

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)



Issue Date: 11 February 2011

BALCA No.: 2010-PER-00106
ETA No.: A-07193-55727

In the Matter of:

FOREST VIEW NURSING HOME AND REHAB CENTER,
Employer,

on behalf of

GAIL WILLIAMS-HENRY,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Jan Brown, Esq.
New York, NY
For the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: Malamphy, Sarno, Krantz
Administrative Law Judges

DECISION AND ORDER
VACATING DENIAL OF CERTIFICATION

This matter arises under Section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).

BACKGROUND

On October 26, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “practical nurse.” (AF 65-74).¹ On October 26, 2007, the CO issued an Audit Notification. (AF 60-62). In the Audit Notification, among other documentation, the CO required the Employer to submit Notice of Filing documentation. (AF 60).

On October 19, 2007, the Employer responded to the Audit Notification. (AF 19-57). In its cover letter, the Employer listed the items it was sending in response to the audit. (AF 19). The numbered list included as number three: “Notice of filing documentation establishing that a Notice of Vacancy was posted for ten consecutive business days from June 5, 2007 to June 18, 2007.” (AF 19). However, the Appeal File does not contain an actual copy of the Notice of Filing. The notice is mentioned in the recruitment report submitted in the Employer’s audit response. The recruitment report states in part: “A Notice of Vacancy was posted at our offices for 10 consecutive business days from June 5, 2007 to June 18, 2007. It remained clearly visible and unobstructed during the entire period of posting. No one responded.” (AF 36).

On June 9, 2008, the Employer sent a letter with proof of delivery of its audit responses and asked for an update of the status of the case, noting that no response had yet been received. (AF 16). On November 25, 2009, the Employer sent a second letter requesting a status update and referencing an earlier phone call inquiring as to the status of the case. (AF 14).

The CO denied certification on December 9, 2008, citing two reasons. (AF 11-13). The first reason given was that the Employer had failed to provide the Notice of Filing requested in the Audit Notification. The second reason given by the CO was that the blank prevailing wage

¹ In this decision, AF is an abbreviation for Appeal File.

on the Prevailing Wage Determination (PWD) does not match the wage listed on the ETA Form 9089. (AF 12).

On January 5, 2009, the Employer submitted a request for review. (AF 3-9). Enclosed in the filing were the Employer's Notice of Filing for the position and a PWD. The Employer stated that both documents were previously submitted on November 19, 2007 in response to the Audit Notification. With respect to the PWD, the Employer explained that a second PWD was obtained when the Employer realized the state department of labor inadvertently left the prevailing wage blank on the original PWD.

On November 17, 2009, the CO found the denial was valid. (AF 1-2). The CO contended that the Notice of Filing had not been submitted in response to the Audit Notification, which was a substantial failure and should result in the application being denied under 20 C.F.R. § 656.26(a)(4)(i). The CO stated that the copy of the notice the Employer included in its request for review could not be considered because under 20 C.F.R. § 656.26(a)(4)(i) an employer may not submit new evidence. (AF 1). The CO accepted the Employer's explanation of why the PWD was not listed as it was on the ETA Form 9089. (AF 1).

The CO forwarded the case to BALCA on November 18, 2009, and BALCA issued a Notice of Docketing on December 7, 2009. The Employer filed a Statement of Intent to Proceed on December 17, 2009 and filed an appellate brief on January 19, 2010. The Employer again stated that it had submitted the Notice of Filing with its response to the Audit Notification and suggested a clerical loss of the notice at the Department of Labor. The Employer observed it had specifically listed the notice in letter describing the documents attached as its audit response. The Employer's attorney stated she had a copy of the notice on file in her copy of the audit response.

The CO filed a Statement of Position on January 22, 2010, contending that the Notice of Filing was not submitted until after the CO had denied certification and therefore should not be considered by BALCA and the denial of certification should be upheld.

DISCUSSION

The regulation at 20 C.F.R. § 656.20(b) provides that an application may be denied if there is a substantial failure by the employer to provide required documentation after an Audit Notification. The section is intended to force an employer to provide all of the requested documentation in a timely fashion, and reflects the design of the PERM regulations to be an exacting process, unforgiving of mistakes or misunderstandings about the regulatory requirements. *See Richard M. Robinson*, 2007-PER-84 (Oct. 15, 2007); *Geoffrey Allen Corp.*, 2008-PER-234 (May 7, 2009); *Kay Mays*, 2008-PER-11 (Aug. 27, 2008) (“The PERM regulations very purposefully were designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program.”).

In the instant case, as in *Luigi’s Restaurant*, 2009-PER-357 (Aug. 31, 2009), the Employer timely responded to the Audit Notification, but although materials within the response reference the included Notice of Filing, the actual notice is not within the record. In the instant case, the Employer suggests it was lost after receipt at the Department of Labor, while acknowledging the possibility that it was inadvertently left out of the response package before it was sent. The Employer’s cover letter to the audit response listing the documents being sent includes a line item for the Notice of Filing. Also, the recruitment report included in the package references the notice and the dates it was displayed. After receiving the denial of certification letter, the Employer responded with a copy of the Notice of Filing within weeks and insisted it had been previously submitted. On its face, the notice does not appear fraudulent.

The CO argued in his Statement of Position that the Employer in fact did not submit the Notice of Filing until after certification had been denied. Therefore, he argued it cannot be considered by BALCA pursuant to the limitations of 20 C.F.R. § 656.26(a)(4)(i). However, the CO had the option of reconsidering the case prior to send it to BALCA for review and did in fact do so in his letter of November 17, 2009. Accordingly, it was in the record before the CO and is properly considered by BALCA on review.

As the BALCA panel determined in *Luigi’s Restaurant*, we find that in these precise circumstances where the Notice of Filing was clearly intended to be included in the audit

response, and in fact could have been if not for a clerical loss upon sending or receipt, upholding the denial of certification is not warranted. Therefore, in the interest of fundamental fairness we vacate the denial of certification, and return this application to the CO to consider whether the Notice of Filing and other audit response documentation complied with the regulations, and whether certification should be granted. This decision should not be construed as support for requiring the CO to reconsider merely if an employer forgot to submit requested documentation, in which case 20 C.F.R. § 656.20(b) supports denial.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **VACATED** and that this matter is returned to the CO for completion of processing.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/AMC/jcb
Newport News, Virginia

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.