

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 December 2011

BALCA Case No.: 2011-PER-00018
ETA Case No.: C-08072-32598

In the Matter of:

TRI VALLEY GOLDEN CARE,
Employer

on behalf of

LOGGER DACUMOS,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Thomas Muro, Agent
Professional Immigration Services
Sacramento, California
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, 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

DECISION AND ORDER
REMANDING 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 March 4, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Home Health Aide.” (AF 57-66)¹ On April 9, 2008, the CO sent Employer an Audit Notification Letter requesting that Employer provide certain information in accordance with 20 C.F.R. §656.20. (AF 52-56) Employer responded on May 6, 2008. (AF 21-51)

On May 15, 2008, the CO denied the application on the ground that Employer failed to provide adequate documentation for the mandatory print advertisements as required in the Audit notification letter and by §§ 656.17(e)(1)(i)(B)(3) and 656.17(e)(2)(ii)(C). Specifically, it failed to provide copies that contain both the name of the newspaper and the date of publication. (AF 17-19) Employer requested review from BALCA on June 13, 2008, asserting that it fully complied with the Audit letter in its audit response. (AF 3-16)

The CO forwarded the case to BALCA on October 4, 2010, and BALCA issued a Notice of Docketing on November 19, 2010. The Employer filed a Statement of Intent to Proceed on November 30, 2010, but did not file an appellate brief. The CO did not file a Statement of Position.

DISCUSSION

An employer that files an application for permanent alien labor certification under the basic process for a nonprofessional position (as Employer did here) must place two newspaper advertisements as part of its effort to recruit U.S. workers for the job opportunity in the application. 20 C.F.R. § 656.17(e)(2). The newspaper advertisements must be placed on two different Sundays. § 656.17(e)(2)(ii). Employer’s ETA Form 9089 states that it advertised in The Press Democrat on 10/14/07 and 10/21/07. (AF 60-61)

In its Audit Notification letter the CO requested recruitment documentation as outlined in §656.17(e). (AF 53) In its audit response, Employer submitted two pages of newspaper copies. The first shows the advertisement text and the second shows the name of The Press Democrat

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

and the date October 21, 2007. (AF 45-46) Employer also submitted a screenshot of The Press Democrat's online Classifieds search page showing an ad with copy identical to that shown on the copy of the newspaper page and reflecting dates of 10/14/07 – 11/12/07. (AF 49) This screenshot has a date in the lower right corner of 11/8/07.² There is a second screenshot, also dated 11/8/07, showing the same URL as the Classifieds screen, and stating: "Classified Detail/ Ad published October 14, 2007" followed by the identical text of the ad, consistent with AF 45 and AF 49. (AF 50)

The regulations for nonprofessional occupations like that of the instant case provide that "Placement of the newspaper advertisements can be documented in the same way as provided in paragraph (e)(1)(i)(B)(3) of this section for professional occupations." § 656.17(e)(2)(ii)(C). The CO denied the application on the ground that Employer did not provide adequate documentation as required by § 656.17(e)(1)(i)(B)(3). With respect to how the newspaper ads must be documented, that Section states:

Documentation of this step can be satisfied by furnishing copies of the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper.

§ 656.17(e)(1)(i)(B)(3). The two copies of the print advertisement submitted by Employer show the published ad on a separate page from the date and publication name. Taken alone, these would be insufficient to prove publication on both October 14 and 21, as they only address October 21. However, Employer also provided proof of publication furnished by the newspaper, namely the screenshots that are clearly from the newspaper's website, which reflect the exact text of the ad shown in the copy of the newspaper page, and which show that the ad was run from October 14 – November 12, 2007.

The Audit Notification letter directed Employer to submit documentation as outlined in §656.17(e). It appears that Employer did furnish copies of the newspaper pages in which the advertisement appeared and proof of publication furnished by the newspaper. The CO argued that this did not satisfy the regulation because "a copy must include the name of the newspaper, the advertisement content, and the date it ran on one page. If copies are provided for

² Indicating that these screenshots were printed during the run of the advertisement, and preserved in keeping with the regulatory requirement that Employer 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).

documenting the advertisement(s), the copy must be long enough to show this information without any part of the newspaper being folded over.” (AF 1) The CO provided no citations of any kind to support this assertion. We can find nothing in §656.17 to support it. The regulations provide no greater detail than “copies of the newspaper pages.”

We find that, taken together, the copies of the newspaper pages and the proof of publication from the publisher are satisfies the regulatory requirement at § 656.17(e)(1)(i)(B)(3) for documentation of this mandatory recruitment step. The CO was incorrect to deny the application on this ground.

However, we note that the content of the advertisement itself does not appear to comply with the regulatory requirements at § 656.17(f). That Section requires that newspaper advertisements must: name the employer; provide a description of the vacancy specific enough to apprise the U.S. worker of the job opportunity for which certification is sought; and indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity; *inter alia*. The text of the ad reads:

ACV need Caregiver
FT NOC shift
Email resume
kimdacv@yahoo.com

It does not appear to name the Employer (Tri Valley Golden Care), accurately describe the position of Home Health Aide, or make any reference to geographic area. This type of omission is generally fatal to an application.

The PERM regulations restrict BALCA’s review of a denial of labor certification to evidence that was part of the record upon which the CO’s decision was made. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c). The content of the newspaper advertisement is part of that evidentiary record, so it is properly within the scope of our review. In *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (en banc), the Board ruled en banc that it may direct the CO on remand to consider an issue not previously considered in the original Notice of Findings (“NOF”) or the Final Determination. Specifically, the Board wrote:

On remand, the CO is directed to consider whether Employer's two years of experience in the job offered (*i.e.*, cooking Cuban cuisine) is an unduly restrictive job requirement. *See* § 656.21(b)(2). We note that *Loews Anatole Hotel*, 1989-INA-230 (Apr. 26, 1991) (*en banc*), has been cited for the proposition that the Board will not consider issues not "preserved" by the CO in the Final Determination. *See, e.g., Mr. & Mrs. Marc Cohen*, 1995-INA-150, slip op. at n.1 (Dec. 4, 1996). *Loews Anatole Hotel*, however, did not hold that an issue is forever waived if not cited in the Final Determination. Rather, in that case, the panel which first decided the case on review had relied on a regulation not cited in the NOF or the Final Determination. The full Board held that the panel erred because the record did not support the raising of the issue relied on by the panel. We hold that *Loews Anatole Hotel* does not preclude the Board from remanding a case for review by the CO of matters not previously considered in the NOF or the Final Determination.

Schimoler, slip op. at 5. *Schimoler* supports the principle that the Board has the discretion to send cases back to the CO to consider issues not raised by the CO on preliminary review. In this case, the newspaper advertisement content appears to be in clear violation of the regulations.

Accordingly, we vacate the denial ground cited by the CO, but remand the application to the CO with instructions to consider whether the content of Employer's newspaper advertisement satisfies the requirements at § 656.17(f).

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **VACATED** and the case is **REMANDED** to the CO for further processing consistent with this Order.

For the Panel:

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KENNETH A. KRANTZ
Administrative Law Judge

KAK/lec/mrc
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.