**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 28 August 2014**

*In the Matters of:*

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| **TERA TECHNOLOGIES, INC.**, | **BALCA No. :** | **2011-PER-02541** |
| *Employer,* | ETA No.: | A-09013-20326 |

*on behalf of*

**HITENDRA BABARIA**,

*Alien,*

*and*

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| **USA WOOL, INC.**, | **BALCA No. :** | **2012-PER-00055** |
| *Employer,* | ETA No.: | A-09083-35485 |

*on behalf of*

**ALEJANDRO KRALL**,

*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearances:

Baolin Chen, Esquire
Chen & Mu, Attorneys at Law
Portland, Oregon
*For Tera Technologies, Inc.*

Timothy A. Greene, Esquire
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*For USA Wool, Inc.*

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U.S. Department of Labor, Office of the Solicitor, Division of Employment and Training Legal Services
Washington, DC
*For the Certifying Officer*

Before: Paul R. Almanza, Colleen A. Geraghty, Paul C. Johnson, Jr., Clement J. Kennington, Larry W. Price, *Administrative Law Judges*

Opinion for the Board filed by ALMANZA, with whom GERAGHTY, JOHNSON, KENNINGTON, and PRICE join:

## DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

These consolidated appeals arise under section 212(a)(5)(A) of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. § 1182(a)(5)(A), and the "PERM" regulations promulgated thereunder at title 20, part 656 of the Code of Federal Regulations.[1]

## BACKGROUND

The INA regulates the admission of foreign nationals (*i.e.*, aliens) into the United States. Section 212(a)(5)(A) prohibits the admission of aliens who seek to enter the United States for the purpose of performing skilled or unskilled labor unless "the Secretary of Labor has determined and certified . . . that there are not sufficient workers who are able, willing, qualified . . . and available at the time of application . . . and at the place where the alien is to perform such skilled or unskilled labor, and the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1182(a)(5)(A). The Department of Labor has promulgated regulations setting forth the procedures whereby this certification—known as a "permanent labor certification"—may be applied for and granted or denied. *See generally* 20 C.F.R. Part 656. Pursuant to these regulations, an employer must apply for labor certification on an alien's behalf.

The employers in the instant appeals, TERA Technologies Inc. ("TERA") and USA Wool, Inc. ("USA Wool") (collectively, "Employers"), each filed an *Application for Permanent Employment Certification* (ETA Form 9089) under the basic labor certification process at 20 C.F.R. § 656.17. (TERA AF 101-110); (USA WOOL AF 45-56).[2] Before an employer may file an *Application for Permanent Employment Certification* under this process, it must provide notice of its intent to file the application 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." 20 C.F.R. § 656.10(d)(1) (implementing Immigration Act of 1990, Public Law 101-649, § 122(b)). The form and substance of this notice—known as a "notice of filing"—are governed by 20 C.F.R. § 656.10(d).

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[1] "PERM" is an acronym for the "Program Electronic Review Management" system established by the regulations that went into effect on March 28, 2005. The regulations in effect prior to that date will be referred to as the "pre-PERM" regulations.

[2] Citations to the Appeal File forwarded by the Office of Foreign Labor Certification concerning TERA's application will be abbreviated "TERA AF" followed by the page number. Citations to the Appeal File forwarded by the Office of Foreign Labor Certification concerning USA Wool's application will be abbreviated "USA WOOL AF" followed by the page number.

A Certifying Officer ("CO") selected the Employers' applications for audit and issued an audit notification letter seeking, *inter alia*, the "[n]otice of filing documentation as outlined in 656.10(d)." (USA WOOL AF 41); (TERA AF 97). Both Employers complied with this request and submitted a copy of the notice of filing that they posted before filing their respective applications. (USA WOOL AF 31); (TERA AF 63). Thereafter, the CO denied certification of both applications on the ground that the Employers' notices of filing did not include the name of the employer, as required by 20 C.F.R. §§ 656.10(d)(4) and 656.17(f).[3] (USA Wool AF 12); (TERA AF 43). The Employers both requested reconsideration of the denial. TERA argued that the omission of its name on the notice of filing was a harmless error because the notice included the term "our company." In support of this argument, TERA provided a letter from its vice president asserting that interested persons would have been aware that "our company" referred to TERA because the notice of filing was posted on the company's premises, where only TERA employees have access, and everyone in the company (which is comprised of three employees) knows the contact person listed on the notice. USA Wool represented itself pro se and its request was not responsive to the grounds cited in the denial letter. Instead, USA Wool's request addressed the newspaper advertisements that it placed pursuant to § 656.17(e).

In both cases, the CO refused to excuse the omission of required information on the notice of filing and forwarded the matter to the Board of Alien Labor Certification Appeals ("BALCA") for administrative review. Each case was assigned to a different panel of three administrative law judges appointed to BALCA. (USA WOOL AF 1); (TERA AF 1). In its brief before BALCA, TERA argued that the CO erred in denying certification because (1) TERA had effectively identified itself in the notice of filing by using the term "our company" and including the name of the Vice President as a contact person; and (2) TERA's failure to include its business name on the notice of filing should have been excused because its request for reconsideration included supporting documentation demonstrating that the notice of filing "unmistakably identified [TERA] by using the term 'our company' and listing [TERA]'s Vice President as a person to contact regarding inquiries about the [notice of filing]." (Brief of Tera Technologies, Inc., dated January 11, 2012, at 17). USA Wool made similar arguments. Specifically, it argued: "[T]he name of the employer is on the ads and, if the person inquiring were to see the internal posting within the USA Wool, Inc. facility, they would know where and the name of the company." (Statement of Intent to Proceed, dated January 19, 2012).

Each panel issued a decision and order affirming the CO's determination denying labor certification. Both panels cited a previous panel decision, *Robert Venuti Landscaping*, 2009-PER-453 (Oct. 27, 2010), with approval and held that an employer's failure to include its business name on the notice of filing is fatal to the application.

[3] The CO cited an additional ground for denying each application. In USA Wool's case, the CO concluded that the notice of filing did not contain the location of the job opportunity, as required by 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(4). In TERA's case, the CO determined that TERA failed to provide documentation as required in the audit notification letter. We need not address either of these grounds for denial, since, as discussed *infra*, we affirm the CO's denial on the above-cited basis.

Both Employers filed timely petitions for en banc review. TERA argued an en banc rehearing was necessary to secure or maintain uniformity of the Board's decisions because the panel's decision in its case conflicted with two earlier panel decisions: *Stone Tech Fabrication*, 2008-PER-187 (Jan. 5, 2009) and *Direct Meds, Inc*., 2009-PER-319 (Mar. 3, 2010). TERA further alleged that en banc review was necessary to resolve a question of exceptional importance. Specifically, TERA argued that due process and fundamental fairness demand that BALCA reverse a CO's denial of labor certification based on a minor and harmless error if the error did not frustrate the purposes of labor certification. In its petition, USA Wool makes an argument similar to TERA's latter argument. USA Wool argued that the omission of its company name on the notice of filing was immaterial because the notice was posted at the only industrial wool processing facility in the area, "where all employees and visitors could see and would know where to look for such notices and know the name and location of the employer." USA Wool asserted that the panel's decision "was simply a rigid enforcement of a government regulation with no consideration for the intent of the rules," and argued that the panel's refusal to consider and address the facts in its case constituted an abuse of discretion.

On May 8, 2014, we granted both petitions, vacated the panel decisions, consolidated the matters for purposes of the en banc rehearing, and permitted the parties to file supplemental briefs.[4]

## DISCUSSION

When an employer files an *Application for Permanent Employment Certification* under the basic labor certification process at section 656.17, as the Employers did here, the notice of filing "must contain the information required for advertisements by § 656.17(f)." 20 C.F.R. § 656.10(d)(4). Section 656.17(f) specifies detailed content requirements for certain advertisements. Pursuant to section 656.17(f)(1), these advertisements "must . . . name the employer." Here, both Employers posted notices of filing that did not "name the employer," as required by §§ 656.10(d)(4) and 656.17(f)(1). The Employers urge us to excuse this omission, and cite to *Stone Tech Fabrication*, 2008-PER-187 (Jan. 5, 2009), to argue that their omissions should be excused as harmless errors.

In *Stone Tech Fabrication*, the CO denied certification because the employer did not include its name on the notice of filing. *Id.*, slip op. at 2. The employer's attorney argued that

[4] By letter dated June 18, 2014, Counsel for the CO submitted a letter to the Chief Administrative Law Judge requesting that the Board withdraw the order granting en banc review, or, alternatively "that the group of judges assigned to the en banc panel be expanded to include all the active members of BALCA, or at least to include all of the judges who decided these cases initially." The Chief Judge referred the letter to this en banc panel. On June 23, 2014, we issued an order notifying the parties that we would treat the CO's letter as a Motion to Reconsider the Granting of En Banc Review and Alternative Motion to Expand the Number of Judges Participating in the En Banc Rehearing. USA Wool filed a response opposing both Motions; TERA did not file a response. Both Motions are hereby DENIED. As we note *infra*, two BALCA panel decisions cite *Stone Tech Fabrication*, 2008-PER-187 (Jan. 5, 2009) to reverse a CO's denial of certification where the notice of filing did not include the name of the employer. En banc review is thus necessary to secure and maintain uniformity of the Board's decisions. The CO filed its Motion to Expand the Number of Judges Participating in the En Banc Rehearing over a month after the en banc panel in this matter issued the Order Granting En Banc Review. We decline to alter the composition of the en banc panel considering these cases are in the midst of the litigation.

this should not cause the employer's application to be denied because the notice of filing was posted "within the job premises" and listed the name and phone number of the president of the company. *Id*. On appeal, a three-judge BALCA panel noted that the employer made "an attractive argument . . . that technical interpretation of the regulations has defeated common sense." *Id*. at 4. The panel suggested that, in some situations, "the purpose of the Notice of Filing would be fully served without the name of the company on the Notice if it was nonetheless clear that the Notice applied to the petitioning [e]mployer, as for example where a the petitioner is a small company where everyone knows the owner on a first name basis." *Id*. But the panel stopped short of reversing the CO's denial because it did not have enough information "to simply accept the [e]mployer's attorney's contention that the posting was adequate because it contained the [e]mployer's president's name and telephone number." *Id*. Specifically, the panel stated:

> In order to make out a compelling case for equitable relief, the [e]mployer needed to do more than simply assert that the president's name and phone number were adequate substitutes for the actual name of the petitioning company because the Notice was posted at the work facility. . . . [I]n order to establish a compelling case for relief from the regulatory requirement that an employer's name must appear on a Notice of Filing, the [e]mployer should have, for example, provided information about the size of the company, how well-know[n] the president's name would be among the work force, and whether the place it posts notices is used exclusively for company bulletins. Although we are adverse to elevating form over substance, we cannot make arguments for employers and we cannot simply assume the truth of generalizations.

*Id*. Two subsequent panel decisions cite *Stone Tech Fabrication* in reversing a CO's denial of certification where the notice of filing did not include the name of the employer. *See Direct Meds, Inc*., 2009-PER-319 (Mar. 3, 2010); *Case Farms*, 2009-PER-94 (Jan. 28, 2009). In both cases, the panel found it was "clear" that the notice of filing "applied" to the employer. *Id*.[5] But these decisions are a rare exception; the vast majority of BALCA panel decisions have affirmed

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[5] In *Direct Meds*, the Board relied on the exception in *Stone Tech Fabrication* to vacate the CO's denial of certification and order that certification be granted. In so holding, the Board noted:

> In the instant case, the Employer was a small company with only 25 employees, and the Employer asserted that the President's name was well-known by the employees. The Employer also contended, both in its request for review and appellate brief, that the notice was posted on a segregated bulletin board reserved for legal notices and notices for the employees, and it was posted adjacent to the notice advising employees of the position as part of the employee referral program, which included the same job description and contact name and was printed on company stationery. Thus, we find that in these circumstances it was clear that the Notice applied to the petitioning Employer, even though the Employer's name was omitted from the Notice. Accordingly, the Employer has demonstrated a compelling case for relief.

*Direct Meds,*, slip op. at 4-5 (footnote omitted). In *Case Farms*, , the Board received a letter from the CO stating that the employer's application should be certified pursuant to the Board's holding in *Stone Tech Fabrication*. The petitioning employer in this case had filed an affidavit explaining why, given the conditions under which the notice of filing was posted, it was clear that the notice of filing applied to the employer, even though it omitted the actual name of the employer. The panel found that the CO's letter was "essentially a concession that [the employer's] affidavit was adequate under the *Stone Tech Fabrication* ruling."

the denial of certification if the petitioning employer's notice of filing did not include the name of the employer. *See generally Aero Parts Management, LLC*, 2011-PER-704 (May 25, 2012) (listing cases).

We decline to adopt the equitable exception suggested by the panel in *Stone Tech Fabrication* and adopted by the panels in *Direct Meds, Inc*. and *Case Farms*. The PERM regulations require an "applicant [to] strictly adhere to the rigorous regulatory requirements." *Alexandria Granite & Marble,* 2009-PER-373, slip op. at 3 (May 26, 2010). The content required by § 656.17(f)(1) is explicit, and reflects the Department's considered judgment about the information that must be included in a notice of filing. The clarity of this requirement—*i.e.*, that the notice "name the employer"—and the ease with which an employer should be able to comply with this requirement belie any suggestion that strict enforcement of this requirement offends fundamental fairness or procedural due process. We therefore adopt the approach taken by the vast majority of BALCA panels and hold that when an employer files an *Application for Permanent Employment Certification* under the basic labor certification process at § 656.17, the notice of filing must explicitly "name the employer."

The Department has successfully defended this approach in federal district court. In *Country Landscaping & Supply Inc.*, No. 1:12-cv-04309 (N.D. Ill. Jan. 31, 2013), a CO denied an employer's *Application for Permanent Employment Certification* because the employer's notice of filing did not state the business name of the employer or the location of the job opportunity. *Id.,* slip op. at 2. The employer requested administrative review, and a BALCA panel affirmed the denial, citing *Robert Venuti Landscaping*, 2009-PER-453 (Oct. 27, 2010), for the proposition that it is "fatal to [an] [e]mployer's application to fail to include its business name on the [notice of filing]." *Id.,* slip op. at 7. The employer filed a complaint in district court against the Department challenging the panel's decision under the APA. In particular, the employer argued that the omission of the company name and address on the notice of filing was a harmless error and the denial of labor certification on this basis was a denial of due process. The Department moved for summary judgment, arguing that BALCA's affirmance of the CO's denial was sufficiently supported by the law. The court granted summary judgment in favor of the Department, finding that the denial of certification on the basis cited by the CO was not arbitrary, capricious or otherwise contradictory to law. The court explained:

> However minor an omission Country Landscaping seeks to characterize its mistake, Country Landscaping provides no basis for why it should be given a special exemption to the notice requirements. The Permanent Labor Certification regulations require an "applicant [to] strictly adhere to the rigorous regulatory requirements." *In the Matter of Alexandria Granite & Marble,* BALCA Case No. 2009-PER-00373, at *3 (May 26, 2010). Additionally, Country Landscaping is not entitled to an exception to the rule by arguing a denial of procedural due process. Country Landscaping's application omitted critical information. It did not simply make a technical or typographical error, as was present in the *HealthAmerica* case, cited by Country Landscaping. *In the Matter of HealthAmerica,* BALCA Case No. 2006-PER-00001 (July 18, 2006) *(en banc).* These regulations are in place to help the DOL process a high volume of applications consistently, while also limiting the ability of an applicant to

> misrepresent a job opportunity on an application. *Id.* As such, granting an exception such as the one sought by Country Landscaping would serve to swallow the rule.

*Country Landscaping*, slip op. at 7. Subsequent BALCA panel decisions have cited the court's decision in *Country Landscaping* to affirm the CO's denial of labor certification in cases where a notice of filing does not contain the name of the employer or the location of the job opportunity. *See, e.g*., *Chemical Abstracts Service*, 2011-PER-01393 (Apr. 11, 2013).

Like the court in *Country Landscaping*, we believe the exception that the Employers seek to the content requirements in this case would "serve to swallow the rule." *Country Landscaping*, slip op. at 7. A CO must make a determination either to grant or deny the requested labor certification on the basis of, *inter alia*, whether the petitioning employer has met the requirements of the PERM regulations. 20 C.F.R. § 656.24(b)(1). The Employers in these matters posted notices of filings that did not "name the employer," as is required by 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(1). Accordingly, we affirm the CO's denial of labor certification in both matters.

## ORDER

In light of the foregoing discussion, we AFFIRM the Certifying Officer's denial of labor certification in the above-captioned matters.

Entered at the Direction of the Board:

**Todd R. Smyth**
Secretary to the Board of Alien Labor
Certification Appeals