, 3691-3694, 3972-3974, 4234-4237, 4416-4419, 4597-4600, 4778-4781, 4957-4960, 5141-5144). The attorney who prepared each of the

denied applications was Kyoung S. Seo, Esq., who claimed JA Immigration Inc. as his place of business on each of the filed applications. The November 19, 2004, Agreement provided JA Immigration, Inc., with the exclusive right to recruit unskilled foreign workers on behalf of the Employer; the Employer “will rely upon [JA Immigration, Inc.] to ensure compliance with any and all applicable laws and regulations in connection with the recruitment, transportation, immigration and work status of the employees provided under [the] Agreement [since the Employer had] no experience in this area.” JA Immigration, Inc. was to “professionally facilitate all administrative functions and provide ongoing support as needed to [Employer] (e.g. English translations and interpretations, employment offer finalization, residency, school entrance for children, social security cards, medical insurance, and other services necessary, including assistance on immigrations matters). JA Immigration, Inc., was to provide orientation and training for workers recruited for Employer specifically tailored to the poultry processing industry and Employer’s needs.

The AF in this case reveals that Attorney K.S. Seo of JA Immigration, Inc., was deeply involved with the Employer’s Director of Human Resources in the PERM recruitment process and audit responses and was replaced during the appellate process by attorney representation from another law firm. However, Audit Notification letters and Denial Notices were sent to both Attorney K.S. Seo and the Employer in the actions relevant to this case. Responses to the respective Audit Notification letters and Requests for Information were all posted by Attorney K.S. Seo while using the JA Immigration, Inc., mailing address as the return address. Whether the Employer was misinformed or misled by its attorney or the attorney was deficient in his advice during the PERM application and audit process is of no consequence. As the Supreme Court has observed, “clients must be held accountable for the acts and omissions of their attorneys.” *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 396 (1993). The Employer “voluntarily chose this attorney as [its] representation in the action, and [it] cannot now avoid the consequence of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation...” *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962); *see also Kaname Japanese Rest.*, 2004-INA-00298 (Aug. 24, 2005) (pre-PERM).

After deliberation on the evidence of record, this presiding Judge finds –

1. Applications submitted by U.S. workers in response to PERM recruitment conducted by the Employer were documents supporting the respectively filed applications that were required to be maintained by the Employer for a period of five years after filing of the respective PERM application pursuant to 20 C.F.R. § 656.10(f).
2. The Employer engaged in an internal practice of destroying applications of U.S. workers submitted during the PERM recruitment process within four months of receipt of the applications in violation of federal regulations at 20 C.F.R. § 656.10(f).
3. The Employer’s practice of destroying applications of U.S. workers during the PERM recruitment process was a repeated, intentional, regular, usual, deliberate, and institutionalized practice that violated PERM regulations at 20 C.F.R. Part 656.

4. The “screen shots” submitted by the Employer in the respective audit responses failed to include all information requested in the Standard Application Data Sheet, including applicant citizenship status, education level, skills, work history and criminal history.
5. The Employer’s failure to submit the requested applications of U.S. workers with its respective audit responses was the result of the Employer’s own, voluntary actions taken in violation of federal regulations at 20 C.F.R. § 656.10(f).
6. The Employer’s failure to submit the requested applications of U.S. workers with its respective audit responses over the time period from August 12, 2016 through May 9, 2017 for PERM applications filed from March 25, 2016 through December 28, 2016 constituted a pattern of failure to comply in the audit process pursuant to 20 C.F.R. § 656.20 based upon the Employer’s prohibited practice of destroying U.S. worker applications submitted during the PERM recruitment process in violations of 20 C.F.R. § 656.10(f).
7. The Employer’s failure to submit the resumes/applications of U.S. workers who applied to the job opportunities with its response to the respective Audit Notifications constituted a “pattern or practice of failure to comply with the audit process pursuant to 20 C.F.R. § 656.20”, within the meaning of 20 C.F.R. § 656.31(f)(1)(iv).¹⁹

II. Debarment from the permanent labor certification program for a period of three years is a reasonable and appropriate period of debarment for Employer under the facts of this case.

The Administrator seeks to have the Employer debarred from participating in the PERM recruitment process for a period of three years. The Administrator points to the purpose and rationale set forth in the preamble to the Final Rule: *Labor Certification for Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27927 (May 17, 2007). That is, debarment in this case is warranted in order to encourage and assure compliance with core program requirement, to maintain the integrity of the PERM attestation-based process, to ensure employers furnish the required documentation within the required timeframes, and to avoid abuse of valuable, limited administrative resources. The Administrator acknowledges that debarment must be reasonable and proportionate to the improper activity. The Administrator submits that debarment for a period of three years is appropriate in this case based in part on the Employer’s repeated failure to comply with core program requirements and persistent failure to cooperate fully in the audit process.

The Employer submits that its practice of destroying the applications submitted by U.S. workers during PERM recruitment was not an intentional violation of PERM regulations on its part and that once it was alerted that it had to retain hard copies of the applications, corrective action was taken to prevent such applications from being destroyed before completion of the PERM regulatory five year holding period has passed. By way of mitigation, the Employer

¹⁹ In view of the findings related to the Employer’s failure to submit completed applications of U.S. workers who applied for the respective job opportunities with its audit responses, the Employer’s complete failure to respond to five audit notifications noted in the application summary table need not be addressed.

acknowledged its malfeasance and has indicated a willingness to comply with all PERM requirements in the future.

The Administrator's audit and review actions have revealed that the Employer relied upon JA Immigration, Inc. and its attorney K.S. Seo for guidance in the PERM recruitment and staffing process. However, as noted above, reliance on guidance and advice from these agents and representatives does not absolve Employer of its own liability for its non-compliance with the core requirements of the PERM process.

The Employer entered into an Agreement with JA Immigration Inc., in November 2004 and now claims it was unaware it had to retain the applications filed by U.S. workers in response to Employer's PERM recruitment efforts until notified by the Administrator through the Denial Notices issued in late October 2016. As noted above, it is not credible that the Employer did not know of this deficiency when it filed the December 2016 PERM applications and failed to adequately address the ongoing deficiency in subsequent audit responses. Thus either the Employer was totally unaware of the issues involved until the debarment action was initiated because of its detrimental reliance on JA Immigrations, Inc. and its preparing attorney K.S. Seo for all PERM recruitment actions, or the Employer was complicit in intentionally trying to avoid the discovery of serious violations of PERM and immigration regulations.²⁰ Additionally, from the Employer's representations, it is reasonable to find that the Employer has systematically destroyed PERM supporting documentation in all other PERM recruitment efforts it had undertaken since July 16, 2007, the effective date of *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. 27904 – 27947 (May 17, 2007).

However, the need for debarment and the reasonableness of any period of debarment must be based solely on the materials submitted for consideration. Under the facts of this case, the seriousness of the Employer's failure to comply with core requirements of the PERM and audit process cannot be ignored. The Employer destroyed supporting documents required to be maintained by the Employer for a period of five years on its own accord making it impossible to provide those documents upon request by the Certifying Officer. Additionally, the Employer asserts its data base contains all the information on filed applications but failed to submit a printout of the database duplicating all the information contained on the sample application form submitted in the audit responses, especially for those audit responses submitted after the Employer was on notice of its response deficiencies.

After deliberation on the documentary materials and argument of the Parties, this presiding Judge finds that under the particular aggravating and mitigating factors presented by the Parties in this case, debarment of the Employer from participating in the PERM process for a period of three

²⁰ The Certifying Officer's efforts discovered JA Immigration, Inc. and its associates were charging potential foreign workers \$2,500.00 to \$19,000.00 for work with the Employer under the PERM immigration process and had collected \$2,500.00 to \$4,000.00 from foreign nationals for assistance in applying for work with the Employer, obtaining immigration visas, and promised subsequent assistance with relocating to the Employer's location, obtaining housing, translations services, training, and dependent schooling. The actions of JA Immigration, Inc., due to its relationship with the Employer, may have systematically violated prohibitions set forth in 20 C.F.R. § 656.12(b).

(3) years is both a reasonable and appropriate period of debarment for the Employer under 20 C.F.R. § 656.31(f)(1)(iv).

III. It is recommended that the Administrator evaluate whether Attorney Kyoung S. Seo, Esq. and/or JA Immigration, Inc. should be sanctioned or barred from participating in the PERM process for a reasonable period of time.

The contractual relationship between the Employer and JA Immigration, combined with the actions and inferences related to the involvement of JA Immigration, Inc. and attorney Kyoung S. Seo, Esq. over the course of the applications contained in the appeal file, raises the question of whether the actions of JA Immigrations, Inc. and/or its attorney Kyoung S. Seo, Esq. constitute serious violations of PERM and immigration regulations, including the prohibitions set forth in 20 C.F.R. § 656.12(b), and thereby warrant corrective actions by way of sanction or debarment for a reasonable period of time.

Such investigation, consideration and appropriate action reside with the Administrator not with BALCA. 20 C.F.R. § 656.12(c). Accordingly, it is recommended that the Administrator consider whether further actions are appropriate as to JA Immigration, Inc. and attorney Kyoung S. Seo, Esq.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation on the evidence of record, this presiding Judge finds –

1. Applications submitted by U.S. workers in response to PERM recruitment conducted by the Employer were documents supporting the respectively filed applications that were required to be maintained by the Employer for a period of five years after filing of the respective PERM application pursuant to 20 C.F.R. § 656.10(f).
2. The Employer engaged in an internal practice of destroying the applications of U.S. workers submitted during the PERM recruitment process within four months of receipt of the applications in violation of federal regulations at 20 C.F.R. § 656.10(f).
3. The Employer's practice of destroying applications of U.S. workers during the PERM recruitment process was a repeated, intentional, regular, usual, deliberate, and institutionalized practice that violated PERM regulations at 20 C.F.R. Part 656.
4. The "screen shots" submitted by the Employer in the respective audit responses failed to include all information requested in the Standard Application Data Sheet, submitted by U.S. workers including applicant citizenship status, education level, skills, work history and criminal history.
5. The Employer's failure to submit the requested applications of U.S. workers with its respective audit responses was the result of the Employer's own, voluntary actions taken in violation of federal regulations at 20 C.F.R. § 656.10(f).
6. The Employer's failure to submit the requested applications of U.S. workers with its respective audit responses over the time period from August 12, 2016 through

May 9, 2017 for PERM applications filed from March 25, 2016 through December 28, 2016 constituted a pattern of failure to comply in the audit process pursuant to 20 C.F.R. § 656.20 based upon the Employer's prohibited practice of destroying U.S. worker applications submitted during the PERM recruitment process in violations of 20 C.F.R. § 656.10(f).

7. The Employer's failure to submit the resumes/applications of U.S. workers who applied to the job opportunities with its response to the respective Audit Notifications constituted a "pattern or practice of failure to comply with the audit process pursuant to 20 C.F.R. § 656.20", within the meaning of 20 C.F.R. § 656.31(f)(1)(iv).
8. Debarment of the Employer from participating in the PERM process for a period of three (3) years is both a reasonable and appropriate period of debarment under 20 C.F.R. § 656.31(f)(1)(iv).

ORDER

It is hereby Ordered that the Employer be debarred from participating in the Permanent Labor Certification Program under 20 C.F.R. Part 656 **for a period of three (3) years** from the date of this Order.

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

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 the Board's 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 400N
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.