

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-00025
ETA Case No.: A-08058-28001

In the Matter of:

NINE MUSES AND APOLLO, INC.,
Employer

on behalf of

NICOLE LIEW OI-LIEN,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Nathan Graham, Esquire
Fragomen, Del Rey, Bersen & Loewy, LLP
Troy, Michigan
For the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones, 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
VACATING 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 February 28, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Literary & Media Specialist.” (AF 69-81)¹ On October 27, 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 65-58) Employer responded on November 17, 2008. (AF 16-64)

On March 22, 2010, the CO denied the application on the ground that Employer failed to provide adequate documentation of the additional recruitment step of a radio advertisement. Specifically, he stated that Employer did not provide a copy of the ad text, as required by 20 C.F.R. § 656.17(e)(1)(ii)(J). (AF 14-15) Employer requested reconsideration on April 20, 2010, submitting additional documentation including a photocopy of the compact disc (CD) recording of the full text of the on-air ad that was submitted with the original audit response, copies of the tearsheet and invoice that were submitted with the original audit response, and a written copy of the ad text. (AF 2-13)

The CO forwarded the case to BALCA on October 4, 2010, stating that Employer’s request for reconsideration did not overcome the deficiency. BALCA issued a Notice of Docketing on November 23, 2010. The Employer filed a Statement of Intent to Proceed on December 3, 2010, and an appellate brief on December 23, 2010 arguing that the verbatim recording of the text is as acceptable as a written version of the text, and that the regulations do not require the text of the ad to be written. The appellate brief included a duplicate copy of the CD submitted with the original audit response. The CO did not file a Statement of Position brief.

DISCUSSION

The PERM regulations require that an employer filing an application for permanent alien labor certification for a professional position, as Employer is here, conduct three additional recruitment steps. One of the additional recruitment steps an employer can utilize to advertise a

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

professional position is to advertise the position on TV or the radio. 20 C.F.R. § 656.17(e)(1)(ii)(J). That regulation provides:

The use of radio and television advertisements can be documented by providing a copy of the employer's text of the employer's advertisement along with a written confirmation from the radio or television station stating when the advertisement was aired.

Id. Employer therefore was required to document the radio ad by providing a copy of the text of the ad, along with written confirmation from the radio station stating when the ad aired.

On its ETA Form 9089, Employer attested that, as one of its additional recruitment steps for a professional position, it advertised with radio or TV ads on December 26, 2007. (AF 73) Employer submitted in its audit response a CD audio recording of the full actual on-air advertisement. The CD was marked with a sticker identifying it, including the title "Radio Proof: N. Liew (Nine Muses)." (AF 61) The sticker also states that the ad was aired on December 26, 2007 on WAXQ-FM. That CD recording, when played, says:

Nine Muses and Apollo Incorporated, a literary and Asian talent management agency, is seeking a literary and media specialist. Fluency in spoken and written Mandarin is required. If qualified, please send resume to: Nine Muses and Apollo Incorporated, Attention: L. Lucas, 525 Broadway, Suite 201, New York, New York, 10012 and be sure to include reference NL1107.

Employer also included in its audit response the tearsheet from the advertiser, which showed that the ads were aired on radio station WAXQ-FM on December 26, 2007 at 12:13 a.m. and 10:16 p.m. (AF 62) The advertiser and customer named on both the CD and the tearsheet are Romads Advertising and Nine Muses, respectively. Finally, Employer submitted the invoice for the radio ad, which reflected the same advertiser, radio station, customer name, and number of spots as the tearsheet. (AF 63)

The CO argues that Employer did not submit the text of the advertisement, but at no time in any of the CO's communications does it discuss the CD recording. The CO's letter forwarding the case to BALCA refers to the recording as though it was first submitted with the request for reconsideration, but as the record shows, this is not the case. Perhaps the CO somehow overlooked the CD recording when it reviewed the audit response. Regardless of the

reason for the CO's failure to address the recording, we find that the recording was submitted with the original audit response and therefore was part of the record upon which the CO's decision was based.

The regulations require that Employer "provid[e] a copy of the employer's text" but they do not specify that the text must be written. We can find no case law or regulatory support for such a requirement. The CO does not argue that the text must be written; he just argues that the text of the ad must be provided. The audio recording provided of the ad text is by definition a copy of the employer's text, and we can find no reason not to accept it as sufficient documentation under § 656.17(e)(1)(ii)(J). Further, we can find no reason not to accept the tearsheet and invoice as written confirmation stating when the advertisement was aired.

Employer's audit response satisfied the regulatory requirements at § 656.17(e)(1)(ii)(J) and therefore the CO was incorrect to deny the application on this ground. The CO preserved no other ground for denial; therefore we return this application to the CO with instructions to certify the application.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **VACATED**.

For the Panel:

A

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.