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: 19 September 2007

BALCA Case No.: 2007-PER-00064
ETA Case No.: A-05236-25961

In the Matter of:

BROOKLYN AMITY SCHOOL,
Employer,

on behalf of

VAHIT SEVINC,
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Eugene Goldstein, Esquire
New York, New York
For the Employer

Gary M. Buff, Associate Solicitor
R. Peter Nessen, 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

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

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] The issue presented is whether alien employment certification was properly denied where the Employer's 20 C.F.R. § 656.10(d)(3) Notice of Filing listed the address for the Certifying Officer ("CO") in New York, but its PERM application was processed under the jurisdiction of the Atlanta National Processing Center.

BACKGROUND

The Employer is a non-profit primary school which draws its students primarily from the Turkish immigrant community. (AF 17).[2] Its application for alien employment certification for the position of Computer Teacher was accepted for processing on October 12, 2005. (AF 37). On January 24, 2006, the Atlanta Certifying Officer ("CO") issued an Audit Notification which, *inter alia*, directed the Employer to submit its recruitment documentation. (AF 37-40). The Employer submitted its documentation by letter dated February 1, 2006. (AF 11-36). Among the documentation submitted was a copy of the Employer's Notice of Filing. This Notice stated, *inter alia*:

> Any person may provide documentary evidence bearing on this application to the Regional Certifying Officer of the U.S. Department of Labor, Employment & Training Administration, 201 Varick Street, Rm 755, New York, New York 10014

(AF 17). The Employer indicated that the Notice of Filing was posted at its worksite from July 25, 2005 to August 8, 2005. (AF 17). On April 14, 2006, the CO issued a denial determination because the Notice of Filing required by 20 C.F.R. §

[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 is an abbreviation for "Appeal File."

656.10(d)(3)(iii) failed to contain the address of the CO having jurisdiction over the application.[3] (AF 8-10). Although the CO did not expressly state which office had such jurisdiction, it may be inferred that she considered the Atlanta office to have been the proper office to list on the Notice of Filing.

By letter dated April 27, 2006, the Employer requested BALCA review. (AF 3-7). The Employer argued, *inter alia*:

> [T]here is no showing that any correspondence resulting from [the mistaken use of the New York CO's address] was sent to the office of the New York Certifying Officer, which it is respectfully submitted, remained open at the time of the posting. It is further respectfully submitted that even if correspondence was sent to the office of the New York Certifying Officer, that the New York Certifying Officer was, presumably, forwarding all material it received the Certifying Officer in Atlanta, Georgia on a regular basis.

(AF 7). The Employer also argued that the audit regulation at 20 C.F.R. § 656.20(b), which states that "[a] substantial failure by the employer to provide required documentation will result in that application being denied…," fails to define the term "substantial," and that the CO was inconsistent in the audit because she found one ground for denial of the application to be a "substantial" failure to test the labor market, but did not make a finding that the posting error was a "substantial" failure.

The CO treated the request for review as a motion for reconsideration, and issued a letter affirming the denial of the application on June 21, 2007. (AF1-2). The CO noted the importance of the Notice of Filing requirement, it being one of the statutory requirements of IMMACT 90, and that in *Voodoo Contracting Corp*., 2007-PER-1 (May 21, 2007), this panel had ruled that the Notice of Filing requirement is not a regulation to be lightly dismissed under a harmless error finding. In regard to the Employer's argument that the New York CO's office was still open at the time it filed the application

[3] The denial was also based on failure to provide a recruitment report. However, the CO later withdrew this ground for denial. (*see* AF 2).

and would presumably have forwarded any correspondence to the Atlanta CO, the CO wrote:

> However, the Regional Office in New York no longer processes permanent employment certifications and has no official connection to the Office of Foreign Labor Certification and/or its Atlanta and Chicago National Processing Centers. Therefore, there can be no expectations of communications between the NY Regional Office and the Atlanta National Processing Center and any correspondence received by the NY Regional Office would not necessarily have been forwarded to the Certifying Officer in Atlanta, Georgia.

(AF 1). The CO then forwarded an Appeal File to BALCA.

BALCA issued a Notice and Order on July 10, 2007, which required the Employer to file a Statement of Intent to Proceed, and permitted the filing of an appellate brief or statement of position, within 30 days of the date of the Notice and Order. The Employer filed the Statement of Intent to Proceed by letter dated July 18, 2007, but did not file an appellate brief or statement of position. The CO filed a statement of position by letter dated August 10, 2007. In this letter, the CO argued that the Employer did not dispute that the Notice had the wrong address for the CO, but relied only on an argument that the error was not substantial. The CO argued that BALCA had decided this very issue in *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007), and therefore the CO's denial of labor certification should be affirmed.

On August 22, 2007, the Board received a rebuttal from the Employer to the CO's statement of position. Since this rebuttal brief was filed outside the 30-day window for filing a brief or statement of position, it is not timely under the Board's Notice and Order. Moreover, we find that the CO's statement of position on appeal did not raise an issue or argument that could not have been addressed by the Employer in a timely appellate brief or statement of position.[4] Accordingly, we decline to consider the Employer's rebuttal brief in deciding this matter.

[4] The rebuttal brief is stated to be in response to the CO's argument that *Voodoo Contracting Corp.* is controlling in this case. However, the CO's June 21, 2007 letter denying reconsideration, although not

DISCUSSION

The regulation at 20 C.F.R. § 656.10(d)(3) provides:

> (3) The notice of the filing of an Application for Permanent Employment Certification must:
>
> (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
> (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
> (iii) Provide the address of the appropriate Certifying Officer; and
> (iv) Be provided between 30 and 180 days before filing the application.

The purpose of section 656.10(d)(3) is to implement the statutory requirement provided by Section 122(b) of Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649, 104 Stat. 4978, effective October 1, 1991, that provides that "any person may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions with respect to the employment of alien workers and co-workers)." ETA, *Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 69 Fed. Reg. 77326, 77337-77338 (Dec. 27, 2004). In *Voodoo Contracting Corp*., this panel observed that the regulation at 20 C.F.R. § 656.10(d)(3)(iii), established a reasonable requirement that the Notice of Filing provide the address of "the appropriate Certifying Officer." The PERM regulations, however, do not define "appropriate Certifying Officer."

In *Voodoo Contracting Corp*. this panel held that the CO properly denied labor certification where a Notice of Filing only made a generic reference to the opportunity to provide documentary evidence to a regional CO, and failed to list an actual address to

---

referencing the name "Voodoo Contracting Corp.," expressly references "BALCA case number 2007-PER-1" as supporting the denial. Thus, the Employer was on notice that the CO was basing the denial of reconsideration in part on the *Voodoo Contracting Corp*. decision.

which persons could provide information.[5] Thus, the decision in *Voodoo Contracting Corp.* did not address the issue of which CO's office was appropriate, but rather was based on the failure of employer to list an address for any CO's office on the Notice of Filing. The case *sub judice* is distinguishable because here the Employer used the address of the New York CO rather than the Atlanta CO on its Notice of Filing. Thus, we begin by considering whether use of the New York CO's office in the Notice of Filing in this case was impermissible under the regulations.

First, we observe that the Employer listed a CO's office in New York for a job to be filled in Brooklyn. Thus, using the New York CO's address in the Notice of Filing is not obviously wrong. However, neither is it obviously correct given that PERM applications for New York were always processed in Atlanta rather than New York.

The regulatory scheme popularly known as "PERM" became effective on March 28, 2005. In the years preceding the effective date of PERM, the Employment and Training Administration ("ETA"), closed a number of regional CO offices, consolidated the processing of pre-PERM applications before two Backlog Elimination Centers, and established new "National Processing Centers" in Atlanta and Chicago for processing labor certification under the new PERM regulations. Although this administrative reorganization would have been well known in most of the immigration legal community, it cannot be assumed that the general population or general legal community would be versed in these organizational changes.

The Appeal File establishes that the Notice of Filing used to support the Employer's PERM application was posted from July 25, 2005 to August 8, 2005. (AF 17). We take administrative notice that according to a web page located on ETA's Office of Foreign Labor Certification web site, the New York CO's office was still

[5] The Notice in that case stated: " ANY PERSON MAY PROVIDE DOCUMENTARY EVIDENCE BEARING ON THE APPLICATION TO THE LOCAL OFFICE OR THE STATE EMPLOYMENT COMMISSION AND/OR THE REGIONAL CERTIFYING OFFICER OF THE DEPARTMENT OF LABOR." *Voodoo Contracting Corp., supra*, slip op. at 3.

processing rebuttals and NOFs through September 30, 2005,[6] but would no longer process applications as of October 2005. The web page also states that the New York office continued to accept calls until December 2005.[7]

We also take administrative notice that ETA posted answers to Frequently Asked Questions ("FAQs") on its web site dated March 3, 2005, which stated in pertinent part:

> ***Question: What address must the employer provide on the posted notice of filing?***
> The employer must provide the address of the appropriate Certifying Officer for the area of intended employment. Addresses for the National Processing Centers and Certifying Officers, including a chart of the states and territories within their jurisdiction, can be found under the section, How to File, above.

(FAQ at page 8). The How to File section of the FAQs states, in pertinent part:

> ***Question: Where does an employer file an application by mail and how can people contact the National Processing Centers to ask questions about an application?***
> National Processing Centers have been established in Atlanta and Chicago. Employers submit their application to the processing center with responsibility for the state or territory where the job opportunity is located. The address and contact information for each processing center and the states and the territories within their jurisdictions are provided below.
>
> * * *

(FAQ at 4). The job opportunity in the instant case is shown to be located in Brooklyn, New York. (AF 42). The FAQ indicates that New York was within the jurisdiction of the Atlanta National Processing Center. (FAQ at 4).

---

[6] Since PERM eliminated "NOFs" [Notices of Findings] and "rebuttals," we interpret this web page as meaning that the New York office was still assisting in processing pre-PERM cases during the summer of 2005.

[7] *See* www.foreignlaborcert.doleta.gov/officecloses.cfm (visited August 21, 2007).

Thus, we draw the conclusion that, technically, the New York CO's office was still open at the time of the posting of the Notice of Filing in this case, albeit it was processing pre-PERM rather than PERM applications. We also conclude that a person who checked ETA's web site FAQs would have been led to information indicating that the Atlanta National Processing Center was the appropriate office to list on a Notice of Filing. However, we also note that the ETA 9089 and its instructions do not provide this information. Neither is it found in the regulations themselves.

In support of her position, the CO contended in the letter denying reconsideration that the New York office had no connection to the National Processing Center in Atlanta, and would not have necessarily forwarded information about an application being processed in Atlanta. But the CO's contention does not bear scrutiny. Upon close reading, it is apparent that the CO's decision was based on the fact that as of June 2007 the New York ETA office no longer processes permanent alien labor certification applications. But the relevant time period is when the Notice of Filing was posted. At that time, the New York CO's office was still open and taking phone calls. Moreover, the Department of Labor is a large agency where misdirected filings are a common occurrence, and it is simply not credible to believe that the New York CO would not have forwarded documentary evidence bearing on an application to Atlanta.

Given the major change that the PERM regulations engendered[8] and that they had only been in effect for a few months when the Notice of Filing in this matter was posted, that the New York CO's office was at least arguably an appropriate place for a person to provide documentary evidence bearing on the application for a job in Brooklyn, that technically the New York CO's office was still open at the time that the posting was made, that the regulations do not themselves define what criteria is used to define the

[8] *See generally HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), slip op. at 4 ("Although amended from time to time, the labor certification regulations did not change in basic concept from the publication of 20 C.F.R. Part 656 in 1977, see 42 Fed. Reg. 3440 (Jan. 18, 1977), until December 2004, when the ETA published a Final Rule deleting the prior language of 20 C.F.R. Part 656 and replacing it in its entirety with new regulatory text, effective on March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The new regulations substantially changed the procedure for applying for permanent labor certification….").

"appropriate" CO's office, that although the CO had posted a FAQ that would have identified Atlanta as the appropriate office neither the Form 9089 or instructions nor the regulations themselves contained this information,[9] under the facts of this specific case, we find that the Employer's Notice of Filing did not list an inappropriate CO's office in the context in and at the time in which it was posted.

The precise issue presented by this case is unlikely to arise again given that all of the old regional CO offices are now closed and that the Backlog Elimination Centers will soon be closed, leaving only the Atlanta and Chicago National Processing Centers as active permanent alien labor certification processing facilities. Nonetheless, we expressly limit our holding to the precise circumstances of this particular case. PERM is no longer a new program, and with the CO's web postings,[10] the *Voodoo Contracting Corp.*, decision,[11] and now the decision in the instant case, employers are on notice that the appropriate CO's office to list on a Notice of Filing required under 20 C.F.R. § 656.10(d)(3)(iii), is the National Processing Center having jurisdiction over the state or territory for the area of intended employment.[12]

Based on the foregoing, we vacate the denial of certification, order that certification be granted, and return this matter to the CO to complete the administrative details required to complete the certification process. *See* 20 C.F.R. § 656.27(c).

---

[9] In *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), slip op. at 12., the Board observed that "[a]lthough web site FAQ postings are a very powerful method of disseminating information and undoubtedly provide helpful guidance to applicants and their representatives, they are not a method by which an agency can impose substantive rules that have the force of law."

[10] The question of appropriate CO's office to list on a Notice of Filing was addressed both in the March 3, 2005 FAQ, and a February 21, 2006 FAQ. *See Voodoo Contracting*, *supra* at 6-9.

[11] In *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007), we observed that "[t]here are only two PERM processing centers, so identifying which CO has jurisdiction over a case and the address for that CO is not onerous or obscure." That observation is still true, and that in large part is why we are narrowly limiting our holding in the case *sub judice* to the precise circumstances presented.

[12] ETA, of course, may find it necessary in the future to change its organizational structure. If so, the interpretation of section 656.10(d)(3)(iii) may need to be modified, if and when such a change occurs.

ORDER

IT IS ORDERED that labor certification in this matter is hereby **GRANTED**.

For the panel:

A

JOHN M. VITTONE
Chief 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.