U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 November 2015

BALCA No.: **2012-PER-00674**
ETA No.: A-10034-84841

In the Matter of:

A & J PARTNERSHIP
d/b/a
HOWARD JOHNSON INN,
Employer,

on behalf of

PATEL, RAIKAV RAJKAMAL,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Farzana Hassonjee, Esquire
Law Offices of Farzana Hassonjee
Chads Ford, Pennsylvania
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Morris D. Davis and Larry S. Merck, *Administrative Law Judges*

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

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" labor certification regulations at 20 C.F.R. Part 656.[1]

[1] "PERM" is an acronym for the "Program Electronic Review Management" system established by the regulations that went into effect on March 28, 2005.

BACKGROUND

The Employer filed an *Application for Permanent Employment Certification* (ETA Form 9089) sponsoring the Alien for permanent employment in the United States for the position of "Network and Compuer [*sic*] Systems Administration." (AF 246-267).[2] The Certifying Officer ("CO") issued an audit notification letter in which he requested "notice of filing documentation as outlined in 656.10(d)." (AF 91-93).

After reviewing the Employer's audit response, the CO denied certification on the basis that the Employer's Notice of Filing ("NOF") did not contain the Employer's name as required by 20 C.F.R. § 656.10(d)(4). (AF 12-13). In its request for reconsideration, the Employer explained that the NOF submitted in response to the audit was a computer generated printout and that the actual NOF was printed on letterhead that contained the Employer's name. (AF 4). The Employer submitted the original NOF it posted during the recruitment period with its request for reconsideration. (AF 7).

On reconsideration, the CO declined to consider the Employer's additional NOF pursuant to 20 C.F.R. § 656.24(g)(2)(i)-(ii) and affirmed the denial of certification. (AF 1).

On appeal, the Employer submitted a brief in which it reiterated that the NOF actually posted during the recruitment period contained the Employer's name on letterhead. The Employer requested that the Board treat the computer generated printout submitted with its audit response as harmless error analogous to the circumstances outlined in *Washington Hospital Center*, 2010-PER-720 (May 13, 2011) and *Forest View Nursing Home and Rehab Center*, 2010-PER-106 (Feb 11, 2011).

The Employer further argued that even if its audit response was reviewed only on the basis of the computer generated printout, the Board should reverse the CO's determination. In support of its argument, the Employer stated that the NOF contained the address of the Employer and no other business operated at that location, making it readily apparent to interested parties that the NOF belonged to the Employer.

The CO did not file a brief on appeal.

DISCUSSION

For applications submitted after July 16, 2007, a request for reconsideration submitted on behalf of an application may only include (1) documentation the CO actually received from the employer in response to a request from the CO; or (2) documentation the employer did not have

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

an opportunity to present to the CO, but which existed at the time the application was filed. 20 C.F.R. § 656.24(g)(2)(i)-(ii). In the instant case, the CO did not err by refusing to consider the NOF submitted with the Employer's request for reconsideration because the Employer had an opportunity to submit the documentation with its audit response. *See Denzil Gunnels*, 2010-PER-628 (Nov. 16, 2010). Likewise, we cannot consider the NOF first submitted with the motion for reconsideration because BALCA's review of a denied labor certification is limited 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); *Eleftheria Restaurant Corp.*, 2008-PER-148 (Jan. 9, 2009); *5th Avenue Landscaping, Inc*., 2008-PER-27 (Feb. 11, 2008). Therefore, our review is limited to the NOF that was submitted with the Employer's audit response.

When an employer files an application for permanent labor certification pursuant to the basic process at 20 C.F.R. § 656.17, it must have already notified its employees of the application by posting a Notice of Filing at the facility or location of employment.[3] 20 C.F.R. § 656.10(d)(1)(ii). The Notice of Filing is not a mere technicality, it is an implementation of a statutory notice requirement designed to assist interested persons in providing relevant information to the CO about an employer's certification application. *Voodoo Contracting Corp*., 2007-PER-1 (May 21, 2007). Failure to comply with the requirements of the NOF regulations cannot be lightly dismissed under a harmless error finding. *Hawai'i Pacific Univ.*, 2009-PER-127 (Mar. 2, 2010) (*en banc*).

A NOF "must contain the information required for advertisements by § 656.17(f)." 20 C.F.R. § 656.10(d)(4). Pursuant to Section 656.17(f)(1), such advertisements must "name the employer." In *Tera Technologies, Inc.*, 2011-PER-2541 and 2012-PER-55 (Aug. 28, 2014) (*en banc*), the Board affirmed the strict enforcement of the requirement of 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(1) that a NOF must explicitly state the name of the employer. The Board found that permitting exceptions to the requirement that the NOF include the name of the employer would "serve to swallow the rule," citing language from *Country Landscaping & Supply Inc.*, No. 1:12-cv-04309 (N.D. Ill. Jan. 31, 2013) (affirming DOL's requirement to strictly adhere to regulatory requirements, and recognizing that the regulations were designed to help DOL process a high volume of applications consistently).

In the instant case, the NOF submitted with the Employer's audit response failed to name the Employer. According to the Employer, its address was an appropriate substitute for its name given that no other business operated at that address. However, previous panels have held that "it is not administratively feasible for the CO to investigate the circumstances of each applicant's business." *Alexandria Granite & Marble*, 2009-PER-373 (May 26, 2010), *pet. en banc review denied* (July 15, 2010); *See also Sachi Enterprise Inc.*, 2011-PER-1636 (Sept. 27, 2012).

[3] Or through a letter to a bargaining representative for employees, if applicable.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED.**

Entered at the direction of the panel by:

Digitally signed by TODD R. SMYTH
DN: CN=TODD R. SMYTH, OU=LEGAL COUNSEL, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

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 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 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 en banc 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.