Assessing Options After The Labor Certification Denials: Realistically Assessing Chances Upon Reconsideration And Appeal

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Sooner or later, every practitioner will receive a denial of a labor certification application. No matter how perfectly an application is prepared, and how carefully the recruiting steps set forth in the regulations are followed, there are times in which the Department of Labor itself makes errors and misunderstands the information provided to it, and so issues a denial. The Department of Labor may even go beyond the four corners of the application, conducting its own research into the job opportunity and requirements for the position, and may issue a denial on grounds not identified prior to the denial and to which the employer has no opportunity to respond. At other times, simple human error on the part of the employer or the employer's counsel may have caused the denial.

This article deals with what happens after the denial: the options the employer has for responding to the denial, the chances of success and timing for each option, and how to analyze which option or options are the best or the particular client.

Options after denial

A denied labor certification presents the employer with four options to continue with the existing recruitment:

1) Re-filing based on still-valid recruitment, if the Department of Labor adjudicated the application quickly enough;
2) Requesting reconsideration of the denial by the Certifying Officer (CO);
3) Requesting reconsideration of the denial and an alternative request for review if the denial is not overcome on reconsideration; and
4) Requesting review by the Board of Alien Labor Certification Appeals directly, without a request for reconsideration.

In addition to those options, of course, an employer always has the option of conducting another recruiting campaign and, if again unsuccessful in locating a qualified, interested and available US worker, re-filing the application on the basis of the new recruitment.

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Re-Filing Based on Still-Valid Recruitment

The option of re-filing the application is set forth in the regulations, and the CO must inform employers of this option with every labor certification denial[2]. It is unfortunate that the Department of Labor informs employers that they have the option of refiling based on the same recruitment in every application, even where the Department of Labor has spent a long time processing the application. Particularly where the Department of Labor audited the original application, it is not unusual for the denial to come more than six months after the original filing date, meaning that all recruitment for the original filing would necessarily have been expired. This language in the denial letters frequently misleads employers into thinking that refiling is an option based on the recruitment already conducted, when in fact they would need to conduct a completely new recruitment campaign as the basis for a new application.[3]

Refiling will be the best option for an employer where the denial comes relatively promptly after the filing of the application, normally meaning that the application was denied without an audit, and where the ground for denial can easily be overcome by the employer. Refiling might be an appropriate strategy where, for example, the employer incorrectly listed one or more of the employee's past jobs on the form, and the denial indicated that a review of the form showed the employee did not meet the requirements of the labor certification at the time of filing. In such a case, correcting the application form to include all of the employee's past experience and resubmitting the application promptly based on the existing recruitment, would be the most viable strategy.

Refiling is not an option where the original recruitment has expired; where an explanation for the ground of denial exists in the employer's public examination file (because no new evidence is presented with a refiling); or where the Department of Labor has based its denial based on information outside the record (for example, concluding that an employer does not have a bona fide permanent job offer based on review of the employer's website). Ultimately, refiling will most likely be a viable option only where a mistake in the completion of the form caused the denial and the original application was filed far enough in advance of the recruitment expiring that the denial was issued prior to that recruitment expiring.[4]

Request for Reconsideration

In a request for reconsideration,[5] the employer requests that the Certifying Officer review his or her decision based on additional information or arguments presented by the employer. The reconsideration can normally be used where the denial of a labor certification denial is predicated on an improper

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[2] 20 CFR 656.24(e)(5).

[3] BALCA has refused to provide "equitable" relief requested by an employer notified by the denial that the form was missing information in one block of the ETA-9089, even where the CO denied the application more than eight months after filing and thus prevented the employer from refiling based on the original recruitment. *Matter of Cardona Company, Inc.*, 2010-PER-00769 (BALCA November 30, 2010).

[4] An employer's recruitment efforts "expire" if they were done more than 180 days prior to the filing of the labor certification application. 20 CFR 656.17(e)(1)(i) and (ii).

[5] 20 CFR 656.24(g)

understanding of information provided on the form or in response to an audit. A simple example might be where the employer listed a Sunday advertisement date, but the Certifying Officer asserted in the denial that the date was, in fact, a Monday. By showing the Certifying Officer a calendar and proof of publication on that date through a motion for reconsideration, the employer can bring the error to the Certifying Officer's attention.

As discussed more fully below, the advantage of reconsideration is that is the only way to get further information in front of the Certifying Officer to aid his or her decision. The significant disadvantage of the reconsideration option is the time frame involved: while those cases the Department of Labor decides are "government error" are handled expeditiously (often within days or weeks of filing a motion for reconsideration), those cases in which the Certifying Officer decides that it was not in error (which would include nearly every ground for denial other than simple mistakes such as the Sunday date error noted above), the processing time for reconsideration is many months (12 to 18 months as of this writing).

It should be noted that reconsideration is only an option where the attorney is confident that information in the audit file shows the employer's strict compliance with all labor certification requirements. If, for example, a denial is issued because the employer did not use a Sunday advertisement, but the only local newspaper for the rural area in which the job is located does not publish a Sunday edition, the employer could respond with the audit file including evidence from the newspaper that it does not publish a Sunday edition. If that same audit file contains A Notice of Filing which lacks the employer's name, however, the motion for reconsideration will be denied on a different ground than the original labor certification denial, and the employer will have wasted 18 to 24 months in waiting for the new denial. In evaluating whether or reconsideration is a realistic option, therefore, the employer should very carefully review every element of the audit file very closely in order to assure that there are no mistakes. As the Board has noted a number of cases, "PERM is an exacting process designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency."[6]

An important procedural note is that the Department of Labor regards a request for reconsideration as a distinct remedy in the event of denial from a request for review. The regulation provides that, if the certifying officer does not grant the employer's motion for reconsideration, the CO may (but not must) treat the denial and motion for reconsideration as a request for review and forward it to BALCA.[7] If the employer wants to preserve the right to appeal, therefore, it is prudent to also request review by BALCA as an alternative remedy. Given that the processing time for labor certification denials is another 18 to 24 months after the motion to reconsider, however, some employers may decide that they wish to file for reconsideration, with the plan of re-doing the recruitment process and withdrawing the motion for reconsideration if the Department of Labor does not assign the application to the "government error" queue. This strategy may be appropriate where the denial was issued after the recruitment was already completed; the employer believes the ground for denial was a government error; and the employer is not concerned about the priority date of the application nor with having an application that has been pending for at least one year or seventh year H. extension purposes[8].

[6] *See, e.g., Matter of Aangat at Harrisburg,* 2010-PER-00194 (BALCA February 28, 2011).

[7] 20 CFR 656.24(g)(3).

[8] A labor certification filed more than one year prior to the exterior of an H-1B worker's status, which remains pending as of the time an extension is needed, can be granted in one year increments, but only so long as the labor

Request for Reconsideration With Alternative Request For Review

As noted about, the Department of Labor considers a request for reconsideration by the CO, and a request for review by BALCA, to be two separate remedies in the event of a denial. A prudent employer will ask for both forms of relief at the outset, so that the Department of Labor does not have a choice of declining to forward the case if the reconsideration motion is denied. The other advantage is that if the employer decides to opt for direct BALCA review after asking for reconsideration, as discussed below, the employer can withdraw the reconsideration request and request that the application move directly to BALCA review. If the employer did not originally requested review by BALCA, this option would not be available, as only the reconsideration request would be in front of the CO, and a request for review at that time would be untimely.[9]

Request for Review

As an alternative to requesting reconsideration of the decision, the employer can request direct review by the Board of Alien Labor Certification Appeals. If the employer requests review, the regulations require the CO to forward the appeal filed to BALCA "immediately."[10] Unlike under USCIS regulations, if the employer does not request reconsideration, there is no mechanism in the regulations for the CO to decide to treat the request for review as a request for reconsideration. As a practical matter, however, if the CO determines that a case in which a request for review was filed should not have been denied, the CO can indicate to BALCA that he or she would like the application remanded to the CO for purposes of granting the application.

When preparing a Request For Review, it is very important for the employer to understand the evidence considered by BALCA in the Request For Review. BALCA will not review any issue, evidence, or argument that was not previously presented to the CO.[11] BALCA may consider whether the CO abused his or her discretion in refusing to consider information presented by the employer, but will not consider that information in the first instance.[12] This limited scope of review means that direct appeal to talk without first going through a motion to reconsider is only appropriate where the CO had a complete record in front of him or her (normally, where the CO denied the case after an audit), so that the employer

certification remains pending. While the application is under review for reconsideration, on appeal at BALCA, or under judicial review of the denial, that labor certification application remains "pending" or purposes of such an "AC-21" extension.

[9] A request for review must be filed within thirty days of the CO's decision. 20 CFR 656.26(a)(1)(i). As there has been no reconsideration decision in the scenario of a long-pending application that the employer wishes sent directly to BALCA, the thirty-day deadline would still run from the original decision.

[10] 20 CFR 656.26(b).

[11] For a full discussion of the scope of evidence and argument considered on Request For Review as compared to reconsideration, *see Matter of Denzil Gunnels d/b/a Gunnels Arabians,* 2010-PER-00628 (BALCA November 16, 2010).

[12] *See Matter of Hawthorn Suites Golf Resorts, LLC*, 2009-PER-00200 (BALCA January 12, 2011); *but see Central Vermont Public Service Corp.*, 2010-PER-01112 (BALCA September 17, 2010).

is not looking to add arguments beyond the arguments already presented to the CO. Indeed, if the application was denied after audit, and the employer then seeks to cure a documentary deficiency noted upon review of the audit file, reconsideration will likely be denied and a request for review will also be denied because the employer failed to provide the evidence at the employer's first opportunity (i.e. in response to the audit).[13] If the application was denied without an audit, direct appeal would only be appropriate if the employer does not need information from the audit file in order to overcome the grounds of denial, because in a case denied without audit, the BALCA appeal file will only consist of the information on the application form.

New Filing Based On New Recruitment

An employer always has the option of conducting a new recruitment campaign and filing a new application based on that new recruitment. It is appropriate, however, to review the procedural aspects of such a refiling if an application for a request for reconsideration or a Request For Review is already pending with the Department of Labor. The Department of Labor takes the position that an employer may not have more than one application pending for the same employee in the same position. Therefore, if the employer has requested review or reconsideration of a denied application, and that request for review or reconsideration is still pending, the employer will have to withdraw the request for reconsideration or review before proceeding with a new application. Because an employer can conduct all of the recruiting steps necessary to prepare the file for application, attorneys may wish to consider leaving a request for reconsideration pending as long as possible, to see whether the Department of Labor might not decide the case before the new filing is necessary. Attorneys should be cautious, however, as a withdrawal of a request for reconsideration, or a withdrawal of a Request For Review, must be filed in writing (including by e-mail), and may take more than a week to resolve. The employer should be careful not to come to close to the deadline for the new recruitment before withdrawing the pending application.

Conclusion

Given the critical importance of priority dates, and of the necessity to have a pending application in order to obtain benefits under AC 21 for H-1B visa holders, there may be circumstances in which an appeal is the only viable route, even where it has relatively low chances of success. When the opportunity to refile presents itself, either with new recruitment or on the basis of the originally conducted recruitment, however, this article should provide attorneys with a firm understanding of their options for overcoming the denial.

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[13] *See, e.g., Matter of Naimisha Construction Inc.*, 2010-PER-00099 (BALCA January 31, 2011) (NOF inadvertently omitted from audit file; not accepted upon reconsideration, denial upheld); *Matter of Rajiv S. Khanna*, 2010-PER-00140 (February 14, 2011)