REQUESTING EXTENSIONS OF TIME TO RESPOND TO AUDIT REQUESTS

By Jonathan Amdur and Susan Anderson

The Eagles’ lyrics, “lighten up while you still can, don't even try to understand, just find a place to make your stand, and take it easy,” may be well-intended, but it widely misses the mark in the context of audit responses under the DOL’s Permanent Labor Certification Program (PERM). The PERM regulations provide very definite and rather harsh language regarding the audit procedure and the deadline for submission of required documentation that effectively ensures that there will be no wasted time.

The pertinent Department of Labor Regulations read as follows:

656.20 Audit Procedures

(a) Review of the labor certification application may lead to an audit of the application. Additionally, certain applications may be selected randomly for audit and quality control purposes. If an application is selected for audit, the Certifying Officer shall issue an audit letter. The audit letter will:

(1) State the documentation that must be submitted by the employer;

(2) Specify a date, 30 days from the date of the audit letter by which the required documentation must be submitted; and

(3) Advise that if the required documentation has not been sent by the date specified the application will be denied.

   (i) Failure to provide documentation in a timely manner constitutes a refusal to exhaust available remedies; and

   (ii) The administrative-judicial review procedure provided in Sec. 656.26 is not available.\(^{378}\)

The language in the next section is even more threatening:

(b) A substantial failure by the employer to provide required documentation will result in that application being denied under Sec. 656.24 and may result in a determination by the Certifying Officer pursuant to Sec. 656.24 to require the employer to conduct supervised recruitment under Sec. 656.21 in future filings of labor certification applications for up to 2 years.\(^{379}\)

So much for taking it easy: by the time most of us read that far into the regulations, we are already sitting at the computer nervously drafting a response, hoping that the audit


\(^{379}\) Id. (emphasis added).
letter is clear enough so that we know what we need to provide, that our compliance file has enough in it so that we can meet that deadline without causing utter chaos in the office— not to mention a potential malpractice suit— and wondering how we are going to keep one more ball in the air. However, a little more reading might provide some much-needed hope:

(c) The Certifying Officer may in his or her discretion provide one extension, of up to 30 days, to the 30 days specified in paragraph (a)(2) of this section.\(^{380}\)

Can we breathe a sigh of relief? Maybe. It could be worse: when the proposed PERM rules were published in the Federal Register on May 6, 2002, a less forgiving policy was contemplated:

Employers would be expected to have assembled and have a hand in all documentation necessary to support their applications before they are submitted … [w]e have concluded that 21 days is sufficient time for employers to respond to audit letters because, as indicated above, the regulations indicate what documentation employers will be required to assemble, maintain and submit to respond to an audit letter. Extensions would not be granted to respond to audit letters.\(^ {381}\)

Luckily, this changed. The regulations were published on December 27, 2004, and the published comments explain how and why the provision for a discretionary extension was added:

AILA stated not allowing extensions under any circumstances is too harsh. Other commenters also supported extension in appropriate circumstances. One commenter stated the elimination of any possibility of extension of time would deny employers due process. We have concluded that it would be appropriate for this final rule to provide that COs may in their discretion, for good cause, grant one extension up to 30 days for the employer to provide requested documentation.\(^ {382}\)

Given the harsh tone of the comments to the proposed rules and the DOL’s clear position that an extension shouldn’t be necessary if we did what we were supposed to do and had all of our ducks in a row before filing, there is little, if any, guidance as to what constitutes the kind of good cause under PERM that warrants the favorable exercise of discretion. Consequently, the thought of asking for an extension makes most of us feel like Oliver Twist: we don’t want to be the first one to say, “Please sir, I want some more.” However, we are not operating in a total vacuum, and there may be some possible authority in the form of Pre-PERM BALCA decisions that might help shed some light on the kinds of situations where a Certifying Officer might favorably consider such requests.

\(^{380}\) Id.

\(^{381}\) 67 Fed. Reg. 87,30465, 87,30475 (not codified) (proposed May 6, 2002).

In *Malone and Associates*, the Board, en banc, stated that “as a matter of equity Employer’s request for an enlargement of time to file the supporting brief will be judged based on a good cause standard.” There is no exhaustive list that illustrates what is and is not good cause; however the cases below provide some examples of instances where BALCA, pre-PERM, found good cause for extension existed. These cases may provide some insight that might be helpful today.

In *Madeleine S. Bloom*, labor certification was granted after being denied initially due to failure of the employer to respond to a Notice of Findings (NOF) within the required deadline. The application was for a position as a Child Monitor. Possession of a valid driver’s license was one of the listed job requirements. The CO found that the employer’s rejection of an applicant for lack of a valid driver’s license was unacceptable absent evidence that the alien possessed such a license. The employer asserted that she had timely delivered a copy of the alien’s valid license to her attorney and that the attorney assured her (the employer) that he (the attorney) submitted it; the attorney apparently disappeared without submitting the required information and the application was denied for failure to meet the deadline for response. The Board, sitting en banc, noted that the regulatory language “clearly state[s] that an employer’s failure to file a timely rebuttal shall constitute a failure to exhaust available administrative and administrative appeal remedies, and the [Notice of Findings (NOF) of the Certifying Officer] automatically become the final decision of the Secretary of Labor denying labor certification.”

While this case involved a request for reconsideration after a denial rather than a request for extension of time, the reasoning treats the issue of waiving or extending deadlines in the interest of justice. The Board observed that, on its face, the regulations at issue appear to be mandatory. In the next paragraph, however, the Board drew a distinction between statutory time limits, which may be jurisdictional, and court and agency rules, which are subject to waiver and tolling. The Board then aptly lay out its analysis by homing in on a series of Supreme Court decisions that were directly on point. The Board noted the Supreme Court’s long-held position that a procedural rule, not made by Congress, but promulgated by the Court (or, seemingly, a department or agency) under the authority of Congress, for the purpose of the orderly transaction of business are not jurisdictional. Additionally, “[i]t is within the discretion of a court or

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384 *Id.* at 1.
386 *Id.* at 2.
387 *Id.*
388 *Id.*
389 *Id.*
390 *Id.* at 3 (emphasis added).
391 *Id.*
392 *Id.*
administrative agency to relax or modify its procedural rules, as justice requires.\textsuperscript{394} The Board noted that this rule does not apply only to self-imposed court or administrative agency rules, but has also been found to apply to specific statutory deadlines.\textsuperscript{395} Furthermore, the Supreme Court has held that a statutory deadline to file an appeal is jurisdictional, but the applicable section of the act at issue in that case explicitly makes the time to file the appeal jurisdictional.\textsuperscript{396}

The Board in \textit{Bloom} concluded that:

\begin{quote}
Although we recognize the importance of compliance with procedural deadlines, it is not the purpose of the Act or the regulations to require a mechanical adherence to filing requirements when the ends of justice will not be served. It is clear from the facts in this case that the ends of justice will not be served by allowing Employer to suffer the consequences of its attorney’s negligence.\textsuperscript{397}
\end{quote}

While the facts in \textit{Bloom} were pretty drastic (\textit{i.e.}, the direct result of the attorney’s blatant malfeasance), the results provide some clues as to what might also trigger the favorable exercise of discretion in the PERM world. The Board emphasized that the intent of the decision was not to ignore or disregard filing deadlines and limited the holding to “those rare instances in which failing to toll regulatory deadlines would result in manifest injustice.”\textsuperscript{398}

Thus, the applicable rule arising from \textit{Bloom} appears to follow a two-prong test:

I. The deadline  
   A.) is not statutory, or  
   B.) possibly is statutory, but the statute does not explicitly tie it to jurisdiction; and  

II. the circumstances are such that to deny certification on the grounds of failure to rebut would be manifestly unjust.

The regulation does not have any language that would violate the first prong of the test; that is, although it carries statutory weight, it does not tie the deadline to jurisdiction. If \textit{Bloom} is to carry any weight in the PERM world then, the sine qua non of a request for extension would be whether denial of such a request would be manifestly unjust.


\textsuperscript{395} \textit{Bloom} 88-INA-152 at 4, \textit{citing} Bowen v. City of New York, 476 U.S, 467 (1986).

\textsuperscript{396} \textit{Bloom} 88-INA-152 at 4, \textit{citing} Brown v. Director, 864 F.2d 120 (11th Cir. 1989).

\textsuperscript{397} \textit{Bloom} 88-INA-152 at 5.

\textsuperscript{398} Id. at n.9.
In *Buena Vista Landscape*, the Board, en banc, applied its manifestly unjust standard to a case where there was a complete failure to rebut. This was an expansion beyond its holding in *Bloom*, which involved an untimely rebuttal. The Board considered such factors as the high probability that the case would have been certified and the employer’s good-faith recruitment efforts and permitted the employer to amend an application after failing to rebut a supplementary NOF concerning a de minimis error in calculation of the overtime rate.

The decision states that:

> [T]he Solicitor’s argument that unlike *Madeleine S. Bloom*, this matter involved a failure to rebut rather than merely an untimely rebuttal is a distinction without a difference. The fact remains that it would be manifestly unjust to deny certification on the ground of failure to rebut under the existing circumstances.”

These decisions suggest that a Certifying Officer might look favorably at a request for extension of time if the request demonstrates a high probability that the extension will bring forth evidence that will make certification highly likely.

In *Jose A. Chavez*, good-faith effort and the high likelihood of certification also weighed the decision in favor of the employer. The employer sought an extension of time to respond to an NOF requesting proof of the alien’s employment experience. The alien had held positions both in the U.S. and in Guatemala. The employer requested verification from Guatemala, which, due to the slow mail service did not arrive within the required response period. The CO denied the extension of time because the employer could have used U.S. employment to verify experience. The Board stated:

Employer was apparently making a good faith attempt to comply with the Notice of findings which required documentation that alien had at least one year of paid experience in the job offered. For reasons which are not explained, Employer was trying to meet the requirement by documenting the alien’s employment in Guatemala. The slowness of mail service between Guatemala and the United States and Employer’s resulting inability to obtain said documentation within the 35 day response period was a circumstance totally beyond his control. In light of these circumstances, I find that the summary denial of the extension of time unnecessarily harsh. Employer should be permitted to submit rebuttal evidence so that the case may be decided on its merits.

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399 Buena Vista Landscape, 90-INA-392 (BALCA Jul. 9, 1991) (en banc).
400 Id.
401 Id. (citation omitted).
402 Id. (citation omitted).
403 Jose A. Chavez, 86-INA-713 (BALCA Oct. 21, 1986).
404 Id. at 3.
405 Id. at 2.
406 See id.
407 Id.
408 Id. at 3.
409 Id.
In today’s wired (and now wireless) world, it may not be as easy to blame slow mail service for inability to meet an audit response deadline; however, the reasoning of the decision should permit the broader interpretation that when an employer could clearly show that the evidence necessary to decide the case on its merits is available, justice requires that the employer be given an opportunity to make a good-faith effort to provide it in an amount of time that is reasonable under those circumstances.

Impossibility of compliance within the specified period has also been grounds for approval of pre-PERM extensions of time to rebut. In Al-Ghazali School, the employer was instructed in an NOF to document efforts to contact U.S. universities in connection with a position for an Arabic language instructor. The employer provided letters from six schools but could not document the results of that contact within the deadline to respond to the NOF. The Board, sitting en banc, recognized that it would have been unreasonable to expect results between the time the NOF was issued (March 9, 1988) and the end of the rebuttal period (rebuttal filed on March 31, 1988).

The Board reaffirmed the Al-Ghazali School tenet in Star Image Production, Inc., which is apparently unpublished. In its decision, a summary of which may be found in Immigration Law and Procedure Reporter, the Board held that the Certifying Officer had abused his discretion in denying the Employer an extension of time for re-recruitment. Due to the company president’s travel schedule, it was not possible to get approval to re-advertise until one week before the end of the rebuttal period. The Board noted that the employer failed to explain this in its request for extension of time, but did so in its motion for reconsideration. It ruled that the Certifying Officer should have granted the extension, as the recruitment process began within the rebuttal period and, even had it begun without the delay, it would have been difficult to complete within the rebuttal period.

However, the employer’s travel was not considered justification when the delay involved initial contact of applicants. In Prince Yeboah, the Board held that employer should not have traveled during a period when he knew recruitment was going to be taking place but should have delayed the trip “a week or so and complete[d] his recruitment;” however, the Board did recognize that a delay in recruiting may be

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411 Id. at 2.
412 Id. at 3.
413 Id. at 2-3.
415 Id.
416 Id.
417 Id.
418 Id.
420 Id. at 4-5.
justified where the employer can show that it handled the outside interference (that caused the delay) reasonably.\textsuperscript{421}

There is more we can learn in 656.20 if we can postpone panic long enough to finish reading the entire Audit procedures section as well as the paragraph that follows:

(d) 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; or
(2) Require the employer to conduct supervised recruitment under 656.21\textsuperscript{422}

Sound familiar? The wording suggests that the old NOF procedure did not die with PERM and that BALCA decisions regarding requests for extension in the NOF context will again prove to be a valuable reference and, arguably, valid precedent.

At this point, you might be hoping for a list of reasons that we have used successfully to get extensions of time for filing audit responses; this article does not offer that. We confess that the threatening tone of the proposed wording (which reveal DOL’s mindset at the time) and final wording of the audit-procedure regulations set the fear factor in our office high enough that we typically have basic business necessity information as well as information for any other identified potential issues ready to go before placing the first ad. However, we also know that business necessity is only one of a number of factors that will trigger audits in the future, and we also know that there will be instances when we may not have anticipated an issue and we will have no choice but to request a discretionary extension. And when that time comes, our strategy will be to try to demonstrate clearly that the evidence we are being asked to provide is in fact available, necessary, and probative to decide the case on its merits favorably, as well as how we will go about providing that evidence, the proactive and good-faith efforts that we made to assemble the required documentation and, if applicable, that the delay was due to circumstances beyond the employer’s or our control. We will also attempt to show that manifest injustice will occur if the extension is not granted. We believe that this approach is consistent with the reasoning expressed in the pre-PERM BALCA decisions.

Labor certification has always been a process that has been so fraught with delay that extending the timing at any step feels like adding insult to injury. With these high stakes, no one wants to be the first to test out the extension provisions in 656.20. However, they are there and we can use them. And while the purpose of this article is not to give you a peaceful, easy feeling about using them, you might find the following advice helpful: re-read this article, formulate your reasons why the extension should be granted, and take it to the limit…things just might go your way.

\textsuperscript{421} \textit{Id.} at 4.
\textsuperscript{422} 20 C.F.R. § 656 (2006).
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Susan Anderson co-authored this article