UNITED STATES DEPARTMENT OF LABOR

BOARD OF ALIEN LABOR CERTIFICATION APPEALS

In the Matter of

SIMPLY SOUP LTD. d/b/a NY SOUP EXCHANGE,
Employer,

ETA Case No.: A-08322-06241

2012-PER-00940

***On behalf of*,**

Morales Velasquez Pedro Pablo,
Noncitizen

On Appeal from a Certifying Officer's Decision

BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE AMERICAN IMMIGRATION COUNCIL AS AMICI CURIAE

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INTRODUCTION

In this proceeding, the Board has an opportunity to reaffirm that due process and fundamental fairness are essential components of the PERM adjudication process. The American Immigration Lawyers Association (AILA) and the American Immigration Council (Immigration Council), in their capacity as *Amici Curiae*, take no position on whether the underlying PERM application should be certified. Instead, they urge the Board to affirm that the Certifying Officer (CO) cannot deny a PERM application for failure to comply with the recruitment report requirements in 20 C.F.R. § 656.17(g)(1), when the employer's compliance is evident from the record despite the omission of certain documentation. The regulatory framework governing the PERM application process permits, and due process and fundamental fairness require, that the CO request missing documentation, per 20 C.F.R. § 656.20(d)(1), when other evidence in the record indicates that such documentation was in existence at the time the application was filed and maintained by the employer to support the PERM application.

INTEREST OF *AMICI CURIAE*

AILA is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy

of those appearing in a representative capacity in immigration and naturalization matters. Through its government agency liaison activities, AILA regularly engages with the Department of Labor and the Office of Foreign Labor Certification (OFLC) directly and through quarterly "stakeholder" meetings conducted by the OFLC as part of its outreach to the regulated community on matters of policy and operation.

The Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council has played an instrumental role in highlighting the important economic contributions of immigrants at the local and federal levels. In addition, through its work on the economic benefits of immigration reform, the Immigration Council has helped to establish baseline standards for understanding the important role immigration plays in shaping and driving a twenty-first century American economy. The Immigration Council also engages in impact litigation, appears as *amicus curiae* before administrative tribunals and federal courts, and provides technical assistance to attorneys on business immigration and other issues.

AILA and the Immigration Council have a substantial interest in the issue presented in this case, which implicates due process and fundamental fairness in PERM adjudications.

ARGUMENT

This case presents the following question: What steps must the CO take when the record gives rise to a reasonable inference that the employer has evidence not found in the record. For example, the record may contain a recruitment report with pages numbered 1, 2 and 4. Or, the employer's cover letter may indicate that a certain document is attached, but when the CO reviews the record, the document is missing. The record would not ordinarily indicate whether the page or document was submitted but lost in transit; received at the OFLC, but missing from the CO's file; or inadvertently omitted by the employer after becoming separated from the package during the photocopying, compiling or mailing process. Regardless of who is at fault for the inadvertent clerical or administrative error, the regulations allow, and due process and fundamental fairness require, that the CO request the missing page or document from the employer. Moreover, this course of action will yield greater administrative efficiency because it will avoid a request for review or reconsideration in such instances.

Amici do not address situations where an employer has submitted deficient evidence in support of a PERM application. Rather, this brief focuses on situations where it is reasonably clear from the record that the employer possesses the necessary documentation, prepared it for submission, and either sent or intended to send it to the CO, but the documentation or a part of it is missing from the record.

I. The CO Must Determine Compliance with the Documentation Requirements in the Context of the PERM Regulatory Scheme, Including Requesting Missing Documentation when There is no Substantial Failure to Comply

A. The CO's implicit conclusion that a PERM application must be automatically denied for lack of any required documentation would render 20 C.F.R. § 656.20(d)(1) superfluous.

To render a sound decision, the CO must ensure that the record is complete. The CO's authority under 20 C.F.R. § 656.20(d)(1) to "request supplemental information and/or documentation" is a critical tool to achieve this goal. Specifically:

> 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; ….

20 C.F.R. § 656.20(d)(1) (emphasis added).

Thus, where it is reasonably likely that a missing page or document exists, having been created and maintained by an employer to support a PERM application, the CO should exercise his authority to request that documentation.[1]

Amici propose the following test for when the CO must request missing information or documentation:

1. The CO has received information or documentation, such as the employer's evidence or the attorney's cover letter, which clearly indicates that the required evidence has been prepared;

[1] The employer's response also may reveal who or what was responsible for the original gap in the evidence.

2. A portion of the documentation the CO needs to determine whether he can give the attestations necessary for certification under § 212(a)(5)(A)(i) of the Immigration and Nationality Act (INA) is missing from the record before him; and
3. From the other documentation received, the CO can determine that the missing documentation was in existence at the time the employer filed the PERM application and was maintained by the employer to support the PERM application.

The proposed test is consistent with the Board's decisions requiring the CO to act affirmatively when the evidence so requires. In *Sharp Image Gaming, Inc.*, 2011-PER-02024 (July 9, 2014), the employer filed a PERM application for a Foreman job, which included supervisory duties. However, the employer listed the job duties of a non-supervisory job – the job from which the foreign national gained his experience for the Foreman job – in §H.11 of the PERM application, where the job duties of the Foreman should have been listed. The CO denied certification because, based on the duties listed on the PERM application, the job offered and the job from which the foreign national gained his experience were identical, rather than not substantially comparable.

The Board found it "readily apparent" from the recruitment documents provided in the employer's audit response that the jobs were not substantially comparable and that the foreign national had the experience required by the employer for the Foreman job. The Board did not allow the CO to rely solely on the

language in the PERM application to the exclusion of the evidence submitted with the audit response.

A page that is obviously missing from a recruitment report meets the proposed test. The CO would be able to tell when the recruitment report was prepared, so he would know that it was in existence when the PERM application was filed, and an employer must maintain the recruitment report as part of the record retention requirements of 20 C.F.R. § 656.10(f).

When the CO denies a PERM application where documentation is obviously missing from a record which evidences compliance, instead of requesting the employer to supplement the record before him, the CO is rendering 20 C.F.R. § 656.20(d)(1) superfluous.

B. When evidence in the record show compliance with regulatory requirements, but some evidence is missing, the omission is not a "substantial failure by the employer to provide required documentation" under 20 C.F.R. § 656.20(b).

In this case, the CO denied the PERM application because "the employer failed in the recruitment report to provide a description of the recruitment steps undertaken as required in 20 C.F.R. § 656.17(g)(1)."[2] Certifying Officer's Certification Denial at 2 (Nov. 14, 2011). The CO apparently made this determination because a page was missing from the recruitment report.

[2] An employer must prepare the report, which must be signed by the employer or its representative, and include a description of the recruitment steps undertaken, results achieved, number of hires and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reason(s) for rejection. *See* 20 C.F.R. § 656.17(g)(1).

Section 656.17(g)(1), which establishes the requirements for the recruitment report, must be read in the context of the overall regulatory scheme. *See, e.g., Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350, 1357 (2012). The CO may not deny a PERM application "for just any failure to provide 'required documentation.'" *SAP America, Inc.*, 2010-PER-01250 (April 18, 2013) (en banc). While a complete recruitment report is required, an application may only be denied where there has been a "substantial failure by the employer to provide required documentation." 20 C.F.R § 656.20(b).

The regulations compel the CO to: (a) first determine whether any failure to produce the requested documentation is "substantial," for purposes of subsection 656.20(b)(1); and then, (b) if the CO concludes it was not, proceed under subsection (d)(1) to exercise discretion to request additional information. Refusing to exercise the discretion that 656.20(d)(1) grants is legal error. *See Asimakopoulos v. INS*, 445 F.2d 1362, 1365 (9th Cir. 1971) ("The Board's failure to exercise discretion is reversible error."). When an adjudicator improperly concludes he or she *lacks discretion*, such misinterpretation is an inherently prejudicial error if it affects the outcome of the decision. *See id*.

A "substantial failure" occurs when an employer fails to provide documentation that the regulations specifically identify as necessary to document an attestation. *See SAP America, Inc.*, 2010-PER-01250 (April 18, 2013) (en banc). If an employer's evidence is deficient in meeting the regulatory requirements or the employer does not provide a reasonable response to the CO's request, only then

would there be a *substantial* failure to provide the evidence, per 20 C.F.R. § 656.20(b), which could result in the denial of the PERM application under 20 C.F.R. § 656.24. But when the circumstances of the case show that the employer maintained evidence establishing its compliance with the regulatory requirements, but certain evidence is obviously missing from the record, then § 656.20(d)(1) makes it incumbent upon the CO to request the missing information or documentation.

This approach also is in harmony with the standards for an employer's submission of documentation in support of a request for reconsideration under 20 C.F.R. § 656.24(g)(2)(ii). The three criteria are: (1) the employer did not have an opportunity to present the documentation to the CO previously; (2) the documentation had to exist at the time the PERM application was filed; and (3) the employer maintained the documentation in support of the PERM application, in compliance with the retention requirements of § 656.10(f). When the CO does not have before him documentation that other evidence clearly shows was created as part of the recruitment report, then the employer *effectively* has not had the opportunity to present the documentation to the CO. The CO can remedy this deficiency by exercising his discretion under 20 C.F.R. § 656.20(d)(1) to request the missing documentation. The CO then can assess the sufficiency of the recruitment report for compliance with § 656.17(g)(1) based on the complete record.

II. Due Process and Fundamental Fairness Require the CO to Request Documentation when Other Evidence Indicates the Documentation Exists

Where the CO can reasonably infer from the record that the employer submitted, or intended to submit, information or documentation that is missing, due process and fundamental fairness require the CO to request the documentation from the employer instead of turning a blind eye to existing evidence.

While the employer is required to prepare a recruitment report in compliance with § 656.17(g)(1), and other regulations impose similar mandatory duties on the employer, these requirements do not relieve the CO of his responsibility to adjudicate PERM applications consistent with the dictates of due process and fundamental fairness. As discussed above, where the CO can reasonably infer from the record that the employer submitted, or intended to submit, information or documentation that is obviously missing from the record, CO must exercise his regulatory authority to request that evidence.

These circumstances are distinguishable from the situations where (i) an employer's report, as submitted in its entirety, is deficient and does not provide the required information or (ii) an employer fails to submit a recruitment report. *See, e.g.*, *Addessi Fencing, LLC*, 2011-PER-02246 (July 10, 2014) (denial upheld because the recruitment report did not include the recruitment steps; other documentation in the audit response cannot substitute for the report); *Marlenny's Haircutters*, 2009-PER-00013 (Jan. 29, 2009) ("The CO's reconsideration letter clearly stated

that the CO had not found such a report upon reviewing the entire file").[3] Rather, the CO has evidence of compliance with the recruitment report regulation, but a page from the report is missing. Due process and fundamental fairness dictate that the CO assesses the employer's compliance based on the complete report.

The PERM process is intended both to protect U.S. workers and to allow employers to sponsor foreign workers where there are no qualified U.S. workers who are able, willing, and ready to work in the job being offered. Denying a PERM application where it is reasonably likely that the employer complied with the regulations, prepared and maintained the required evidence, and submitted, or intended to submit, documentation missing from the CO's record does not serve this purpose.

The goal of administrative efficiency in adjudicating PERM applications cannot override fundamental fairness and due process considerations. The streamlining of the labor certification application process does not take precedence over providing due process. *See Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883, 892 (5th Cir. 1989) ("[E]fficiency is not the standard-bearer of due process.")

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[3] This situation is equally distinguishable from Board decisions affirming the CO's denial due to a "substantial failure" by the employer during the audit process "to provide required documentation," per 20 C.F.R. § 656.20(b). In those cases, which include *Marlenny's Haircutters*, the record showed the absence of documentation specifically identified in the regulations as evidence necessary to document a particular attestation. *See SAP America, Inc.*, 2010-PER-01250 (April 18, 2013) (en banc), *citing Yakima Steel Fabricators*, 2011-PER-01289 (July 5, 2012) (no proof of print ads); *Gotham Distribution*, 2011-PER-01352 (Aug. 2, 2012) (no Notice of Filing or print ads) and *Marlenny's Haircutters* (no recruitment report). Here, the other evidence shows the employer has the required documentation, but a portion of the documentation is not in the CO's file.

When the CO denies a PERM application because evidence that the employer submitted, or thought it submitted, is missing from the record, the employer has to file a request for review or reconsideration. This adds a time-consuming administrative process to the adjudication of PERM applications and wastes scarce administrative resources. If the CO instead asks the employer to provide the missing information or documentation, then the CO can made a decision on the complete record. *See Park Ave. Mini Market*, 2010-PER-00826 (Feb. 21, 2012) (Reversing CO's denial for inability to affirm employer sponsorship; CO had the alternative of using § 656.20(d)(1) to request supplemental information or documentation).

CONCLUSION

Amici respectfully request that the Board affirm that due process and fundamental fairness remain components of PERM adjudication. Consistent with these doctrines, when evidence in the record indicates that certain additional information or documentation was inadvertently omitted, the CO must affirmatively request the information or documentation, as provided by 20 C.F.R. § 656.20(d)(1).

Respectfully submitted August 29, 2014.

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