U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 March 2011

BALCA Case No.: 2010-PER-00151
ETA Case No.: A-07235-68780

In the Matter of:

BETTINA EQUITIES CO,
Employer

on behalf of

FAUSTO PERALTA,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Robert J. Shannon, Esquire
Roura, Melamed & Shannon, L.L.P.
New York, N.Y.
For the Employer

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

Before: **Krantz, Sarno, Bergstrom**
Administrative Law Judges

KENNETH A. KRANTZ
Administrative Law Judge

DECISION AND ORDER
AFFIRMING 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 May 29, 2007, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Maintenance and Repair Workers, General" (AF 84-85).[1] On August 28, 2007, the CO denied the application because it indicated that the job opportunity listed in Section H of ETA Form 9089 was not being offered to the alien identified in Section J, as required by 20 C.F.R. § 656.10. (AF 80-82)

On September 12, 2007, Employer timely requested review and reconsideration of the denial, arguing that it was inadvertent error to check the box in Section H16 "no" and that it should have been checked "yes." Employer stated that the job was properly advertised and that the denial should be reconsidered in view of *Matter of Health America*, 2006-PER-1 (July 18, 2006)(en banc). [*HealthAmerica]*. (AF 69) Employer reiterated this request on September 11, 2008. (AF 66-67)

On May 7, 2009, the application was selected for audit and Employer was requested to provide specific documentation, including

> A copy of the job order placed with the SWA [State Workforce Agency] serving the area of intended employment downloaded from the SWA Internet job listing side, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the content of the job order, where a job order is required by the

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

> recruitment provision of 20 CFR 656 and/or a job order is listed on the ETA Form 9089 as a recruitment source.

(AF 37-39) Employer responded to the audit on May 28, 2009, providing a completed "New York State Department of Labor Job Order Form" and a "Send Confirmation Report" confirming the job order was faxed. (AF 12-36) On August 26, 2009, the CO denied the application, stating that the documentation sent by Employer failed to confirm that the SWA ran the job order and does not show the final content of the job order as run by the SWA. Employer therefore failed to provide proof of publication of the job order from the SWA containing the content of the job order, as requested in the Audit Notification letter. (AF 9-10)

On September 24, 2009, Employer timely requested review and reconsideration of the denial, arguing that the denial was due to harmless error under *HealthAmerica*. Employer contends that the fax confirmation of the job order, and a follow-up letter sent to the state Department of Labor is proof that the job was properly placed. (AF 1)

The CO forwarded the case to BALCA on December 3, 2009, and BALCA issued a Notice of Docketing on January 6, 2010. The Employer filed a Statement of Intent to Proceed on January 12, 2010, but did not file an appellate brief. On February 22, 2010, the Department of Labor Associate Solicitor for the Division of Employment and Training Legal Services filed a Statement of Position, asserting that Employer failed to provide proof of publication of the job order as requested in the audit letter and required by 20 C.F.R. § 656.20(b).

DISCUSSION

PERM is an exacting process, 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. *HealthAmerica*, slip op. at 19. An employer bears the burden of proof to establish eligibility for labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b).

The PERM regulations require an employer seeking to apply for permanent labor certification on behalf of an alien to file an ETA Form 9089. 20 C.F.R. § 656.17(a). The regulations provide that incomplete applications will be denied. 20 C.F.R. § 656.17(a). The burden is on the employer to ensure that it is submitting a complete application to the Certifying Officer. 20 C.F.R. § 656.2(b); *All Ohio Air Filter Sales & Service Co*., 2009-PER-205 (April 7, 2010); *Alpine Store Inc.*, 2007-PER-40 (June 27, 2007).

The CO may only certify permanent labor applications if there are not sufficient United States workers who are able, willing, qualified, and available at the time of the application. *See* 20 C.F.R. § 656.1(a)(1). Therefore, the CO must determine whether the Employer conducted the mandatory recruitment steps designed to apprise U.S. workers of the job opportunity in the labor application. 20 C.F.R. § 656.20(b)(1).

One of the mandatory recruitment steps an employer must undertake in order to inform U.S. workers about the job opportunity is to place a job order with the SWA serving the area of intended employment for 30 days. 20 C.F.R. § 656.17(e)(1)(i)(A). In the Audit letter, the CO specifically requested documentation to verify this step, and spelled out exactly what documents were required from Employer. Employer was to provide:

- A copy of the job order placed with the SWA serving the area of intended employment downloaded from the SWA Internet job listing side,
- A copy of the job order provided by the SWA, or
- Other proof of publication from the SWA containing the content of the job order.

(AF 39). Employer did not provide any of these three specific documents. Instead, it provided a completed job order form and a fax confirmation sheet. These documents do not adequately demonstrate to the CO that the Job Order Form was received and published by the SWA.

"Where a document has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document, if requested by the Certifying Officer, must be adduced." *In the Matter of Gencorp*, 87-INA-659 (Jan. 13, 1988). The

documents requested by the CO in this case had direct bearing on the resolution of the issue, and were obtainable by reasonable efforts, as the regulations require the employer to document all recruitment steps and retain documentation for five years after the date of filing the application. *See* 20 C.F.R. §§ 565.10(f), 656.17(a)(3), 656.17(e)(1). We therefore find that Employer's failure to provide proof of publication of the job order as requested in the audit letter renders the application incomplete.

Finally, Employer argued that the error was harmless under *HealthAmerica.* In *HealthAmerica*, the error in question was typographical. Here, the error is failure to follow the regulations by failing to adequately respond to an audit. Even if the two errors were similar, after *HealthAmerica* the Employment and Training Administration ("ETA") amended the regulations, rejecting the argument that typographical errors were immaterial, noting that "typographical or similar errors are not immaterial if they cause an application to be denied based on regulatory requirements." ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives for Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27916 (May 17, 2007). Therefore, we find that the error is neither immaterial nor harmless.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

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KENNETH A. KRANTZ
Administrative Law Judge

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.