

Responding to PERM Denials: Options and Strategies

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Overview of Presentation

- Evaluating the Denial Decision
- Options After a Denial
 - Reconsideration (“government error” and “regular”)
 - Request for Review
- Potential Responses from the CO
- BALCA Procedures
- Strategic Considerations/Tips

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Introduction

- Number of PERM Appeals Docketed by BALCA

Year	Number of PERM Appeals Docketed by BALCA
2007	~100
2008	~250
2009	~500
2010	~1700
2011	~3000
2012	~3800

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Introduction

- “DOL stated that appeals (including both reconsideration and BALCA appeals) and reversals are trending down, indicating that the adjudication quality is improving.”

- Oct. 5, 2011 DOL OFLC Liaison Minutes

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Evaluating the Denial Decision

- How many grounds for denial? Can you overcome all of them?
- Is there a factual basis for the CO's position?
- Is there a legal basis for the CO's position?
- If so, what arguments are available and what is their likelihood of success?

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Options After a Denial

- Do nothing/re-file
- Motion to Reconsider (aka Request for Reconsideration)
 - “Government Error” motion
 - “Regular” motion (20 C.F.R. § 656.24(g))
- Request for Review (20 C.F.R. § 656.26(a))
- Deadline to respond: 30 days from date of denial decision

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“Government Error” MTR

- What is it?
 - A separate appeals “queue”
 - Historically, much faster processing times
- What constitutes “government error”?
 - FAQ: “The Department determines what constitutes a Department error.”
- If multiple grounds for denial, ALL must qualify as “government error”

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“Government Error” MTR

- How do I file one?
 - Generally, same as “regular” MTR
 - FAQ: include a “brightly colored cover sheet” stating that filing appeal because government error is the sole basis for the denial
- If DOL doesn’t agree that qualifies as government error, it will place the case in the “regular” reconsideration queue
 - DOL will not notify you if this occurs.

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“Government Error” MTR

- Benefit: Speed?

PERM Processing Times (as of July 1, 2013)

Processing Queue	Priority Dates	
	Month	Year
Analyst Reviews	January 24	2013
Audit Review	July 31	2012
Reconsideration Requests to the CO	July 1	2013
Gov’t Error Reconsiderations	Current	

The Analyst Review and Audit dates posted on iCERT above reflect the month and year in which cases were filed that are now being adjudicated at the Atlanta National Processing Center. The Reconsideration Request to the CO dates posted on iCERT above reflect the month and year in which cases that are now being reviewed at the Atlanta National Processing Center were appealed. For various reasons, we may be completing the processing of applications filed prior to the month posted on iCERT. If your application was filed more than 3 months prior to the month posted, you may contact our Helpdesk for a status on the application at plc.atlanta@50i.gov.

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“Regular” MTR (20 C.F.R. § 656.24(g))

- Filed with the Certifying Officer (“CO”)
- Asks the CO to reconsider the denial
- Must be requested within 30 days from the date of denial
- Processing times: much shorter than in previous years (“current”?)

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“Regular” MTR (20 C.F.R. § 656.24(g))

- Evidence that can be submitted with a MTR (§ 656.24(g)(2)):
 - Documentation the CO **actually received** from the employer in response to a request from the CO; or
 - Documentation that the employer **did not previously have an opportunity to submit** to the CO, but that **existed at the time the PERM was filed** and was part of the audit file
- Possible exceptions/work-arounds?

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Request for Review (20 C.F.R. § 656.26(a))

- Filed with the CO (not BALCA)
 - FAQ: cover letter should expressly include terms “request for review”
- Must be sent within 30 days of the date of the denial
- Limitations: “must contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based”
 - Ex: *Matter of Del Rivero Messianu LLC*, 2010-PER-875 (BALCA Mar. 6, 2012).

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Request for Review (20 C.F.R. § 656.26(a))

"Where an employer unambiguously requests BALCA review, it makes a tactical decision to have the Board rather than the CO review the denial of certification. The employer is deemed to understand that the consequence of the decision to opt for direct BALCA review is that the employer cannot supplement the record with argument or evidence that was not before the CO when the CO denied the application."

- *Matter of Denzil Gunnels*, 2010-PER-628, at 14 (BALCA Nov. 16, 2010).

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MTR vs Request for Review

- MTRs:
 - Processing times improving
 - May not be successful, but potentially provides more issues for appeal/more insight into basis for denial
- Request for Review:
 - Given current processing times, likely few benefits over a MTR
 - DOL has indicated that it still reconsiders before sending to BALCA (see Feb. 2009 DOL Liaison Minutes)

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The CO's Response to MTR

- Potential responses include:
 - Uphold denial and transmit case to BALCA (transmittal letter)
 - New denial
 - New audit request/RFI
 - Supervised Recruitment

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Evaluating the Transmittal Letter

- New reasons for denial?
 - See, e.g., *Matter of IAC Search & Media, Inc.*, 2011-PER-845, at 7 (BALCA May 2, 2012) (“[I]n the interest of due process and fundamental fairness, the Employer should not be denied certification based on the new reason provided by the CO in his transmittal letter.”)



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Evaluating the Transmittal Letter

- Concede any issues or reasons for denial?
- If you submitted “new” evidence with a motion:
 - Was it considered by the CO?
 - If not, should it have been?

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The Appeal File

- CO’s duty to assemble
- Must contain “all the written material . . . upon which the denial was based” (20 C.F.R. § 656.26(b)(1))
- Significance: on appeal, BALCA’s review limited to the contents of the appeal file (§ 656.27(c))



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The Appeal File

- Review as soon as possible to identify any omissions or inaccuracies
- Employers have the right to “furnish or suggest” any missing documentation—but only if it was submitted to CO before the final determination (§ 656.26(b)(3))

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The Appeal File

- If document(s) missing, consider:
 - Material to the appeal?
 - Does it appear elsewhere in the appeal file?
 - Omission from the CO’s file or omission from CD?
- Possible remedies:
 - Request paper copy of the appeal file from the CO
 - File supplement to appeal file with BALCA
 - Point out in BALCA brief

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BALCA Procedures

- First official correspondence from BALCA:
Notice of Docketing and Order Requiring Response to Notice of Docketing
 - Sent to attorney, employer, and PERM beneficiary (among others)
 - Response due 15 days from date docketed (Statement of Intent to Proceed)

U.S. Department of Labor

Board of Alien Labor Certification Appeals
 800 K Street, NW, Suite 400-N
 Washington, DC 20001-8002
 (202) 693-7300
 (202) 693-7365 (FAX)



BALCA Procedures

- Mechanics of filing
 - Must serve a copy of all filings on:
 - BALCA
 - "other parties of record" (e.g., Counsel for Litigation)
 - Easiest approach: adapt the format of BALCA's Service Sheet to include with all filings



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Strategic Considerations at BALCA

- Should we file a brief?
 - What could you address in a brief that is not contained in your MTR/Request for Review?
 - E.g., the CO's transmittal letter
- Potential procedural tools
 - Motions to Strike
 - Administrative notice
 - Adverse inferences

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Final Thoughts: The 9089

- Accuracy of the 9089 is critical—almost impossible to overcome errors/omissions on appeal

- **BUT:**

"[T]here is no regulation that states that an application can be denied solely because of a typographical error. The issue of denials based on typographical errors only comes into play when the typographical error has resulted in some violation of the requirements set forth in the regulations."

- *Matter of IAC Search & Media*, 2011-PER-845, at 5 n.3 (BALCA May 2, 2012).

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Final Thoughts: Be Proactive

- Common hurdle for any appeal: regulation on evidence that can be submitted with a MTR
 - BUT, only potentially applies if the evidence is actually submitted with a MTR
 - For audited cases, if identify a potential issue after filing, consider including evidence that you can point to in a MTR, if one is necessary

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Final Thoughts: Realities of BALCA

- Only a small percentage of cases are reversed
- Consistency (or lack thereof)
 - Example: same employer, same issue, same attorney, cases decided the same week—**opposite result**
 - Compare *Matter of Architectural Stone Accents, Inc.*, 2011-PER-01751 (BALCA July 1, 2013) (affirming denial), with *Matter of Architectural Stone Accents, Inc.*, 2011-PER-02719 (BALCA July 3, 2013) (reversing denial and ordering certification).

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Final Thoughts

- Recognize: constantly evolving, both at the CO level and at BALCA
- What “worked” six months ago may not “work” tomorrow



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Questions???

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