U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 March 2010

BALCA Case No.: 2009-PER-00127
ETA Case No.: C-07100-26606

In the Matter of:

HAWAI'I PACIFIC UNIVERSITY,
Employer,

on behalf of

GUILHERME F.C. ALBIERI,
Alien.

Certifying Officer: Dominic Pavese
Chicago National Processing Center

Appearances: Carmen DiAmore-Siah
Honolulu, Hawaii
For the Employer

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

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

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), as supplemented by Section 122(b) of the Immigration Act

of 1990, Public Law 101-649, 104 Stat. 4978; and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations.[1] Under the PERM regulations, most employers who apply for permanent labor certification must provide notice of the filing of labor certification either by notifying the appropriate bargaining representative, or if there is no bargaining representative, by posting a notice at the facility or location of the employment. The regulations at 20 C.F.R. § 656.10(d) specify the manner and substance of the "Notice of Filing." One of the requirements is that the Notice "[p]rovide the address of the appropriate Certifying Officer." 20 C.F.R. § 656.10(d)(3)(iii).

On June 25, 2009, a panel of the Board of Alien Labor Certification Appeals ("Board" or "BALCA") issued a Decision and Order in the above-captioned matter reversing the Certifying Officer's ("CO") denial of permanent alien labor certification. *Hawai'i Pacific University*, 2009-PER-127 (June 25, 2009).[2] The CO had denied the application because the Notice of Filing posted by the Employer listed the address of the regional office of the Employment and Training Administration ("ETA") instead of the CO at a National Processing Center ("NPC").[3] On August 1, 2009, the Board granted the Certifying Officer's Petition for En Banc Review. Upon en banc review, we vacate the panel decision and affirm the CO's denial of certification.

STATEMENT OF THE CASE

The CO accepted the Employer's Form 9089 Application for Permanent Employment Certification for filing on August 10, 2007. The application is for the position of "Admissions Recruiter." (AF 287-303).[4] The CO selected the case for audit.

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[1] "PERM" is an acronym for "Program Electronic Review Management" system. In this Decision and Order, we will refer to the regulations in effect on or after March 28, 2005 as the "PERM" regulations. The regulations in effect prior to that date will be referred to as the "pre-PERM" regulations.

[2] The Order paragraph of *Hawai'i Pacific* was corrected by an erratum issued on June 30, 2009.

[3] The NPCs were created to handle permanent labor certification cases filed under the PERM system. *See* 70 Fed. Reg. 6734 (Feb. 8, 2005). At the time of the filing of the instant application, the NPC with jurisdiction over this matter was located in Chicago. Currently, ETA processes all PERM applications at the Atlanta NPC. *See* 73 Fed. Reg. 11954 (Mar. 5, 2008).

[4] In this Decision and Order, "AF" will be used for citations to the Appeal File.

(AF 283-286). Among the documentation submitted with the Employer's audit response was a copy of its Notice of Filing posted from February 26 to March 30, 2007. (AF 70). The Notice stated:

> This opening is being posted in connection with a filing of an application for a permanent alien labor certification (ETA 9089). Any person may provide documentary evidence bearing on the application to:
>
> THE REGIONAL CERTIFYING OFFICER, DOL/ETA
> CERTIFICATION NATIONAL PROCESSING CENTER
> U.S. DOL/ETA
> 71 STEVENSON STREET
> ROOM 830
> SAN FRANCISCO, CALIFORNIA 94119-3767

On October 3, 2007, the CO denied the application on the ground that the Notice of Filing of the ETA Form 9089 did not contain the address for the appropriate CO at the National Processing Center with jurisdiction over the application, as required by 20 C.F.R. § 656.10(d)(3)(iii). (AF 9-11).

The Employer filed a motion for reconsideration. (AF 5-8). The Employer asserted that the Notice contained a valid address because the San Francisco office was "a hub of the Chicago Processing Center." The Employer stated that: "Because the San Francisco [office] did process such applications previously, an inquiry made in regard to this matter revealed that the Certifying Officer continues to forward all applications received by the center to the new processing center. Furthermore, the website of the San Francisco region indicates that they have jurisdiction over application[s] filed by petitioner's [sic] within the State of Hawaii." The Employer argued that the processing of the application had not been prejudiced because the San Francisco office would have forwarded any applications received in connection with the Employer's petition.

The CO denied the motion for reconsideration on the ground that the only two appropriate COs at the time of the Employer's application were located in Chicago and Atlanta. (AF 1-2). The CO then forwarded the case to BALCA.

A two-member majority of the BALCA panel assigned to the case found that the circumstances were not materially distinguishable from those in *Brooklyn Amity School*, 2007-PER-64 (Sept. 19, 2007), in which the panel had vacated the CO's denial of certification where the employer listed the address of the New York CO instead of the appropriate NPC. One member of the panel in the *Hawai'i Pacific* case dissented on the grounds that *Brooklyn Amity School* was distinguishable and that the panel had not explained why the instant case was distinguishable from other recent panel decisions that had not found *Brooklyn Amity School* to be applicable.

The CO filed a petition for en banc review largely based on the dissenting opinion in the *Hawai'i Pacific* panel decision. The petition was granted by the Board.

In its en banc brief, the Employer distinguished the panel decisions that did not follow *Brooklyn Amity School*, primarily on the ground that the employers in those cases had listed offices on their Notices of Filing that had never processed permanent alien labor certification applications, whereas in the instant case, the Region VI ETA office had done so in the past. The Employer argued that it had made an honest and harmless error that had not prejudiced the application because its Notice of Filing contained a valid DOL/ETA address in San Francisco, and because the CO had not disputed that the San Francisco office would have forwarded related materials to the proper CO. The Employer noted that the ETA Region VI web site continues to claim jurisdiction over Hawaii, which could understandably cause confusion.

The American Immigration Lawyers Association ("AILA") filed an amicus brief arguing that the Board should adopt a harmless error standard "to resolve applications containing mistakes that otherwise elevate form over substance." AILA Brief at 2.

The CO's en banc brief reiterated and expanded on the arguments made in his petition for en banc review.

DISCUSSION

In order to understand ETA's current view of the purpose of the Notice of Filing – and more specifically the purpose for requiring the Notice to include the address of the appropriate CO – it is instructive to review the history of posting and notice requirements under the 20 C.F.R. Part 656 regulations.

Posting Requirements Under the Pre-PERM Regulations

From their inception in 1977, the Part 656 regulations required a posting of the job opportunity at the employer's place of business as a required element of the recruitment an employer had to perform in order to apply for permanent alien labor certification. The regulations originally only required that the posting describe the job with particularity. *See* 42 Fed. Reg. 3440, 3445 (Jan. 18, 1977) (original Part 656 regulations at 20 C.F.R. § 656.21(b)(10)).

Amendments in 1980 to Part 656 required that the posting contain the information required for advertisements in newspapers or professional or ethnic publications – i.e., describe the job with particularity; state the rate of pay (which could not be below the prevailing wage); offer prevailing working conditions; state the minimum job requirements; offer training normally provided for the job; and offer wages, terms, and conditions of employment no less favorable than those offered to the alien. The posting was to direct applicants to the employer and not the local job service. *See* 45 Fed. Reg. 83926, 83938-83399 (Dec. 19, 1980) (1980 version of Part 656 at 20 C.F.R. § 656.21(b)((3)). When promulgating the 1980 amendments, ETA stated that the purpose of the posting was to be part of the employer's reasonable recruitment efforts. The posting was intended to inform both the employer's current employees and visitors to the employer's premises of the job opportunity to promote word-of-mouth recruitment. 45 Fed. Reg. at 83929-83930.

The Immigration Act of 1990 ("IMMACT90"), Public Law 101-649, 104 Stat. 4978 (Nov. 29, 1990, effective Oct. 1, 1991), made major changes to and supplemented

the Immigration and Nationality Act (8 U.S.C. § 1101 et seq.). As pertinent to the instant appeal, IMMACT90 provided:

> (b) NOTICE IN LABOR CERTIFICATIONS- The Secretary of Labor shall provide, in the labor certification process under section 212(a)(5)(A) of the Immigration and Nationality Act, that—
>
> (1) no certification may be made unless the applicant for certification has, at the time of filing the application, provided notice of the filing (A) to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or (B) if there is no such bargaining representative, to employees employed at the facility through posting in conspicuous locations; and
>
> (2) any person may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet terms and conditions with respect to the employment of alien workers and co-workers).

Section 122(b) of IMMACT90.[5]

On March 20, 1991, the Department of Labor ("DOL") published an "Advance notice of proposed rulemaking" in which it announced its general approach and timetable for implementing its responsibilities under IMMACT90. 56 Fed. Reg. 11705 (Mar. 20, 1991). In regard to the section 122(b) requirements, DOL wrote that "[c]urrently the posting of notice regulation at 20 CFR 656.21(b)(3) regards the employer's recruitment activity for the job opportunity. The Act in this section also provides for the submission of documentary evidence by third parties to the Department bearing on the application such as the availability of qualified workers for the job(s) in question, wages and working conditions, and information about the employer's failure to meet terms and conditions of employment with respect to the employment of alien workers and co-workers." 56 Fed.

[5] The Joint Explanatory Statement contained in the House Conference Report on IMMACT90, H.R. Conf. Rep. 101-955 P.L. 101-649, 1990 USCCAN 6784, 6786-87, clarified that an employer must notify the bargaining representative (if any) at each of its locations in the area, but is required only to post the notice at the facility in conspicuous locations if there is no bargaining representation in the area. The Statement, however, provided no other information on the purpose or interpretation of section 122(b) of IMMACT90.

Reg. 11705, 11709 (Mar. 20, 1991). DOL thus sought comments on the best way to provide for such notice, postulating that it could be handled by amending the current notice regulation, or by creating a new procedure. *Id.*

On July 15, 1991, DOL published a Proposed Rule, which adopted the approach of amending the existing posting requirement. 56 Fed. Reg. 32244, 32247-32248 (July 15, 1991). DOL only sought to require an employer to document that the notice was provided to the bargaining representative because requiring documentation of acknowledgment by the bargaining representative would enable the representative to delay processing of the application for an inordinate amount of time. The proposed rule also added a provision in the general filing instructions to provide that any person may submit documentary evidence bearing on an application to the Employment Service local office or the CO. The proposed rule provided that such information will be considered by the CO in making the determination. DOL stated that submission and consideration of such information was already an existing practice.

The Department published an Interim Final Rule on October 23, 1991. 56 Fed. Reg. 54920, 54924-54925 (Oct. 23, 1991). In the preamble, the drafters of the Final Rule stated that the IMMACT Section 122(b)(1) requirements were only a slight extension of the current practice, and responded to commenters suggesting a more rigorous and formal notice to unions by noting that Section 122(b)(1) did not require proof of actual receipt of the notice by the collective bargaining representative, and reiterating that ETA did not want to place a bargaining representative in a position to delay the processing of the applications. The drafters agreed with a commenter who suggested that the notice should state that any person may file documentary evidence bearing on an application, and amended the interim final rule to include this requirement. The preamble then addressed comments concerning what use the COs would make of documentary evidence. ETA indicated that employers would be given an opportunity to rebut any information used to deny an application, and stated that third parties would not have standing in any appeal of a denial of certification. ETA, however, indicated that COs would not be required to specifically address in writing documentary evidence received

under the notice/posting provision because it "would impose an unwarranted administrative burden on the Certifying Officer, and would cause further processing delays." 56 Fed. Reg. 54920, 54924-54925 (Oct. 23, 1991).

The text of the Interim Final Regulations implementing the IMMACT90 notice/posting requirements was thus placed in the general filing instructions (i.e., moving the posting rule from section 656.21 to section 656.20(g)). In pertinent part, the amended regulations provided:

> (3) Any notice of the filing of an Application for Alien Employment Certification shall:
>
> (i) state that applicants should report to the employer, not to the local Employment Service office;
>
> (ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and
>
> (iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

The Interim Final Regulations also added a provision in section 656.20(h), stating:

> (h)(1)(i) Any person may submit to the local Employment Service office or to the Certifying Officer documentary evidence bearing on an application for permanent alien labor certification filed under the basic labor certification process at § 656.21 of this part or under the special handling procedures at § 656.21a of this part.
>
> (ii) Documentary evidence submitted pursuant to paragraph (h)(1)(i) of this section may include information on available workers, information on wages and working conditions, and information on the employer's failure to meet terms and conditions with respect to the employment of alien workers and co-workers. The Certifying Officer shall consider this information in making his or her determination.

56 Fed. Reg. at 54927-54928. This provision of the regulations remained unchanged from 1991 until the effective date of the PERM regulations on March 28, 2005.

The Notice of Filing Requirement Under the PERM Regulations

In 2002, ETA published a notice of proposed rulemaking of the regulations that would become the current "PERM" program. The proposed rule at 20 C.F.R. § 656.10(d)(3) required that any notice of filing must:

> (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
>
> (ii) State that any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor; and
>
> (iii) Provide the address of the appropriate Certifying Officer.

67 Fed. Reg. 30466, 30494-30495 (May 6, 2002). The proposed rule further provided:

> (e)(1)(i) *Submission of evidence*. Any person may submit to the Certifying Officer documentary evidence bearing on an application for permanent alien labor certification filed under the basic labor certification process at § 656.17 or an application involving a college and university teacher that may be selected in a competitive recruitment and selection process under § 656.18.
>
> (ii) Documentary evidence submitted under paragraph (e)(1)(i) of this section may include information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions for the employment of alien workers and co-workers. The Certifying Officer must consider this information in making his or her determination.

Id., at 30495.

In December 2004, ETA published the final PERM rule. The preamble to the final rule contained a lengthy discussion of the "Notice of Filing" provision. 69 Fed. Reg. 77326, 77337-77340 (Dec. 27, 2004). Responding to various commenters, ETA

repeatedly emphasized that section 656.10(d)(3) was drafted to implement the statutory requirement provided by Section 122(b) of IMMACT90. ETA stated that:

> In our view, Congress' primary purpose in promulgating the notice requirement was to provide a way for interested parties to submit documentary evidence bearing on the application for certification rather than to provide another way to recruit for U.S. workers. See 8 U.S.C. 1182 note.

Id. at 77337-77338.[6] In regard to a comment from a SWA urging establishment of a grievance system for handling complaints against the petitioning employer, ETA stated that it would "accept documentary evidence about labor certification applications and consider the evidence in deciding whether or not to certify. We do not believe any more formal process is needed." *Id.* at 77340.

BALCA Panel Decisions

BALCA initially decides appeals in three-member panels. Under PERM, all decisions involving an employer listing the wrong CO on its Notice of Filing were decided by the same panel of administrative law judges.

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[6] *See also* 69 Fed. Reg. at 77338 (rejecting suggestion that employers should be required under the posting regulations to include a finder's or referral fee "because ... the posting requirement is not designed to be a recruitment vehicle"); *Id.* (declining to exempt Schedule A occupations – i.e., occupations for which recruitment is not a requirement – from the notice requirement because "in our view Congress' primary purpose in promulgating the notice requirement was to provide a means for persons to submit documentary evidence bearing on the application"); *Id*. (noting that advertisements placed pursuant to the basic certification process outlined in section 656.17(f), no longer are required to state wage or salary information in the advertisement, but that the wage offered must be included in the Notice because of the IMMACT90 requirement that the Secretary cannot certify an application unless the employer had provided notice of the filing); *Id.* (responding to comments about the timing and duration of the Notice by stating that "the notice requirement is primarily a medium to obtain documentary evidence bearing on the application"); *Id.* at 77339 (rejecting suggestion that notice of filing information should be included in the advertisements required under section 656.17(f) because ETA concluded that placement of the statutory notice requirements in recruitment advertising would be counterproductive); *Id.* at 77340 (rejecting suggestion that at least one of the mandatory advertisements include the language of the posted notice requirements at § 656.10(d) with respect to furnishing of documentary evidence bearing on the application because "[p]otential job applicants might see the advertisement not as a job opportunity, but as a legal or information notice for the employer, and would be discouraged from applying to the advertisement").

In *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007) (per curiam), the panel held that the CO properly denied labor certification where a Notice of Filing only made a generic reference to the opportunity to provide documentary evidence to a regional CO, and failed to list an actual address to which persons could provide information. In *Brooklyn Amity School,* 2007-PER-64 (Sept. 19, 2007), however, the same panel vacated the CO's denial of certification where the employer listed the New York CO's address instead of the Atlanta NPC. In that case, the Atlanta NPC had jurisdiction over the employer's PERM application, but the New York CO had been the office with jurisdiction over labor certification applications from New York before March 28, 2005, and the office was still open processing pre-PERM applications, and accepting telephone calls at the time the Employer posted its Notice of Filing. The panel took into consideration that PERM was then still a new set of regulations, and that only 120 days had passed since the establishment of the Atlanta and the Chicago NPCs. The panel in *Brooklyn Amity School* also found that the information necessary to determine that Atlanta was the appropriate CO's office to list in the NOF was only available in a FAQ. The panel limited the ruling to the precise circumstances of that particular case.

Following *Brooklyn Amity School*, the same panel of the Board declined to find that the narrow *Brooklyn Amity School* exception applied under different fact patterns. In *Art of Insurance Agency, Inc.*, 2008-PER-54 (Feb. 17, 2009), *en banc review den.* (Apr. 13, 2009), the panel affirmed the denial of certification where the employer listed an address on its Notice of Filing for the Chicago regional ETA office, but ETA published a notice in the Federal Register nine months earlier that all of the CO's staff would be working in a new location in Chicago. A similar ruling was made in *Centro Cultural Chicano, Inc.*, 2008-PER-53 (Feb. 17, 2009), except that over twenty one months had passed since the Federal Register notice had been published. In *Form-Co Supply, LLC*, 2007-PER-118 (Feb. 17, 2009), the panel declined to apply the *Brooklyn Amity School* exception where the employer's Notice of Filing listed the Washington, DC headquarters of ETA's Office of Foreign Labor Certification ("OFLC"). In each of these three decisions, one panel member dissented on the ground that the facts were not materially distinguishable from those in *Brooklyn Amity School*.

In, *Hawai'i Pacific University*, 2009-PER-127 (June 25, 2009) – the matter currently before the Board en banc – the panel concluded that the case was not distinguishable from *Brooklyn Amity School*, and reversed the CO's denial of certification. One member of the panel dissented, arguing that the circumstances in *Hawai'i Pacific* were distinguishable from *Brooklyn Amity School*, and not sufficiently distinguishable from *Art of Insurance Agency*, *Centro Cultural Chicano, and Form-Co Supply*.

On June 30, 2009, the same panel of the Board found unanimously in *Hispanic Connection, Inc.*, 2009-PER-29 (June 30, 2009) (per curiam), that the circumstances closely resembled those in *Brooklyn Amity School*, and reversed the denial of certification. In *Hispanic Connection*, the Employer's Notice of Filing had listed the address of the Dallas CO. The Dallas office had become a "Backlog Elimination Center," processing pre-PERM applications, and was still open as of the date of the employer's application. The employer posted its Notice of Filing just 37 days after the transition to the NPC in Chicago, and filed its application only 120 days after the transition to PERM. In other words, those dates were even closer to the transition dates than those in *Brooklyn Amity School*.

Analysis

IMMACT90 required the Secretary of Labor to provide in the labor certification process a prohibition on the granting of certification unless notice of the filing of labor certification is provided to the appropriate bargaining representative, or if there is no such bargaining representative, the notice is posted in a conspicuous location at the facility or location of the employment. Moreover, IMMACT90 required the Secretary to set up a procedure for any person to submit documentary evidence bearing on the application for certification. ETA chose to implement these requirements by adapting its existing posting regulation and adding a provision requiring the CO to consider any documentation supplied as a consequence of the Notice of Filing.

When the PERM regulations were adopted, the recruitment aspect of the posting requirement was significantly diminished. The regulatory history to PERM clearly establishes that ETA's current view is that the notice/posting requirement is primarily a means by which employees and interested persons can be notified that an employer is seeking to fill a position under the alien labor certification program, and by which documentary evidence bearing on the application can be received and considered by the CO when deciding whether to grant certification. Thus, the purpose of including the address of the appropriate CO on the Notice of Filing is clear – to get the information to the CO who is reviewing the labor certification application directly, and without procedural formalities and without delay – so that the CO can perform his or her duty to consider that information before making a decision whether to grant or deny certification.

Although the Board has recognized that notions of fundamental fairness and procedural due process are applicable in PERM processing,[7] the Notice of Filing requirement is an implementation of IMMACT's notice/posting requirement that cannot be lightly dismissed under a harmless error finding. The enforcement of the regulatory requirements implementing this statutory purpose does not in itself offend fundamental fairness or procedural due process. Although AILA made a forceful argument about why the PERM regulations should have included a harmless error provision similar to the one found in the pre-PERM regulations, the instant case is a poor vehicle for consideration of such an argument because it is not possible to know whether the Employer's failure to list the address of the CO at the Chicago NPC actually was harmless. Despite the Employer's attorney's assertion that the Region VI office had informed her that it would have forwarded PERM "applications"[8] to the Chicago NPC, one can only speculate as to

[7] *See Voodoo Contracting*, slip op. at 9-10, citing *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc). See also *Aramark Corp.*, 2008-PER-181 (Jan. 8, 2009), where the panel rejected an argument that only an infinitesimal number of contacts are directed to the CO as the result of Notices of Filings, and therefore the absence of the CO's address could have had no significant impact on the integrity of the employer's application.

[8] In appellate briefing, there was some suggestion that Region VI had indicated that it would have forwarded any materials about a PERM application to the Chicago NPC. We note, however, that when this contention was first presented, the Employer's attorney only referred to the Region VI forwarding

whether the San Francisco Region VI office would have forwarded any communication about the application in a timely fashion to the Chicago NPC. Moreover, we agree with the dissent in the panel decision in *Hawai'i Pacific* that "it is simply unreasonable for petitioning employers to put the burden on [ETA] to redirect communications about labor certification applications from workers or members of the public when the regulations direct employers to put the proper address on the Notice of Filing in the first instance."

We do not have the facts of *Brooklyn Amity School* and *Hispanic Connection* before us, and decline to second-guess the panel decisions in those matters. Essentially, those decisions were based on (1) the notion that fundamental fairness dictated taking into consideration that PERM was a major change to the labor certification process and that it may not have been easy for applicants to follow ETA's office reorganization, and (2) the fact that the employers in those cases had listed CO offices that were still open, albeit only for finalizing the processing of pre-PERM applications, and probably would have known to send information received about an application to the appropriate NPC. In other words, despite the employers' error in listing the wrong CO's office, it appeared that the statutory and regulatory purpose of the notice requirement would have been achieved.

Neither of those factors is present in the *Hawai'i Pacific* matter. The PERM regulations had been in effect for almost two years prior to the Employer's posting of its Notice of Filing in this matter. Moreover, the CO had provided ample notice of where PERM applications would be processed in the form of Federal Register notices and FAQ postings on its web site.[9] Specifically, on February 8, 2005, ETA published an announcement in the Federal Register that PERM applications would be handled by two new offices opened in Chicago and Atlanta. This announcement listed the states within

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"applications" to the Chicago NPC. (AF 6). We also note that almost no information was provided about who at Region VI the attorney spoke to, and whether that person was only referring to PERM applications, or also documentation provided in response to a Notice of Filing.

[9] We take note that although the ETA web site has changed considerably since the time that the Employer posted its Notice of Filing in this matter, archived versions of ETA's web site are available at the Internet Archive at web.archive.org. *See* 29 C.F.R. § 18.201 (official notice of adjudicative facts).

the jurisdiction of the respective offices. *See* 70 Fed. Reg. 6734 (Feb. 8, 2005). On March 3, 2005, ETA posted answers to Frequently Asked Questions on its web site, which if consulted would have specifically informed employers of which CO's office should be listed on the Notice of Filing.[10] On July 19, 2005, ETA published an additional announcement of locations for the processing of PERM and other labor certification applications, which again listed the states within the jurisdiction of the respective offices. 70 Fed. Reg. 41432 (July 19, 2005). Additionally, although since edited, a February 21, 2006 FAQ would have linked readers to a sample Notice of Filing on a USCIS web site, which would in turn have linked to the ETA web site for a listing of the appropriate CO's office to list on the Notice of Filing.[11]

We also note that in the month preceding the Employer's posting, the OFLC web site included links (both from the OFLC home page and its "contacts" page) to a page describing office closures. That page stated:

> **Closing of regional offices within the Office of Foreign Labor Certification.** As the Office of Foreign Labor Certification centralizes its review of permanent and temporary program applications, we will be closing regional office operations in order to unify filing and processing activities in two National Processing Centers, located in Atlanta and Chicago, and two Backlog Elimination Centers, located in Dallas and Philadelphia. The chart below provides status information for each of the centers and offices. Please be aware that, as indicated on the chart, the Division's offices in Boston and Seattle have already closed. Therefore, those offices are no longer responding to phone calls or written inquiries, or accepting substitution requests or other filings. Other regional offices

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[10] *See* www.foreignlaborcert.doleta.gov/foreign/pdf/perm_faqs_3-3-05.pdf (from 02/17/2006 Internet Archive).

[11] *See Voodoo Contracting*, *supra*, at 6-9, quoting from FAQ at ww.ows.doleta.gov/foreign/pdf/perm_faqs_2-21-06.pdf,.and sample USCIS Notice of Filing at www.uscis.gov/propub/ProPubVAP.jsp?dockey=724ce55f1a60168e48ce159d286150e2, which in turn cross-referenced www.foreignlaborcert.doleta.gov/foreign/contacts.asp.

We acknowledge that the ETA home page at the time of the Employer's application in this matter would have directed someone clicking the "Regional Offices" link on the ETA home page to a page that stated that ETA Region VI had jurisdiction over matters arising out of Hawaii. But given the ETA's publication of Federal Register notices, and OFLC web site's contact information page, office closure page, and FAQs pages, we conclude that ETA clearly provided the information needed to correctly identify the appropriate CO to list on a Notice of Filing, for reasonably diligent labor certification applicants.

> are winding down operations. We appreciate your patience during this transition. In case of inquiries about applications processed by or activities otherwise associated with closing offices, please contact the appropriate center, as listed in the chart.

The page included a chart indicating that the San Francisco office was no longer processing applications as of 10-2005, had only accepted telephone calls until December 2005, and that as of January 2006, inquiries about applications or other matters should be directed to the Chicago NPC.[12]

Thus, in this case the circumstances do not support a finding either that the Employer's error in listing the wrong ETA office was excusable, or that the statutory and regulatory purpose of the Notice of Filing had been served despite the error in the listing of the CO's address. In the instant case, too much time had passed from the effective date of the PERM regulations to attribute the Employer's error to the newness of PERM. Moreover, by the time the Employer posted its Notice of Filing, a CO had not been stationed in San Francisco for over a year, and we decline to simply assume that personnel in Region VI would have known where to send communications about a PERM labor certification matter, or that even if it did, it would done so in sufficient time for the appropriate CO to consider that information. The CO has an obligation under IMMACT90 and the regulations to consider documentation supplied by employees or other persons relating to application. The CO cannot fulfill that duty if the documentation is not timely supplied.

[12] *See* www.foreignlaborcert.doleta.gov/officecloses.cfm (from 01/26/2007 Internet Archive).

ORDER

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

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Judge Pamela Lakes Wood, dissenting.

I respectfully dissent. Although I agree with much of the analysis in the majority's decision, the decision simply does not adequately address the recurring nature of the problem and the confusing, inconsistent instructions that have been provided to practitioners with respect to the issue presented by the instant case.

This case is not materially distinguishable from *Brooklyn Amity School*, 2007-PER-64 (Sept. 19, 2007), which involved the listing of an old address for the CO on the posted Notice of Filing as the sole basis for denial of labor certification. Here, similarly, the Employer listed the address for the office in San Francisco that previously handled applications for permanent labor certification arising out of Hawaii, instead of that of the Chicago Processing Center, which at that time did so under what is now the PERM program. As it was undisputed that the San Francisco office had been forwarding PERM submissions to the appropriate office, any comments by workers or the general public would ultimately reach the correct destination.[13] In contrast, *Voodoo Contracting*, 2007-

[13] The suggestion by the majority that the employees of the San Francisco ETA office lack the competence to simply forward immigration-related correspondence to the appropriate office in a timely manner is specious. Indeed, that suggestion flies in the face of the majority's apparent reliance upon the availability of information as to the appropriate office (such as through Federal Register notices). More importantly, the employees work for the ETA and could clearly be directed by ETA management as to where to forward correspondence with only a minimal burden to the agency.

PER-1 (May 21, 2007) concerned a notice that provided no address whatsoever, and in *Brooklyn Amity School* we distinguished *Voodoo Contracting* on that basis. As the majority notes, there have been multiple other cases involving parties who included the incorrect address for the CO, suggesting that this is a recurring problem, contrary to the suggestion in *Brooklyn Amity School* that this was a short term problem that would resolve itself. To the contrary, it has not, and a simple passage of time is simply no basis for altering the result in *Brooklyn Amity School*. Rather, the recurring nature of the situation involved here suggests a flaw in the process that has yet to be resolved, despite the optimism we expressed in *Brooklyn Amity School* to the effect that the issue presented by that case was "unlikely to arise again."

A review of the "Frequently Asked Questions" on the Employment and Training Administration (ETA) website reflects that the advice provided is still confusing. A novice practitioner visiting the ETA website would find a table of various regional offices indicating the geographical areas for which each is responsible. The table lists the San Francisco office as the one responsible for Hawaii. Under the section of the website relating to "Frequently Asked Questions" for Foreign Labor Certification, persons preparing Notices of Filing in connection with labor certification applications are advised to list the appropriate certifying officer for the area of intended employment, at addresses listed on "a chart of the states and territories within their jurisdictions." There is no such chart. A diligent applicant would learn that the only place to file is the Atlanta National Processing Center, but other offices are listed elsewhere on the website as being involved in the foreign labor certification process. While the website was not identical at the time this application was filed, it was similarly confusing.

Citing *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), we noted in *Voodoo Contracting* that notions of fundamental fairness and procedural due process are applicable to PERM processing. In *HealthAmerica*, we found en banc that the CO's refusal to allow applicants to correct typographical errors had the effect of elevating form over substance. Citing precedent from the U.S. Court of Appeals for the D.C. Circuit, we noted that an agency may write strict procedural rules in order to deal with the

administrative demands of processing large numbers of applications within a tight budget but that the "quid pro quo for such stringent criteria is explicit notice." Likewise, citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), we noted that due process was a flexible concept requiring consideration of such factors as the private interest affected by the official action, the risk of an erroneous deprivation through the procedure coupled with the probable value of additional procedural safeguards, and the Government's interest.

Applying these precedents to the instant case, it is clear that the notice provided by ETA was inadequate for applicants such as the Employer in the instant case; that the NOF was deficient due in part to the inadequate guidance provided by the ETA; that the deficiency could be cured by ETA's regional office simply forwarding any communications to the correct office; and that an applicant's interest in having a technically noncompliant NOF accepted so that it will not have to repeat a time consuming process is more significant than the interest by ETA in not having to forward submissions from one office to another. As in *Subhashini Software Solutions*, 2007-PER-00043 (Dec. 18, 2007), reliance on such a technicality would result in an injustice and would not satisfy the requirements of due process:

> . . . . The consequences to the Employer were out of proportion to the mistake. To deny labor certification for such an error would be to elevate form over substance, to lose perspective of the relative weight of the offense compared to the consequences to the petitioning Employer, and to offend the concept of fundamental fairness.

Given the lack of assistance provided to practitioners with respect to the PERM system, coupled with the fact that the system is far from user-friendly, fundamental fairness requires that the Employer's listing of an old address for the CO should be excused. Where, as here, an applicant has made a technical error in the application process due to confusing or misleading advice provided by the federal government, the error should be excused if harmless or easily rectified. Accordingly, I would reverse the CO's decision in the instant case.