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: 18 September 2007

BALCA No.: **2007-PER-00055**
ETA Case No.: C-05354-66207

In the Matter of:

BEST PARK, LLC,
Employer,

on behalf of

JUAN VALENZUELA,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Tom L. Travis, Esquire
Little Rock, Arkansas
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. 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.[1]

BACKGROUND

The Employer submitted this application for permanent alien labor certification for the position of Storage Garage Manager. (AF 19).[2] The application was accepted for processing on November 29, 2005. (AF 5). On February 9, 2006, the Certifying Officer (CO) denied the application on the ground that a selection was not made for Section H-6A, number of months experience required. The CO found that the application was incomplete and subject to denial pursuant to 20 C.F.R. § 656.17(a). (AF 7).

By letter dated February 14, 2006, the Employer's representative requested reconsideration, arguing that the denial of the application was "in error" since his "records indicate[d] that the listed selections were properly made on the submitted Form ETA 9089." (AF 4).

On May 11, 2007, the CO issued a letter denying reconsideration and forwarding the matter to this Board. In this letter, the CO rejected the Employer's request for reconsideration because the Employer did not address the ground for denial and "failed to provide its actual minimum requirements for the job opportunity." (AF 1).

The Board issued a Notice and Order on June 5, 2007 establishing a briefing schedule.[3] The CO submitted a brief to this Board on July 31, 2007. The CO stated that

[1] The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

[2] AF refers to the Appeal File.

[3] The Notice and Order instructed the Employer to file a Statement of Intent to Proceed, and that failure to do so would "result in a finding that the Employer is not interested in review by the Board, and dismissal of the appeal." (Emphasis in original). The Board did not receive a response within the given time, and issued an Order of Dismissal on July 3, 2007. By fax transmission on July 3, 2007, the Employer's representative filed a brief stating that he had just received the Notice and Order, since it had been mailed to his old address, returned to the Board and then forwarded to his new address. The Employer's representative requested that this brief be accepted as a Statement of Intent to Proceed, and that additional time be given

both copies of the application in the Appeal File - the application that was mailed in and the application entered into the system by ETA data processors - showed that no response was made to Section H-6A. The CO stated that this information was essential to evaluate whether the job opportunity was actually being offered with the actual minimum requirements so that a domestic worker would have been able to fairly compete for the job, and to verify whether the Alien actually met the minimum requirements. (CO's Brief at 1).

On August 3, 2007, the Employer's representative faxed an Appellate Brief to this Board.[4] The Employer's representative asserted that the Employer "complied with the regulation in question but merely made a typographical error." (Employer's Brief at 4). The Employer's representative provided copies of a Prevailing Wage Request Form and a Job Order Form filed with the State of Arkansas Employment Security Department, both of which showed a required experience level of two years for the position. The Employer's representative also argued that the "Employer should have been given an opportunity to provide countervailing evidence" and that the "CO should have requested … other materials available before making a determination." (Employer's Brief at 5).

DISCUSSION

The CO correctly determined that the Employer did not complete Section H-6A on the application according to the instructions. On the ETA Form 9089, H-6 asks if experience in the job offered is required. An employer must select "Yes" or "No" to answer the question. If the employer selects "Yes," then it must complete H-6A, which asks for the number of months experience required. The Employer in the instant case marked "Yes" for H-6, but did not make a subsequent entry for H-6A. (*See* AF 10 and 20). Failing to make an entry for this section caused the application to be incomplete, and subject to denial pursuant to 20 C.F.R. § 656.17(a)(1).

---

to file a legal brief. On July 6, 2007, the Board issued an Order Vacating Dismissal finding that the Employer established good cause for vacating the dismissal and granting the Employer an extension of time.

[4] The Board also received a copy of this brief by mail on August 6, 2007.

The purpose of requiring employers to state their minimum requirements for the job offered is so that the CO can "evaluate whether the job opportunity is being offered with the actual minimum requirements for the position in order to ensure that a domestic worker is able to fairly compete for the position." (CO's Brief at 1). According to 20 C.F.R. § 656.17(i)(1), "the job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity." The CO must be able to ensure that all of the applicants for the position were evaluated by the employer using the same minimum requirements, and that there were no U.S. workers who were able, willing, qualified, or available under those minimum requirements. (*See* 20 C.F.R. § 656.1(a)(1)). The regulation at 20 C.F.R. § 656.17(i)(4) states that the CO must also evaluate "whether the alien beneficiary satisfies the employer's actual minimum requirements," and is thus truly qualified for the position as the beneficiary of the labor certification.[5]

Thus, the CO correctly denied the application for failure to indicate at Section H-6A the length of experience required. The question then is whether the CO abused his discretion by refusing to reconsider the denial.

In *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), the Board held that the CO should have reconsidered the denial of a PERM application based on a pro forma computer check indicating that the employer had not complied with the two-Sunday publication rule where newspaper tear sheets conclusively established that the apparent violation was merely an unintentional typographical error on the Form 9089. In *HealthAmerica*, the Board detailed the reasons why it found that the CO had abused his discretion in denying reconsideration. One of those reasons was that "[t]he Employer asserted that there had been a typographical error in the application, and the tear sheets were submitted for the purpose of substantiating that assertion; not for the purpose of amending the application." Slip op. at Thus, the Employer's attorney in *HealthAmerica*

[5] Furthermore, the CO must have knowledge of the minimum requirements for the job to determine if they are "those normally required for the occupation" and "not exceed[ing] the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones," according to the regulation at 20 C.F.R. § 656.17(h)(1).

made the typographical error argument and presented evidence to support that argument at the time of the motion for reconsideration. Slip op. at 6.

In contrast, in the instant case, the argument made by the Employer's attorney at the time of the motion for reconsideration was that the form had been correctly filled out. (AF 4). Since this argument was clearly erroneous, the CO did not abuse his discretion in denying reconsideration.

In the Employer's appellate brief, the Employer's counsel admitted that he had assumed the missing entry was an error on the part of ETA's data processors, since he had experience of such occurrences and that "[n]ormally a review of the original application would remedy the situation." (Appellate Brief at 3). Attached to the appellate brief is documentation that tends to show that the Employer intended for the job to require two years of experience, and that the omission of a response to Section H-6A was merely a typographical error. However, this panel cannot consider this argument and evidentiary submission.

The regulation at 20 C.F.R. § 656.26(a)(2) states that "[t]he request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." Therefore, the argument and documents that the Employer submitted with its appellate brief cannot be taken into consideration by this Board.[6]

Based on the foregoing, we find that the CO properly denied certification.

[6] Assuming arguendo that we could consider new arguments made by the Employer on appeal, we are not persuaded by the contention that the CO should have selected the matter for audit or otherwise requested additional information. It is the Employer's burden under the regulations to make sure that it is submitting a complete application. As this panel held in Alpine Store Inc., 2007-PER-40 (June 27, 2007), the "CO is under no obligation to gather the information needed to perfect an application."

ORDER

IT IS ORDERED that the Certifying Officer's denial of labor certification in the above-captioned matter is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

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.