



5 Tips For A Successful Appeal In Front of BALCA

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Law360, New York (March 20, 2015, 1:45 PM ET) -- The Board of Alien Labor Certification Appeals, which oversees challenges to labor certification denials, can be a notoriously tough customer to please. Here, Law360 offers five tips on how to mount a successful BALCA appeal.

Know What BALCA Is Willing to Overturn

Labor certifications, which are designed to ensure that hiring workers from abroad won't hurt Americans' wages or job prospects, is typically a prerequisite for securing a visa for a foreign employee. But if the certification request is denied by a certifying officer with the U.S. [Department of Labor](#), an employer may be forced to take the issue up with BALCA.

Since the vast majority of BALCA decisions end up siding with the certifying officer, it's important to know which kinds of cases the board will be more receptive to, according William Stock, the First Vice President of the [American Immigration Lawyers Association](#).

"At this point, BALCA is not willing to bail an employer or attorney out from a mistake that they've made," Stock said. "There's very little ability to appeal to fundamental fairness, or a 'no harm, no foul,' standard that a lot of people assert when it comes to relatively minor discrepancies."

Instead, Stock said the board is more open to overturning denials based on issues of procedural fairness. For instance, if the certifying officer only asked three questions but denied the application for a fourth reason that the employer was never given a chance to address, BALCA may step in due to procedural fairness, according to Stock.

The board is also increasingly willing to examine certifying officers' decisions on more substantive areas — such as whether a company properly evaluated U.S. candidates for the job — and is frequently tackling issues related to the prevailing

wage determinations, Stock said.

Show the Denial Wasn't Tied to Regulations

Gregory Palakow, chair of the immigration and homeland security group at [Archer & Greiner PC](#), said that the one way to win a BALCA appeal is to show that the certifying officer's denial wasn't tied to a regulation governing the labor certification process.

Of course, mounting an appeal based on regulations requires a solid understanding of the labor certification process for foreign workers, outlined at 20 C.F.R. Parts 655 and 656. These regulations explain when to place advertisements for U.S. workers as a prerequisite to the labor certification request, what must be contained in a recruitment report, and other key requirements.

Denials based on an employer's failure to submit its prevailing wage determination request, or a copy of its job order, are two examples of non-regulatory denials that BALCA has been examining recently, Palakow noted.

"[N]either of those two things are actually required by the regulations — the denials by the certifying officer are not tied to a regulation," Palakow said. "And thus, BALCA will overturn that and certify, if there's no other reason to deny."

BALCA's penchant for overturning labor certification denials on regulatory grounds was born out in a recent decision in favor of American Airlines, which won a permanent labor certification for a senior infrastructure engineer job in February. In that ruling, the board reiterated that a PERM request cannot be denied because an additional recruitment step doesn't comply with certain advertising content regulations.

Keep On Top of Docketing

It may seem like Lawyering 101, but keeping tabs on BALCA docketing is key, said William Coffman of [Mintz Levin Cohn Ferris Glovsky](#) and Popeo PC.

Since cases can pend for a long time before being taken up by the board, BALCA will send employers docketing notices when the case is finally up for review. But because the board only gives parties 15 days to respond, it's crucial that attorneys and employers reply promptly, Coffman said.

“If you don't send it in, they're just going to assume you're not interested in pursuing the case anymore, and they'll just dismiss it,” Coffman warned.

As a precautionary measure, if you know you'll be out of the office on vacation and a BALCA docketing notice is likely to arrive soon, it's smart to make sure that someone else is looking out for it, he added.

Get Your Detail Orientation On

Pursuing a BALCA challenge will require plenty of regulatory citations and knowledge of the DOL's frequently asked questions on the permanent labor certification process, so attorneys need to be highly detail-oriented in their appeal, said Coffman.

“Usually, when something's being appealed to BALCA, it's a very discrete issue,” said Coffman. “It's likely to be one little thing that DOL didn't like, and now you're having to explain to BALCA why the certifying officer is wrong.”

With that in mind, it's important to keep highly detailed records of your labor certification application and interactions with the certifying officer so you'll be able to write an appeal with citations backing up your claims against the officer's apparent errors.

Additionally, a strong, detailed adherence to the labor certification rules from the beginning will help you challenge any denials at BALCA. Stock recommends making a check-list of all the PERM requirements, including the mandated recruitment steps for U.S. workers.

When All Else Fails, Refile the Case

Sometimes, if it's clear that a company botched a key recruitment step, or if the employer and certifying officer are splitting hairs over whether a U.S. applicant is qualified, refiling the case might be a better option than challenging a denial at BALCA, said Coffman.

Unfortunately, the employer will have to pay for new recruiting efforts and will have to go through the whole process again, but that may be preferable to launching an appeal with no chance of winning.

“If a case is denied for an issue not realized at the time of filing ... the best course of action is to do the recruiting again,” Coffman said. “Do the case again, and correct the problem, if it can be corrected.”