UNITED STATES DEPARTMENT OF LABOR

BOARD OF ALIEN LABOR CERTIFICATION APPEALS

800 K. Street, NW, Suite 400-N

Washington DC 20001-8002

In the Matter of

SYRACUSE UNIVERSITY
Employer,
ETA Case # A-10035-84990

On Appeal of a Certifying Officer Decision

Brief of the American Immigration Lawyers Association, Amicus Curiae

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TABLE OF CONTENTS

Introduction

Labor certification applications for college and university teachers using the "competitive recruitment and selection process" ("special handling applications") have succinct and limited recruitment requirements. *See* 20 CFR § 656.18(b). Such applications require "a copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name, and the date(s) of publication; and which states the job title, duties, and requirements." *See* 20 CFR § 656.18(b)(3). The required recruitment mirrors the real world recruitment of colleges and universities, and is unique to teachers at institutions of higher education. This recruitment is very different from the basic labor certification recruitment requirements governed by 20 CFR § 656.17.

In the case at hand, Syracuse University, ETA Case # A-10035-84990, this Board is asked to review one of numerous similar cases in which the Certifying Officer ("CO") engaged in his own independent investigation, outside the record, to deny a prima facie approvable application without providing the applicant an opportunity to respond to the evidence used as the basis for denial. *See* Exhibit A-AILA Questions to Department of Labor and attached chart of cases. Believing incorrectly that he had found derogatory information, the CO denied the application for its failure to comply with Frequently Asked Questions (FAQs) issued by the agency and posted online.[1] Notably, the CO denied the applications without informing the applicant of his own investigation and without providing an opportunity to respond to his own factual investigation and erroneous finding.

The University complied with the recruitment steps for obtaining the labor certification for a university professor under the special handling provisions at 20 CFR § 656.18, including the requirement that it recruit for the position in a national, professional journal, the Modern

[1] *See* brief of ETA Case # A-10035-84990

Language Association's ("MLA") Job Information List ("JIL") print version. The University published its advertisement in the print media and electronic version of this publication. Nevertheless, the Certifying Officer denied the application, without audit, based upon information obtained through his independent search of the MLA website. Significantly, this information did not form a part of the administrative record. Because of this, the University has never had the opportunity to review, let alone refute or rebut, the information the DOL relied on to deny its application.

In denying the application, the CO determined that the advertisement was not an adequate print publication and that it failed to satisfy the requirements that the agency has set forth in its Frequently Asked Questions (FAQs), which assert that "use of an electronic national professional journal does not satisfy the optional special recruitment provision's advertising requirement. The employer must use a print publication."[2] However, the governing special handling regulation does not require that an advertisement appear in print. Instead, the regulations require that the competitive recruitment include a "copy of at least one advertisement for the job opportunity . . . in a national professional journal…." *See* 20 CFR § 656.18. The CO relied on his answers to FAQs, promulgated solely online, and the untested information he independently obtained from the MLA website to deny the application without audit.

Amicus, the American Immigration Lawyers Association (AILA), offers this brief to explain that the regulation is clear, the FAQ is wrong and unlawful, and to assert that sound administrative adjudication practices, rooted in statutory and constitutional norms, indicate that when the CO engages in extra-record investigation, the applicant ought to have an opportunity to respond to any perceived derogatory information, particularly if that information is then used to deny an application.

[2] U.S. Department of Labor, Employment and Training Administration, OFLC Frequently Asked Questions and Answers, http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm

None of these issues are new. In *Matter of HealthAmerica*, AILA argued that the CO's reliance on FAQs to alter the PERM regulation was improper as a means of substantive law. *HealthAmerica's* message, though, has fallen on deaf ears. Through its liaison functions, AILA has proffered numerous examples of the problematic nature of the CO's reliance on extra-record evidence without resolution. For this reason, AILA seeks to articulate its positions thorough the submission of this amicus brief. AILA takes no position on the merits of the employer's claims or whether certification is appropriate.

Amicus Statement of Interest

The American Immigration Lawyers Association (AILA), founded in 1946, is a nonpartisan, not-for profit organization comprised of over 11,000 attorneys and law professors who practice and teach immigration law.[3] AILA members provide professional services, continuing legal education, information and, additionally, represent U.S. families, businesses, foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis.[4] AILA has participated as amicus curiae in numerous cases, such as, *Matter of HealthAmerica,* 2006-PER-1 (July 18, 2006) (en banc); *In the Matters of Albert Einstein Medical Center,* 2009-PER-00379 *and Abingdon Memorial Hospital*[5], 2009-PER-433; *In the Matter of Hawaii Pacific University*, 2000-PER-00127 (June 30, 2009).

As a friend of the court, AILA hopes to provide a larger context for the present appeal in order to promote due process and the just administration of law in the PERM process.[6]

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[3] *See* http://www.aila.org/
[4] *See* http://www.aila.org/
[5] As of August 9, 2010 a decision has not yet been issued in this case.
[6] The Special handling labor certification process that applies to college or university teachers is designed to enable colleges and universities to attract and retain outstanding teachers. In 1976, Congress amended the INA §212(a)(14) [now §212(a)(5)] to create the "equally qualified" selection standard to be applied when testing the labor market for members of the teaching profession. *See* Immigration & Nationality Amendments of 1976, Pub. L. No. 94-571, §5, 90 Stat. 2703 (Codified at 8 USC). The Legislative History reflects frustration with the Department of Labor's treatment of such teachers. "[T]he Committee believes that the Department of Labor has impeded the efforts of colleges and universities to acquire outstanding educators or faculty members who possess specialized knowledge or

Arguments

The questions presented here reflect a larger systemic problem identified by AILA in the administrative adjudications of labor certification applications by the Secretary: rule of law evidentiary principles are not widely or consistently honored. The questions presented here underscore the problem. The first question involves the use of perceived derogatory evidence collected by the Certifying Officer, never submitted into the record, but nonetheless used as a basis for denial without prior notice or an opportunity to respond. This type of adjudication by "surprise" is a standard practice of the DOL and is not countenanced by constitutional or statutory norms. The second question involves the Secretary's insistence on substantive program regulation through its FAQ process[7] -- a process that has no basis in the Administrative Procedures Act and appears to be unique to the Departments charged with enforcing the Immigration and Nationality Act. It is a process that blocks public participation and eliminates informed governance by circumventing the rulemaking procedures Congress intended that the Executive Branch use for substantive regulation. The FAQs do not have the force of law, yet one would be surprised to learn that in reading the CO's decision in this case, which is representative of many others brought to the attention of the DOL by this organization.

Although the Secretary of Labor is granted latitude in fashioning the procedures used in her administrative adjudications, every procedure and its end result must always comport with governing statutory and constitutional mandates. An agency abuses its discretion when it relies

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a unique combination of administrative and teaching skills. As a result, this legislation includes an amendment to [INA] § 212(a)(14), which requires the Secretary of Labor to determine that "equally qualified" American workers are available in order to deny a labor certification for members of the teaching profession or for those who have exceptional ability in the arts and sciences. See H.R. Rep. No. 94-1553, 94th Cong. 1st Sess., *reprinted in* 1977 *U.S. Code Cong.& Admin. News 6073, 6086, 6083, 6086* (no Senate Reports was submitted). In reporting out the amendment, the House Judiciary Committee advised the DOL to work closely with interested parties to develop appropriate regulatory standards and criteria to carry out its purpose. *See* H.R. Rep. No. 94-1553*, supra*

[7] Despite their name, the DOL's "Frequently Asked Questions" are not questions gathered from members of the public. It is not clear who poses the questions that comprise the "FAQs," but the DOL appears to independently identify issues it seeks to unilaterally answer. Answers to these "frequently asked" questions often significantly alter established rules and procedures, circumventing the required rule-making process under the APA.

on evidence outside the record to deny an application without first providing an opportunity for the applicant to respond and/or explain that evidence. When an agency considers facts that are outside the administrative record and then relies upon this potentially adverse information to deny a benefit, there is not a rational connection between the actual facts found and the decision rendered. *See Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (U.S. 1962) (holding that the Interstate Commerce Commission erred in its consideration of facts which were not before it as evidence. Where the decision relied on these facts, no rational connection exists between the actual facts found and the decision rendered.)

The procedures adopted by the Secretary in this special handling case cannot be correct for at least three reasons. **First,** the APA precludes the use of extra-record information in adjudications without providing an opportunity to respond. Citing to unverified information, collected independently from the Modern Language Association's (MLA) website, the CO concluded that the advertisements only appeared electronically and that a print version sufficient to qualify the advertisement did not exist. In the denial, the CO asserted that the primary purpose of the print version of the MLA was to "assist departments that hire foreign nationals to meet the tear-sheet requirement of the U.S. Immigration regulations. The print version is not available to individuals."[8] The CO relied on this unverified statement, outside of the record, for its denial. Although the CO may have the authority to investigate when the facts of a particular case warrant it, with the exception of matters involving national security or confidential informant information, we cannot locate any authority for the exclusion of these investigative results from the record. *See* 8 C.F.R. § 103.2(b)(16)(iv). The Certifying Officer does not have the power to manufacture his own authority for doing so and, accordingly, his exclusion of his

[8] *See* copy of the CO's March 25, 2010 Decision and the ETA 9089 attached as Exhibit 1 to the brief of ETA Case # A-10035-84990d.

independent investigation from the record is unlawful.

Second, as the primary purpose of the Certifying Officer's role is to ascertain the truth, experience has shown that adjudication by "surprise" is never fair or effective in the long-run. If the University had been afforded the opportunity to respond, an explanation to refute the misleading information derived from the MLA website could have been submitted. In turn, the CO would have had the opportunity to consider all of the relevant facts before issuing a denial. Although the denial was based on a mistaken conclusion that the employer must use a print ad and the CO's independent conclusion that no advertisement had appeared in print, the employer could have submitted evidence that, in fact, the MLA publishes both electronic and print versions of the relevant Job Information List (JIL). By denying the application without opportunity to explain, the CO prevented consideration of all relevant factors, which amounted to a clear error of law.

The Certifying Officer had several options at his disposal to provide the opportunity to respond to the perceived derogatory information. Although deliberately streamlined, the PERM system and procedure must comport with the APA and due process. In *HealthAmerica*, this Board determined that a CO abuses his or her discretion by denying reconsideration of a case when reconsideration does not impose a substantial burden on the DOL. *HealthAmerica,* 2006-PER-1, p. 20. The facts of the instant case, representative of other Special handling denials, weigh even more strongly in favor of reversal than *HealthAmerica.* Although the employer in *HealthAmerica* complied with the PERM regulations in its labor certification recruitment, the employer's attorney admittedly made a typographical error in its application. *Id.* at 12.

Unlike the employer in *HealthAmerica,* the University here made no typographical error in the application. Instead, Syracuse University, like other similarly situated universities, filed a prima facie approvable PERM application listing a source of print media in full compliance with

the governing regulation as well as agency FAQs. In his adjudication, the CO independently collected evidence from outside the record to deny the application. Before denial, the University should have been allowed an opportunity to explain the evidence presented against it through an audit. In *HealthAmerica,* this Board found that the CO had abused his discretion by not allowing the employer an opportunity to present tear sheets of advertisements, in existence at the time of filing, to substantiate its assertion of full compliance with the PERM regulations. *HealthAmerica,* 2006-PER-1, p. 21. *A fortiori*, here, a university who filed a facially valid and approvable special handling application, absent any errors, should have been granted an opportunity to respond to the evidence gathered against it.

Rather than simply denying the application in violation of the APA and due process norms, the Certifying Officer could have used the audit procedure to obtain documentation of the employer's print recruitment and any further information necessary to clarify the location and means of the publication of the advertisement. Such information is required to be kept by the employer by the PERM regulation. *See* 20 CFR §656.10(f). While the PERM regulation was intended to eliminate the "back and forth" communication that characterized the prior labor certification application process, and to provide a more streamlined mechanism for making decisions, this Board has recognized that the process cannot be so streamlined as to violate due process. *HealthAmerica,* 2006-PER-1, p. 18-19. In this instance, the CO abused agency discretion, in violation of the APA, by refusing to inform the applicant of derogatory information that would be used in the decision, and by failing to provide the applicant the opportunity to rebut that evidence.

Certainly, without an audit, there is no real or fair opportunity to challenge the use of information acquired through an agency's independent research. Consequently, there is no check upon the agency's discretion and the Certifying Officer, as happened here, is able to make an

arbitrary and erroneous decision based on out-of-context or misinformation. The APA and due process simply do not afford the DOL this unfettered discretion.

Third, the CO's actions violate procedural due process of law by relying on adverse information outside the record to deny a labor certification application without first affording the employer an opportunity to confront this information before a decision is made. A party is entitled "to know the issues on which [a] decision will turn and to be apprised of the factual material on which the agency relies for [a] decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 289 (U.S. 1974) citing *Ohio Bell Telephone Co. v. Public Utilities Comm'n,* 301 U.S. 292 (1937*); United States v. Abilene & S. R. Co.,* 265 U.S. 274 (1924).

In other immigration contexts, courts recognize that due process requires an opportunity to respond to adverse information prior to the adjudication. *See Circu v. Gonzales*, 450 F. 3rd 990 (9th Cir. 2006)(*en banc*) (Failure to give asylum applicant the right to rebut an Administratively Noticed report violates due process). Due process requires that the University must have been afforded the opportunity to explain or rebut the out of record information relied upon by the Certifying Officer (CO), before the labor certification application was denied, particularly when that information is used as the sole basis of the CO's decision to deny an application. *See Shihao Guan v. Holder*, 2009 U.S. LEXIS 2135 (9th Cir. September 29, 2009) (Case remanded after an immigration judge based the denial decision on an article that was not in the record without affording the applicant an opportunity to explain).

This Board has affirmed that, in conformity with due process, an employer must "be advised of the evidence being used against him so that he may have the opportunity to rebut it." *Little Mermaid Restaurant,* 87 INA 675 (Mar. 9, 1988). This opportunity to present evidence to

explain and/or refute must be afforded before a denial and not for the first time after a lengthy review or appeal process. It is fundamentally unjust to issue a denial based upon evidence, of which the other party is unaware. Affording the other party the opportunity to review and explain the evidence ensures that this information is credible and not fabricated for the purpose of denial.

(1) The Certifying Officer's Use of Outside Evidence as the Basis for Denial, Without Audit, is Contrary to the Principles of Fundamental Fairness and Due Process of Law

Although the PERM regulation is designed to streamline the labor certification process, audits are nevertheless permitted within this schema, allowing the CO to clarify information contained in an application. Denying the employer's application based on evidence obtained outside the administrative record, without an audit, violates due process of law and creates a significant burden on the college or university, overshadowing the de minimis administrative burden experienced by the CO in allowing an audit.

Allowing an opportunity for the employer to explain the evidence in the record, through audit, benefits both the private and public interest. In *Matthews v. Eldridge*, the Supreme Court noted that "resolution of the issue whether the administrative procedures provided here are constitutionally sufficient require analysis of the governmental and private interest that are affected." *Mathews v. Eldridge,* 424 U.S. 319 (U.S. 1976) citing *Arnett v. Kennedy,* 416 U.S. 134, 167-168 (U.S. 1974).

The private interest adversely impacted by the CO's practice of introducing evidence outside the record and refusing audit is significantly greater than the minimal effort impact on the government in providing the employer an opportunity to explain the evidence obtained before making a decision on an application. Requiring an employer to wait until the denial is issued and a request for reconsideration or appeal is reviewed in order to first present an

explanation refuting the CO's use of uncontested out of record evidence is insufficient. The limitations on presenting new evidence, which is not part of the administrative record, could prevent an employer from ever refuting CO's independent, extra-record investigation with its own new, credible evidence. *See* 20 CFR § 656.24(g).[9] This limitation is especially problematic where the CO denies an application by taking notice of matters outside the audit file of which an employer has no knowledge and could not have anticipated. In such situations, 656.24(g) may foreclose the employer's ability to submit documents not contained it its audit file that could legitimately refute the CO's findings.

Additionally, a university's Motion to Reconsider or appeal in order to correct the Certifying Officer's erroneous decision based on unverified information can take several years, during which the employee is unable to obtain lawful permanent residence and the university is unable to benefit from having the assurance of an employee with permanent residence status. For example, according to PERM processing times as of June 30, 2010, the current processing date for standard appeals is January 2008 and for audits the processing date is June 2008.[10] In other words, for either a Motion to Reconsider or a direct appeal, the college or university would have to wait roughly two years for an opportunity to show that its application was approvable as filed. Further, as stated previously, it is not clear at what point in this process, if ever, the employer would be permitted to submit its evidence to refute the erroneous information on which the DOL denial was based.

In enacting the amendment to the INA to allow colleges and universities to attract the top teachers, Congress expressly stated that its amendment was designed to correct DOL's impediments to these applications. Congress urged the DOL in its regulations to adhere to this

[9] Under 656.24(g) an employer is limited in the types of documentation it can submit with a Motion to Reconsider. Specifically, the employer is only allowed to submit documentation that it keeps in its audit file or "documents the Department actually received from the employer in response to a request from the Certifying Officer."
[10] *See* PERM Processing Times, http://icert.doleta.gov/

intent to facilitate applications by the colleges and universities on behalf of foreign national teachers.[11] Under the current regulation, the college or university has a significant interest in being able to use the real world and existing competitive recruitment and selection process outlined in the regulations to secure permanent residence for its qualifying foreign national teachers and professors in a reasonable timeframe. Colleges and universities incur significant costs and expend often-scarce resources in the process of recruiting and hiring faculty members, a process that spans one to two years at most institutions. First a number of internal steps must be completed, including assessing the need for a new faculty member, securing a line of funding, creating a position description, creating a hiring committee, and determining the criteria by which to assess applicants, among others. Many institutions begin advertising in the fall term for faculty members to begin employment the following fall term. The advertising campaign for a faculty member at a major university often includes advertisements in a variety of online venues considered most likely to reach the largest audience of qualified potential applicants, including the employment sections of appropriate scientific or scholarly journal's web sites, which provide information about current job openings in the field. It is not uncommon for the advertising campaign alone to cost several thousand dollars. Hiring committees composed of faculty members, administrators, and others review applications and usually create a "short list" of the most qualified applicants who are invited to campus, at the cost of the institution, to participate in series of interviews and provide a teaching demonstration. An applicant who is offered a faculty position may also be offered the expectation of tenure, and many faculty job offers include "start-up" funding for laboratories and research programs.

Requiring an institution that has undertaken such a lengthy and expensive process--both in terms of financial and human resources-- conducted in good faith to identify and hire the most

[11] *See* Footnote 6, *supra*

qualified applicant, to wait an additional period of two or more years in an appeal queue imposes a substantial penalty on the university that is arbitrary and capricious under these circumstances. The employer's alternative approach, to conduct a new test of the market, when the market was already tested effectively at great expense to the employer, is not a reasonable alternative since it would result in great expense and significant delay.

Moreover, any additional recruitment undertaken by a university would again involve the uncertainty of whether the ad used is a qualifying ad, as there is no effective guidance from the DOL.[12] Given the arbitrariness of the CO's current denials, filing a new application remains extremely risky. In addition, the newly filed application will face a backlog of several months. For example, as of June 30, 2010, the DOL is currently processing applications with a receipt date of October 2009 (as of June 30th, 2010) demonstrating the significant backlog of applications.[13] Although filing a new application may be possible if the teacher has sufficient time remaining in work visa nonimmigrant status, for a teacher who has used most of the allowed time in nonimmigrant status, the only choice may be to pursue the lengthy appeals process in order to remain eligible to file extensions of the nonimmigrant visa status.[14] In either case, whether the university appeals or begins a new recruitment process, it is faced with substantial costs, delays, and the uncertainty of having made a substantial investment in identifying, evaluating, hiring, and perhaps even having to provide significant "start-up" funds to a faculty member that it may not be able to retain.

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[12] The DOL's FAQs (http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#Perm_Program) provide: "**What is considered an acceptable newspaper and/or acceptable journal and is there a published list?** There is no published list of acceptable publications. Most employers, based on their normal recruiting efforts, will be able to readily identify those newspapers (or journals for certain professional positions) that are most likely to bring responses from able, willing, qualified, and available U.S. workers. The employer must be able to document that the newspaper and/or journal chosen is the most appropriate to the occupation and the workers likely to apply for the job opportunity." [Emphasis added.]

[13] *See also*, "Current PERM Processing Dates/Times (as of May 31, 2010)" http://www.laborimmigration.com/topics/perm/.

[14] *See* §106(a) of the American Competitiveness in the Twenty-First Century Act of 2000 (Public Law 106-313).

Offering the opportunity for the college or university to explain itself, through audit, could be provided "without a time-consuming or probing analysis." *HealthAmerica,* 2006-PER-1, p. 20**.** The private interests of the university and applicants weigh substantially in favor of permitting an audit in order for the university to have an opportunity to explain the evidence gathered against it. Indeed, an audit in this circumstance will promote the public interest of speedier adjudications based on a full and complete record. As this Board has previously acknowledged, "the risk of erroneous deprivation under the rule as interpreted by ETA is great and the potential consequences significant." *HealthAmerica,* 2006-PER-1, p. 19.

The present University, like other similarly situated special handling applicants who suffered denials based on extra-record evidence, complied with the regulations and DOL guidance. The application was nevertheless denied based upon the CO's reliance on outside evidence. When a labor certification application is prima facie approvable for certification, that case should not be denied without an audit or opportunity to respond.

(2) The Certifying Officers Must Provide a Reasoned Analysis for the Rejection of a Prima Facie Approvable Application.

In denying the special handling application, the CO acknowledges that the MLA's Job Information List is a professional journal advertisement.[15] However, he claims it is not an appropriate publication for the job opportunity because it is available in electronic form. The decision acknowledges that the JIL appears in print version, which is sent quarterly to member departments, but notes that information obtained from the MLA's website suggests that these printed lists serve primarily to satisfy DOL requirements for print-media advertisements and that the print version is not available to individuals.[16] On this basis, the DOL then concludes that the

[15] *See* copy of the CO's March 25, 2010 Decision and the ETA 9089 attached as Exhibit 1 to the brief of ETA Case # A-10035-84990d

[16] *See* Modern Language Association Website, "About the JIL" (http://www.mla.org/resources/jil/jil_about)

MLA JIL is not a print journal, but instead an electronic journal.[17]

An agency's failure to provide a reasoned analysis sufficient to appraise a petitioner of the basis for denial constitutes an abuse of discretion in violation of the APA and is contrary to due process. An agency must examine the relevant evidence and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the decision made." *California ex rel. Lockyer v. United States Dep't of Agriculture,* 2008 U.S. Dist. LEXIS 72817 (E.D. Cal. Aug. 18, 2008*)* citing *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (U.S. 1983); 5 U.S.C. § 706(2)(A); *Wilderness Soc'y v. Thomas,* 188 F.3d 1130, 1136 (9th Cir. 1999). Consequently, pursuant to the APA, an agency action which fails to provide a reasoned analysis should be set aside as "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *See* 5 U.S.C.S § 706(2)(A),(B). Moreover, "it is enough if the agency . . . articulates its decision in terms adequate to allow a reviewing court to conclude that the agency has thought about the evidence and the issues and reached a reasoned conclusion." *Raza v. Gonzales,* 484 F.3d 125, 128 (1st Cir. 2007) (citing *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.)* 419 U.S. 281, 285-286 (1974) *Transp., Inc. v. Ark.-Best Freight Sys., Inc.,* 419 U.S. 281, 285-286 (1974); *Mansour v. INS,* 230 F.3d 902, 908 (7th Cir. 2000). In this special handling denial, the CO has failed to provide a sufficiently cogent analysis to demonstrate that the agency has thought about the evidence and reached a reasoned conclusion. The decision violates the APA.

It is unclear why the CO found that the journal advertisement was not appropriate and did not satisfy the regulations and Department of Labor's FAQs. The decision[18] begs several questions. Acknowledging that the journal was distributed quarterly in print to university

[17] *See* copy of the CO's March 25, 2010 Decision and the ETA 9089 attached as Exhibit 1 to the brief of ETA Case # A-10035-84990

[18] *See* copy of the CO's March 25, 2010 Decision and the ETA 9089 attached as Exhibit 1 to the brief of ETA Case # A-10035-84990

members and departments, the CO nevertheless denied the ad as non-qualifying. It appears that the CO may have determined that if a national professional journal is available electronically as well as in print, then it no longer qualifies as a print advertisement. The denied university is left wondering whether the COemploys a formula based on a journal's mix of print and electronic distribution to determine whether an ad qualifies, or whether the reason for the print advertisement controls. Based on this denial, there is no way for an employer to predict what national professional journal ad will be appropriate for purposes of special handling applications.

The CO's denial without providing a reasoned analysis leaves special handling university applicants to chase a moving target without guidance. S*ee* Footnote 9, *infra,* This renders compliance with these regulations nearly impossible as colleges and universities cannot predict the grounds upon which its publication will be deemed appropriate or improper. This practice is contrary to the principles of fundamental fairness and strips colleges and universities of their rights to due process of law. The CO must clearly articulate his reasons for denial and the rules, particularly when "the less forgiving the standard, the more precise its requirements must be." *HealthAmerica,* 2006-PER-1, p. 17.

(3) The Certifying Officer Erred in Requiring that the Advertisement Appear in Print as the Plain Language of the Special handling Regulation Does Not Impose Such a Requirement

Syracuse University placed an ad in the MLA's Job Information List, in both the print version and the electronic version. Even if its ad had only appeared in the electronic version, the ad was a qualifying ad under the regulations. The plain language of the special handling regulation requires that "at least one advertisement for the job opportunity [be] placed in a national professional journal . . . " *See* 20 CFR § 656.18(b)(3). This lies in stark contrast to the explicit requirement of a print advertisement under the more onerous basic labor certification regulations, where employers are required to place "two print advertisements." *See* 20 CFR §

656.17. The basic labor certification regulations also expressly exempt the recruitment of college and university teachers from the requirement of "two print advertisements." *See* 20 CFR § 656.17(e) ("Except for labor certification applications involving college or university teachers selected pursuant to a competitive recruitment and selection process.") The print ad requirement for the basic process is clear and explicit. In the special handling context, no such requirement exists. Nevertheless, the DOL imposes a print advertisement in its own FAQs.[19] These lack the force of law. Therefore, the CO erred in imposing this requirement on the employer applicants.

Basic rules of statutory construction assume that drafters know the meaning and implication of the actual words they used and, where a requirement appears in one section but not a different separate section, it is assumed that the drafters knew what they were doing, and that they meant to impose different requirements in different contexts. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in disparate inclusion and exclusion").

The preamble to the PERM regulation addresses the print ad requirement but only in the context of the basic recruitment process.[20] The DOL offers two reasons why, despite public comments arguing against the print ad requirement, it would retain this requirement in the basic process: 1) in its experience the print ad recruitment covers a broad range of industries and positions and therefore attracts the widest pool of potentially qualified applicants and 2) it allows the PERM system to be streamlined by not having to tailor the required recruitment to each

[19] *See* DOL Frequently Asked Questions stating "The employer may not use an electronic national professional journal to satisfy the provision found at 20 CFR 656.17(e)(1)(i)(B)(4) permitting the use of a journal as an alternative to one of the mandatory Sunday advertisements for professional positions. The employer may not use an electronic national professional journal to satisfy the provision found at § 656.18(b)(3) requiring an advertisement in a journal under optional special recruitment procedures for college and university teachers. The employer must use a print journal to satisfy these two requirements." http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm

[20] *See* Federal Register, Vol. 69, No. 247, Monday, December 27, 2004, Rules and Regulations, pg 77344-77345

particular profession or industry.[21] The preamble section that addresses special handling states simply that nothing has changed from the previous system of labor certifications for university teachers. Any discussion of recruitment requirements is conspicuously absent.[22] The reasons offered for retaining the print ad requirement in the basic PERM process were never mentioned in the special handling context, nor do they apply.

It is difficult to imagine any person seeking a college or university faculty position in the United States who would not have access to the internet and utilize it in his or her job search. The same is true for persons seeking professional positions.[23] For this and various other reasons, most professional journals no longer publish employment advertisements or announcements in a print media form but rather publish them on their web sites. As their statistics concerning circulation and visits to their web sites demonstrate, an online job advertisement is much more likely to be seen than would one in a print publication. For example, the *Journal of Biological Chemistry*, the most cited journal in the last decade according to Thompson-Reuters,[24] has a "total paid circulation" of 3200, but its web site receives 1,274,101 visits each month.[25] The second most frequently cited journal according to Thompson Reuters, the *Proceedings of the National Academy of Sciences (PNAS)*, has a "print circulation of nearly 3000," but "PNAS Online receives over 16 million hits per month."[26] The journal *Nature*, the third most cited, had a print circulation of approximately 53,000 for the year 2009, but its web site was viewed more than 2.7 million times per month, and the "jobs page" was viewed more than 2.7 million times

[21] *See* Federal Register, Vol. 69, No. 247, Monday, December 27, 2004, Rules and Regulations, pg 77344-77345
[22] *See* Federal Register, Vol. 69, No. 247, Monday, December 27, 2004, Rules and Regulations, pg 77357
[23] For example, the national recruiting firm Accolo, Inc. cites a survey by the Society for Human Resources Management indicating that 96% of job seekers now utilize the internet in their search. http://www.accolo.com/docs/bright_papers/online_job_recruitment.pdf
[24] *See* the journal rankings at http://sciencewatch.com/dr/sci/09/aug2-09_2/
[25] *See* http://www.asbmb.org/uploadedFiles/Publications/2009ASBMBJournalsMediaKit.pdf
[26] *See* http://www.pnas.org/site/misc/2010_MediaKitFinal_11_13_09small.pdf

per month.[27] The highly ranked journal *Science* has a circulation of approximately 129,000, but the "Science Careers" section of its web site receives approximately 983,000 visits per month.[28] That most people seeking a faculty position at a college or university utilize the internet in their job search, few professional print journals continue to accept job advertisements, and the greater efficacy of online job advertisements are all logical reasons for the DOL to have left the print ad requirement out of the Special handling regulations.

Despite the clear language of the regulations, DOL has posted an on line FAQ requiring that, for the special handling recruitment, a national professional journal ad must not be an electronic journal form—only a print ad will qualify.[29] The DOL has never offered any reasoned analysis for its imposition of this requirement in the special handling context, not in its stakeholder meetings when the requirement was questioned, or in support of the FAQs themselves, or even in the preamble to the regulations.[30] Instead, this additional print ad requirement, absent from the regulation itself, has been unilaterally proclaimed as law by DOL in its FAQ.

(4) The Certifying Officer's Use of the Agency FAQ as Substantive Law and the Basis for the CO's Denial is an Abuse of Discretion In Violation of the APA

An agency "may not unilaterally impose novel substantive or evidentiary requirements" beyond the pertinent regulations without violating fundamental fairness and abusing its discretion in violation of the APA. *Kazarian v USCIS,* 596 F.3d, 1115, 1121 (9th Cir. 2010). It is not the role of the DOL and CO to subjectively interpret the PERM regulations in an FAQ and then use that interpretation as the basis to deny labor certifications. The DOL's unsubstantiated

[27] *See* http://www.nature.com/naturejobs/employers/why-naturejobs/stats/index.html
[28] *See* http://images.sciencecareers.org/pdf/mediakit/2010/2010RMK_FULL_norates.pdf
[29] *See* DOL Frequently asked questions stating "The employer may not use an electronic national professional journal to satisfy the provision found at 20 CFR 656.17(e)(1)(i)(B)(4) permitting the use of a journal as an alternative to one of the mandatory Sunday advertisements for professional positions. The employer may not use an electronic national professional journal to satisfy the provision found at § 656.18(b)(3) requiring an advertisement in a journal under optional special recruitment procedures for college and university teachers. The employer must use a print journal to satisfy these two requirements." http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm
[30] *See* Federal Register, Vol. 69, No. 247, Monday, December 27, 2004, Rules and Regulations, pg 77357

imposition of the print requirement is a clear abuse of agency discretion in violation of the APA. As the D.C. Circuit has ruled consistently, the issuance of guidance by a government agency, even if labeled informal, constitutes final agency action and is therefore subject to judicial review under the APA. *See Barrick Goldstrike Mines, Inc. v. Browner* 215 F.3d 45, 48 n. 3 (D.C. Cir. 2000).

The CO's use of the print advertisement requirement based solely on its FAQ and not on the plain language of the regulation involves a change in a substantive rule. In *HealthAmerica*, BALCA addressed DOL's practice of rulemaking by FAQ and determined that it is not permissible. "Although website FAQ postings are a powerful method of disseminating information and undoubtedly provide helpful guidance to applicants and their representatives, they are not a method by which an agency can impose substantive rules that have the force of law." *HealthAmerica,* 2006-PER-1, p. 12-13.

The imposition of a print advertisement requirement by FAQ was not an attempt to clarify the existing special handling rules. Rather, this requirement substantively changes a preexisting regulation, which is not permitted. *See United States Telecom Ass'n v. F.C.C.,* 400 F.3d 29, 38 (D.C. Cir. 2005) ("the rule at issue substantively changes a preexisting legislative rule. Such a rule is a legislative rule, and it can be valid only if it satisfies the notice and comment requirements of the APA.") An agency may not reinterpret its regulation without the same notice and comment procedure that was required for the underlying regulation, "otherwise, an agency could easily evade notice and comment requirements by amending a ruled under the guise of reinterpreting it." *Environmental Integrity Project v. EPA*, 425 F. 3d 992, 995 (D.C. Cir. 2005, quoting *Molycorp, Inc. V. EPA*, 197 F. 3d 543, 546 (D.C. Cir. 1999). Before the DOL may apply its FAQ as law, it must first undergo the notice and comment process as required by the APA. Pursuant to the APA, "general notice of proposed rule making shall be published in

the Federal Register . . . The notice shall include, (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." *See* 5 U.S.C.S § 553(b)(1-3).

In *HealthAmerica*, this Board noted that a strict procedural rule requires explicit and precise notice of the standard and "the less forgiving the standard, the more precise its requirements must be." *HealthAmerica* 2006-PER-1, p. 17. In *HealthAmerica,* the procedural rule involved its strict liability approach to processing a PERM application containing an obvious typographical mistake. The CO permitted no corrections, no explanations, only denials. In its pursuit of a streamlined system, the CO argued that no review was permitted despite the employer's clear typographical mistake. *Id.* This Board determined that before the CO could apply such a strict and unforgiving procedural rule, he must first provide explicit and precise notice of the standard it was applying, which it failed to do in its initial PERM regulations. *Id.* at 20.

Similarly, in the case of the special handling denials, the CO has again adopted the strict liability approach without the required, concomitant clear guidance for petitioning employers. Here, the employer made no mistake, but the CO denied the application based on a requirement not found in the governing regulation. Although the posted FAQ alerted those who read it that the special handling ad must appear in print, DOL failed to provide adequate notice of this interpretation of the regulation. The DOL cannot impose a strict and unforgiving rule without explicit and precise notice of the standard to be applied.

An agency acts "arbitrarily and abuse[s] its discretion in applying a standard contrary to its existing regulations. [It] . . . must give notice that the standard is being changed, and apply the changed standard only to those actions taken by parties after the new standard has been

proclaimed as in effect." *Boston Edison Co. v. Federal Power Com.,* 557 F.2d 845, 849 (D.C. Cir. 1977).

Under current practice, the CO has arbitrarily enforced additional requirements, beyond the regulation, without giving the required form of notice of the changed substantive rule. This action is a clear abuse of agency discretion and a deliberate violation of the required procedures under the APA. An agency's interpretations, such as those in enforcement guidelines like FAQ's, "lack the force of law and do not warrant" deference or the controlling weight afforded to an agency's interpretation of federal statutes." *HealthAmerica,* 2006-PER-1, p. 12-13. Thus, no deference should be given to the agency's interpretation that the national professional journal advertisement appear in print.

Conclusion

The instant case illustrates that CO's special handling denials are (1) are impermissibly based on contested evidence outside the record (2) impermissibly based on adverse evidence that the employer has been unable to explain or rebut (3) lack a reasoned analysis sufficient to appraise the employer of basis for the denial, and (4) apply a unilaterally imposed substantive requirement that does not exist in the pertinent regulation. Such agency action is arbitrary and capricious and therefore in violation of the APA and due process rights of this university. The CO must be instructed to alter its process to comport with the law.

Submitted this 10th Day of August, 2010

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