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Association of
International Educators

BALCA's Impact on Hiring University Employees

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David Muusz | [University of Michigan](#)

Dena Neese | [Virginia Tech](#)

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Welcome to this Government Connection on the Board of Alien Labor Certification Appeals

- Hosted by NAFSA: Association of International Educators (www.nafsa.org)
- Remember, in order to hear the audio you must call (855) 212-0212
- Questions will be accepted via the chat box
- Slides and a recording of the event will be posted on the Government Connection page of the NAFSA web site <http://www.nafsa.org/GovernmentConnection/>
- Thanks for joining us today!

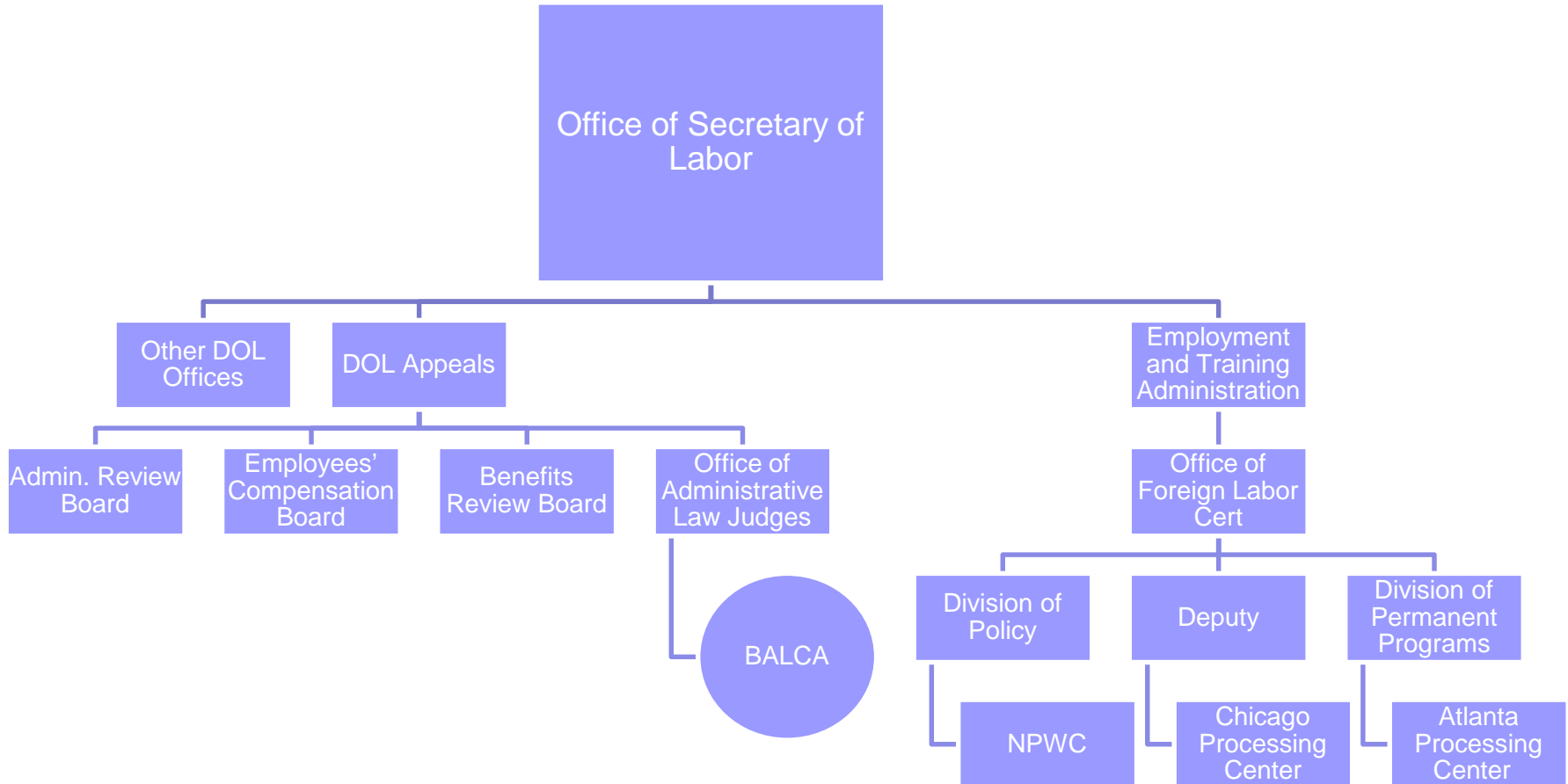
Overview

- Overview of BALCA
- The appeals process
- Implications of a BALCA decision
- Review of common issues appealed
- Pros and cons of filing a BALCA appeal
- BALCA decisions that impact higher education
- Review of higher education issues that could use clarification from BALCA
- BALCA Resources

BALCA Overview

- BALCA established by US Department of Labor in 1987 to “**enhance uniformity and consistency of decisions.**” *See Federal Register Vol. 52, No. 67, 11216-11219, April 8, 1987*
- Chaired by Chief Administrative Law Judge in Washington, D.C.
- Currently 20 Administrative Law Judges (ALJs) sit on BALCA to hear/decide PW, PERM, and debarment cases
- Generally panels of 3, but if en banc, panels of 4+
- Offices in: Washington, D.C.; Boston; Covington, LA; and Newport News, VA
- Citations: “INA” = pre-PERM; “LCA” = LCA; “PER” = PERM; “PWD” = prevailing wage; en banc cases notated with “en banc”

DOL Organizational Chart



Appeals Process

- Three queues; one with BALCA
- Must be sought by employer
- Last Resort (short of federal court)
- BALCA will review
 - PERM denials/revocations
 - PWD challenges
 - debarment cases
- BALCA cannot invalidate regulations even if in conflict with statute
- Employer must *request* BALCA review

Appeals Process

- BALCA appeal must be made within 30 days of decision
 - PWD appeals must be made to NPWC (20 CFR 656.41(d)(2))
 - PERM appeals must be made to CO (20 CFR 656.26(a)(2))
 - Debarment appeals must be made to Administrator of OFLC (20 CFR 656.26(a)(3))
- BALCA appeals must only contain legal arguments and include evidence that was within the record upon which the decision was made. No new evidence for BALCA.
 - 20 CFR 656.41(d)(1) and 656.26(a)(4)(i)
 - Debarment cases are *de novo* 656.26(a)(4)(ii)
- *En banc* reviews must be requested by employer; however, in some rare instances, BALCA may do so *sua sponte*

Implications of BALCA Decisions

- Consider two buckets:
 - Employer who lodges appeal
 - General filing community
 - Non-en banc decisions
 - En banc decisions

Implications of BALCA decisions

- For individual who lodged appeal, per 20 CFR 656.27(c), BALCA must -
 - Affirm denial of PERM application, revocation of certification, or prevailing wage determination;
 - Direct Certifying Officer to grant labor certification, overrule the revocation of certification, or overrule the prevailing wage determination; or
 - Direct a hearing on the case
- May also remand cases for further processing or proceedings consistent with the order or decision

Implications of BALCA decisions

- For the general filing community
 - Non-en banc decisions
 - May impact the way OFLC treats the same issue in similar, future cases (but may not)
 - Should impact BALCA's treatment of same issue in future appeals (but BALCA decisions are not always consistent)
 - En banc decisions
 - Decided by a larger panel within BALCA, employer may request *en banc* decisions (but rarely issued), BALCA may decide on its own to issue en banc decisions on issues of importance, and on issues that require clarification or uniformity

Implications of En Banc BALCA decisions

- OFLC has acknowledged it is bound by en banc BALCA decisions (and has acknowledged that it reviews and considers all BALCA decisions when determining future case processing) -
 - See AILA Minutes of OFLC Stakeholder Meeting, September 12, 2014, page 4, discussion of Matter of Meltwater News US1 2014-PWD-0005 (July 16, 2014)
 - In same Stakeholder meeting, OFLC acknowledged that it will follow en banc Symantec decision
- BALCA decisions (even non-en banc) have led to OFLC FAQs
 - Electronic National Professional Journal for cases filed under special handling regulation (in response to University of Texas at Brownsville)
- **However, there doesn't appear to be definitive legal authority on the legal impact of a BALCA decision on OFLC**

See Island Holdings Decision

- DOL's response to BALCA's en banc decision in Island Holdings demonstrates that even en banc decisions may not necessarily be binding on DOL or OFLC (although some might call this case an outlier) . . .

In response to Island Holdings, 2013-PWD-00002 (December 3, 2013) (*en banc*), the Office of the Secretary of Labor declared in a Federal Register Notice, (FR Vol. 29 No 242, December 17, 2014, 75179 – 75184) its intent to issue a declaratory order and requested comment:

“BALCA's Island Holdings decision does not represent the legal or policy position of the Secretary of Labor. **The Administrative Law Judges composing the BALCA are subordinate employees of the agency . . . If the Secretary determines that the BALCA's decision rests on a legal error or departs from the Secretary's announced legal interpretation or policy, the Secretary may issue in his discretion a declaratory order overruling the BALCA . . .** A final declaratory order on this issue will also establish binding precedent for resolution of all supplemental prevailing wage determinations . . . involving similarly situated parties.”

BALCA Appeals - Statistics

Fiscal Year	# PERM Appeals Docketed with BALCA*
2009	488
2010	1,666
2011	2,988
2012	3,768
2013	3,422
2014	1,776
* See OALJ website: http://www.oalj.dol.gov/libina.htm	

In FY 2014, OFLC's Atlanta Processing Center processed **70,998** labor certification cases (61% increase from FY 2013), and denied **4,349** of those (4,016 were withdrawn). See *OFLC 2014 Annual Report*.

Appeals – Processing Times

- BALCA Appeals processing times not posted
- PERM appeals: decisions rendered approx. 2 - 3 years from date docketed with BALCA
- PW appeals: decisions rendered approx. 6 – 8 months from date appeal filed with BALCA
- Generally process cases using FIFO, base upon docket date (not LC filing date)

Reasons to File Appeal

- Address a clear error
- Preserve a PERM priority date
- Last Resort
- Establish a principle/get clarification

Reasons Not to File BALCA Appeal

- Cost
- Time involved to prepare reconsideration and appeal
- Timeline involved
- PERM case is locked
- Chance of reversal of denial low
- 18 month clock keeps ticking for SH PERM until 9089 filed (if PWD BALCA case)
- Overall uncertainty for hiring department and international employee, often making reselection or EB-1B more palatable options!

Past Issues Appealed to BALCA

[Notice of Filing Content](#) | SWA job order issues | [PW issues](#)

Questions about recruitment sources | [Whether position is permanent](#)

Minimum job requirements | Alternative experience requirements

[Recruitment report content](#) | CO letter of denial requirements

Completeness of ETA 9089 | [“As Qualified” standard for college and university teachers](#) | Fundamental Fairness and Due Process Issues

BALCA decisions important for higher ed

- [Emory University](#) – 2011-PWD-00001: *abuse of discretion standard*
- [Hathaway Children's Services](#) – 1991-INA-00388 (*en banc*): *wage data must be cross-industry*
- [University of Michigan](#) – 2015-PWD-00006: *ACWIA wage data do not need to be cross industry*
- [General Anesthesia Specialists Partnership](#) (GASP) – 2014-PWD-00014: *CO cannot apply PWD guidance in automated fashion*
- [Bilinguals](#) – 2015-PWD-00001: *median wage is acceptable*
- [Meltwater News](#) – 2014-PWD-00005: *use of "all other" code*
- [Quest Diagnostics](#) – 2015-PWD-00002: *use of "all other" code*
- [Take Solutions](#) – 2010-PER-00907: *must use higher of PWDs when multiple issued*
- [Children's Hospital](#) – 2011-PER-01338: *Affiliation/ eligibility for ACWIA wages*
- [Mercer University](#) – 2011-PER-00162: *required amount of teaching for Special Handling*
- [East Tennessee State University](#) – 2010-PER-00038 (*en banc*): *May use "basic" process for SH PERM*
- [University of Texas at Brownsville](#) – 2010-PER-00887: *30-day online ads*

What could BALCA clarify for Higher Ed?

- Defining “national professional journal”
- Clarification on ad content – are pointer ads acceptable?
- What sections of 20 CFR 656.17 and relevant DOL/OFLC guidance pertaining to 20 CFR 656.17 apply to 20 CFR 656.18?
- Can OFLC require on-line professional journal ads to run for 30 days?

BALCA Resources

- OALJ website: <http://www.oalj.dol.gov/LIBINA.HTM> (includes BALCA cases, regulations and other resources and information)
 - Digest of PERM decisions, 12/1/2010 and earlier + August to December 2015:
http://www.oalj.dol.gov/PUBLIC/INA/REFERENCES/REFERENCE_WORKS/BALCA_PERM_DIGEST.HTM
 - En banc decisions (PERM) from 2006 to present:
http://www.oalj.dol.gov/PUBLIC/INA/REFERENCES/CASELISTS/BALCA_DECISIONS_PERM.HTM
 - En banc decisions (Pre-PERM) from 1988 to 2006:
http://www.oalj.dol.gov/PUBLIC/INA/REFERENCES/REFERENCE_WORKS/BALCA_EN_BANC_SUMMARIES_TABLE_OF_CONTENTS.HTM
 - Prevailing Wage decisions from 2012 to present:
http://www.oalj.dol.gov/PUBLIC/INA/REFERENCES/CASELISTS/PWD_DECISIONS.HTM
 - BALCA benchbook 1992 (second and appears to be most recent edition):
http://www.oalj.dol.gov/PUBLIC/INA/REFERENCES/REFERENCE_WORKS/DBTC.HTM

BALCA Resources

- 20 CFR 656.26, 20 CFR 656.17 and 20 CFR 656.41(d)
- OFLC PERM FAQs:
<https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>
 - “PERM Appeals – Best Practices”
 - “Certifying Officer Review and Board of Alien Certification Appeals (BALCA)”
 - “Prevailing Wage Appeals”

BALCA Resources

- **NAFSA Adviser's Manual:**

- 12.14: Review of PERM denials
- 8.9: Challenging a NPWC determination

- **NAFSA International Faculty, Staff and Researchers Resource page:**

<http://www.nafsa.org/findresources/default.aspx?catId=518244>

- Summaries and links to important BALCA decisions; minutes of OFLC Stakeholder Meetings, where BALCA issues sometimes discussed



For Further Information

David Muusz

Assistant Director, Faculty & Staff Immigration Services

University of Michigan

muusz@umich.edu

(734) 647-7277

Dena Neese

Associate Director, International Support Services

Virginia Tech

dneese@vt.edu

(540) 231-1425