U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 August 2016

BALCA Case No.: 2012-PER-01739
ETA Case No.: A-10326-33527

In the Matter of:

ROBERT BOSCH LLC,
Employer,

on behalf of

CECILIA RONQUILLO-CHAPARRO,
Alien.

Certifying Officer: William Carlson, Ph.D.
National Certifying Officer
Atlanta National Processing Center

Appearance: Christian M. Dallman, Esquire
Fragomen, Del Rey, Bernsen & Loewy LLP
Chicago, Illinois
For the Employer

Before: Colleen A. Geraghty, *District Chief Administrative Law Judge*, Timothy J. McGrath, *Administrative Law Judge*, and Daniel F. Sutton, *Administrative Law Judge*

Opinion for the Board filed by SUTTON, *Administrative Law Judge* with whom GERAGHTY, *District Chief Administrative Law Judge*, and McGRATH, *Administrative Law Judge*, join:

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter which arises under Section 212(a)(5)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(5)(A) and the "PERM" labor certification regulations at 20 C.F.R. Part 656[1] is before the Board of Alien Labor Certification Appeals ("the Board") on the

[1] "PERM" is an acronym for the "Program Electronic Review Management" system established by the regulations that went into effect on March 28, 2005. 69 Fed. Reg. 77326 (Dec. 27, 2004).

Employer's request for review pursuant to 20 C.F.R. § 656.26 of the administrative denial of its application for a Permanent Employment Certification. The Board's consideration of the request for review is based on a review of the record upon which the denial of certification was made, the request for review, and the Employer's appellate brief. 20 C.F.R. § 656.27(c). For the reasons set forth below, we affirm the denial of certification.

BACKGROUND

On November 24, 2010, the Certifying Officer ("CO") accepted for filing the Employer's *Application for Permanent Employment Certification* ("Form 9089") sponsoring the Alien for permanent employment in the United States as a Senior Business Unit (BU) Analyst in Plymouth, Michigan. (AF 591-607).[2] The occupational title listed on the Employer's Form 9089, Section F-3 was "Market Research Analysts Level II," Standard Occupational Classification Code 19-3021.00. (AF 592).

On December 10, 2010, the Certifying Officer ("CO") issued an *Audit Notification* which requested the Employer to provide certain information. (AF 587-590). As pertinent to this appeal, the CO directed the Employer to provide "the resumes and applications for all U.S. workers who applied for the employer's job opportunity listed on the ETA Form 9089. In addition, please provide a report that lists the following information for each U.S. worker rejected for the job opportunity: the date(s) the employer contacted the U.S. worker; the date(s) the employer interviewed the U.S. worker; if appropriate, the reason(s) the employer did not interview the employee; the specific lawful job related reason(s) the U.S. worker was rejected; and how the U.S. worker was informed he or she did not qualify for the job opportunity." (AF 589). The Employer responded to the CO's audit notification by letter dated "January 11, 2010." (AF 251-586).[3]

After reviewing the Employer's audit response, the CO notified the Employer by letter dated June 28, 2011 that certification of its application had been denied for the following reason:

> The employer failed in the recruitment report to provide the reason(s) for rejection of one applicant as required in 20 CFR 656.17(g)(l). Specifically, the employer states that it had 62 responses to its recruitment efforts. The employer also states six candidates did not meet the degree requirement, seven did not meet the experience requirement, and 48 did not meet the skills requirements. However, the employer's categorization of its reasons for rejection of the applicants, totals up to 61 and the employer states there were 62 responses.

(AF 250). As authority for the denial, the CO cited 20 CFR 656.17(g)(l) ("The employer must prepare a recruitment report signed by the employer or employer's representative noted in Section 20 CFR 656.10(b)(2)(ii) describing the recruitment steps undertaken and the results

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[2] Citations to the Appeal File are abbreviated as "AF" followed by the page number.

[3] The January 10, 2010 date on the Employer's audit response letter appears to be a typographical error since the copy of the Employer's Federal Express shipping label indicates that the response was shipped on January 11, 2011. (AF 252).

achieved, the number of hires and if, applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections.").

On July 26, 2011, the Employer timely filed a request for reconsideration, a supporting brief and documentation with the CO. (AF 3-248). The Employer argued that the CO's denial was "legally wrong, because there were, in fact, only 61 resumes and/or applications received in response to the recruitment . . . [and] [t]he discrepancy between the number of responses to recruitment indicated by Bosch on the recruitment report (62) and the total number of reasons for rejections (61) is due to a typographical error on the recruitment chart." (AF 6). In this regard, the Employer attached a "recruitment chart" that it completed to track the resumes received in response to the recruitment for the job opportunity, and it explained that while the rows on the chart are numbered 1-62, there is no row 53 due to a "typographical error." (AF 6).[4] The Employer explained that "[a]s a result of this typographical error, the recruitment report also erroneously states that there were 62 applicants" when the actual number was 61. The Employer attached copies of each of the 61 resumes received in response to its recruitment steps and "a corrected version of page 2 of the Bosch recruitment report, indicating that 61 resumes were received." (AF 6). The Employer asked the CO to note that "the initial recruitment report, submitted in response to the audit request, thoroughly detailed the reasons why each of the 61 applicants did not meet the minimum requirements for the PERM position." (AF 6). In support of its motion for reconsideration, the Employer cited the Board's decision in *HealthAmerica*, 2006-PER-1 (July 18, 2006) (*en banc*) for the proposition that it is an abuse of the CO's discretion to refuse to permit an employer to correct a typographical error where the employer was in actual compliance with the PERM regulations. (AF 7). The Employer asserted that it was in actual compliance with 20 C.F.R. §656.17(g)(l) despite the typographical error on the recruitment report which, it argued, should be considered a "harmless error" pursuant to *HealthAmerica*. (AF 6).

By letter dated March 15, 2012, the CO notified the Employer that its request for reconsideration did not overcome the deficiency cited in the initial denial. (AF 1-2). While the CO acknowledged the explanation provided by the Employer's attorney in the motion for reconsideration of the discrepancy between the 62 resumes referenced in the Employer's recruitment report and the 61 resumes listed in the recruitment chart, the CO was not persuaded that the denial of certification was not warranted. (AF 1). The CO explained his rationale as follows:

> However, the employer's attorney's statement regarding the recruitment report chart, standing alone, does not overcome the representation on the original recruitment report that 62 applicants applied. In this regard, the employer's attorney's assertion is not supported by documentary evidence from the employer to reasonably assure the Department only 61 applicants applied for the position. For example, the employer's attorney's assertion is not supported by an affidavit from the employer's representative who oversaw the preparation the recruitment

[4] The "recruitment chart" was not included in the Employer's audit response submitted on January 11, 2011. (AF 251-586). .

report to explain the seemingly random error made conspicuous by the otherwise complete nature of the recruitment report chart.

(AF 1). The CO further stated that the corrected modified recruitment report submitted with the Employer's motion for reconsideration could not be considered as part of the record upon which the denial was based consistent with PERM regulations at 20 CFR §§ 656.24(g)(2)(i) and 656.24(g)(2)(ii). (AF 1). The CO thus concluded that "[s]ince the employer's recruitment report did not specify the lawful reasons for rejection of 62 U.S. workers," denial of certification was appropriate in accordance 20 C.F.R. §§ 656.10(b)(2)(ii) and 656.17(g)(1). (AF 1).

After denying the Employer's request for reconsideration, the CO forwarded the case to the Board, and the Employer filed a statement confirming its intention to proceed with the appeal in response to the Board's notice of docketing. Neither the Employer nor the CO filed appellate briefs.

DISCUSSION

The Board's review of the CO's legal and factual determinations when denying an application for permanent alien labor certification is *de novo*, limited in scope by 20 C.F.R. § 656.27(c). *Albert Einstein Medical Center*, 2009-PER-00379 (Nov. 21, 2011) (*en banc*), slip op. at 32. Thus, the Board engages in *de novo* review of the record upon which the CO denied permanent alien labor certification, together with the request for review, and any statements of position or legal briefs. *Id*. at 25. The Board may not consider evidence first presented in an appellate brief. *Id*. at 7. The Board permits general legal argument in briefs, but will not consider wholly new arguments not made before the CO. *Id*. at 8. The Board will not decide an appeal on grounds for denial not raised while the case was before the CO. *Loews Anatole Hotel*, 1989-INA-00230 (Apr. 26, 1991) (*en banc*); *Mandy Donuts Corp.*, 2009-PER-00481 (Jan. 7, 2011). The burden of proof in a PERM proceeding is on the employer to establish eligibility for labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b).

In this case, the CO denied certification because of a discrepancy between the total number of resumes (62) stated in the recruitment report submitted with its audit response and the total number of job applicants (61) for which rejection reasons were cited in the recruitment report. The Employer requested reconsideration, explaining that the discrepancy was attributable to a typographical error in its "recruitment chart" and it offered a corrected version of the recruitment report. However, the CO determined that the assertion of error made by the Employer's attorney insufficient as it was unsupported by any documentary evidence or affidavit, and the CO rejected the corrected recruitment report as barred by the § 656.24(g)(2) evidentiary limitation.[5]

[5] Section 656.24(g)(2) places limitations on the documentation that may be used to support a motion for reconsideration:

> (2) For applications submitted after July 16, 2007, a request for reconsideration may include only:

The PERM regulations at 20 C.F.R. § 656.17(g) provide, in pertinent part, that "[t]he employer must prepare a recruitment report signed by the employer or the employer's representative noted in § 656.10(b)(2)(ii) describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections." Deficiencies in an employer's recruitment report are grounds for a CO to deny certification. *See Landmarc Contractors*, 2012-PER-03468 (May 1, 2014); *Addessi Fencing*, LLC, 2011-PER-02246 (July 10, 2014).

The Employer concedes that the recruitment report that it submitted in response to the CO's audit notification contained an error with respect to the number of U.S. workers whose applications were rejected, but it argues that *Health America* permits correction of non-material typographical errors. In *HealthAmerica*, 2006-PER-00001 (July 18, 2006) (*en banc*), the Board held that the CO abused his discretion by refusing to consider newspaper tear sheets that an employer provided in its request for reconsideration when the employer's Form 9089 contained a typographical error concerning the date of the newspaper advertisements, and the tear sheets established actual compliance with regulation on which the denial was based. The Employment and Training Administration ("ETA") subsequently amended the PERM regulations to prohibit modifications to applications once submitted, and to impose evidentiary limitations on the documentation that may be used to support a motion for reconsideration. 72 Fed. Reg. 27903 (May 17, 2007). The 2007 amendments effectively overruled *HealthAmerica's* central holding that an employer was permitted to present with a motion for reconsideration documentation from its audit file showing actual compliance with the substantive recruitment requirements of the PERM regulations despite the appearance otherwise based on a typographical error on the Form 9089. *See Sushi Shogun*, 2011-PER-2677 (May 28, 2013) (finding that *HealthAmerica* had effectively been overruled by 20 C.F.R. § 656.11(b) (2007), which states that "[r]equests for modifications to an application will not be accepted for applications submitted after July 16, 2007," and that even a typographical error Form 9089 that indicates non-compliance with the regulations may itself be grounds for denial of certification). See also 72 Fed. Reg. 27904, 27917 ("typographical or similar errors are not immaterial if they cause an application to be denied based on regulatory requirements.").

Here, the Employer hasn't requested to modify its Form 9089 which is clearly impermissible under the current PERM regulations, but rather to correct a claimed typographical error in the recruitment report that it submitted in response to the CO's audit notification. While this precise scenario is not directly addressed by *HealthAmerica* or the 2007 regulatory amendments, it did come before a Board panel in *Hankins, Charles*, 2012-PER-00912 (Nov. 6,

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> (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
> (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of §656.10(f).

20 C.F.R. § 656.24(g)(2).

2015). In *Hankins*, the CO denied certification because the recruitment report stated that the newspaper ads and job order had been placed in Florida while supporting documentation indicated that these recruitment activities had actually taken place in Illinois. On reconsideration, the employer asserted that the original recruitment report had been prepared in error, submitted a corrected recruitment report and asked that the error be viewed as harmless since the documentation showed that the advertising had been properly conducted in Illinois in compliance with the regulations. The CO refused to consider the corrected recruitment report pursuant to 20 C.F.R. §§ 656.24(g)(2)(i)-(ii) as it was not included in the original audit response and the Employer had a previous opportunity to submit it. On appeal, the Board affirmed the CO's denial, stating,

> In the instant case, the Employer did not inadvertently omit documentation, but rather submitted deficient documentation. While the Employer attempted to correct the deficiencies by submitting a new recruitment report with its request for reconsideration, the CO declined to consider the second report. The CO was barred by 20 C.F.R. § 656.24(g)(2)(ii) from considering that newly submitted report. The regulations limit the evidence a CO can consider on reconsideration to documentation that was actually submitted and documentation an employer did not have an opportunity to submit, but nevertheless existed at the time the application was filed. The Employer had the opportunity to submit a correct report in its audit response. Additionally, the second report did not exist at the time the Employer filed its application. It was created just before the Employer submitted its request for reconsideration.

Slip op. at 3. The *Hankins* panel also rejected the employer's "harmless error" arguments:

> Simply put, under the very restrictive evidentiary limitations imposed on motions for reconsideration by Section 656.24(g)(2)(ii), the Employer could not cure its failure to provide an accurate recruitment report with its audit response by supplying a recruitment report created only after the denial letter exposed the error.

Slip op. at 4. *See also Simply Soup, LTD, d/b/a NY Soup Exchange*, 2012-PER-00940 (Jan. 13, 2015 (*en banc*), slip op. at 10 (declining to "invoke the concept of fundamental fairness to reverse a denial of certification where the Employer failed to submit a compliant recruitment report with its audit response, and the regulations clearly barred the Employer from correcting that failure by submitting additional audit response documentation for the first time with a motion for reconsideration.").[6]

We find the reasoning of *Haskins* persuasive and similarly conclude that the CO properly refused to accept and consider the Employer's corrected recruitment report which was prepared

[6] The Board in *Simply Soup* acknowledged the severity of defaulting an entire application where the employer claimed mere inadvertence explained its failure include the first page of its recruitment report with its audit response, but stated that the Board "cannot substitute its judgment for that of the Employment and Training Administration and judicially re-write the regulations to produce the result sought by the Employer." Slip op. at 10.

after the initial denial and thus barred by 20 C.F.R. § 656.24(g)(2)(ii). Accordingly, we affirm the CO's denial of certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **AFFIRMED**.

SO ORDERED.

For the panel:

Digitally signed by Daniel F. Sutton
DN: CN=Daniel F. Sutton, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

DANIEL F. SUTTON
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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc consideration is necessary to secure or maintain uniformity of the Board's 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 400N
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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.