U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 January 2016

BALCA Case No.: 2012-PER-01071
ETA Case No.: A-10124-97314

In the Matter of:

NORMAN W. FRIES, INC.
d/b/a
CLAXTON POULTRY FARMS,
Employer,

on behalf of

KWAK, HYEJOO,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: David S. Perrie, Esquire
Perrie & Associates, LLC
Atlanta, Georgia
For the Employer

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

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

PER CURIAM. This matter arises under § 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 "Meat, Poultry Cutter and Trimmer." (AF 72-81).[2] The Certifying Officer ("CO") audited the application. (AF 69-71). The Employer's audit response contained a Notice of Filing ("NOF") that failed to name the Employer. (AF 58). After reviewing the Employer's audit response, the CO denied certification on five grounds. (AF 34-37).[3]

The Employer submitted a request for reconsideration that disputed each of the five denial grounds. (AF 3-33). With respect to the third ground, the Employer argued "[t]he advertisements did name the employer, please refer to the newspaper advertisement copies attached hereto." (AF 5). While the Employer mistakenly referred to newspaper advertisements in its argument, a list of exhibits included with the request for reconsideration clarified that the Employer intended to address the NOF deficiency: "[p]roof of posting the Notice of Filing – Picture copy of the Notice of Filing…and Copy of original Notice of Filing." (AF 7). The request for reconsideration also included a revised NOF that named the Employer and a photograph of a NOF posted on a bulletin board. (AF 31-32). Finally, the Employer asserted that all documents submitted with its request for reconsideration "were submitted with the audit response and are part of the record." (AF 6).

On reconsideration, the CO determined that the Employer did not squarely address the NOF deficiency because its request for reconsideration referenced newspaper advertisements. (AF 1). Additionally, while the CO accepted the NOF submitted on reconsideration for the purposes of establishing when the NOF was posted (thereby reversing a separate denial ground), the CO also determined that the "NOF can not be utilized to satisfy the issues concerning the employer's name" because "[a] comparison of the initial NOF submitted with the audit response and the NOF submitted with the reconsideration request contain substantial differences concerning the employer's name." (AF 2). The CO affirmed denial of certification on this basis.

Neither party filed a brief on appeal.

DISCUSSION

The Record for Review

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 an opportunity to present to the CO, but which existed at the time the application was filed.

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

[3] For the purposes of deciding this appeal, we limit our consideration to the CO's third ground for denial - that the NOF did not conform with 20 C.F.R. § 656.10(d)(4) because it did not include the name of the Employer.

20 C.F.R. § 656.24(g)(2)(i)-(ii). Furthermore, 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).

A narrow exception to § 656.24(g)(2)(i)-(ii) nevertheless exists. When the CO actually considers evidence submitted on reconsideration, it is part of the record on which the denial was made and it is proper for BALCA to consider the evidence on appeal. *Almstead Tree & Shrub LLC*, 2011-PER-1569 (Dec. 22, 2011); *Hellmuth Obata + Kassabaum, Inc.*, 2011-PER-240 (Dec. 14, 2011); *Take Solutions, Inc.*, 2010-PER-449 (Sept. 8, 2010); *Clearstream Banking S.A.*, 2009-PER-15 (Mar. 30, 2010). Previous panels have clarified what it means for a CO to "actually consider" evidence on reconsideration:

1. If the CO explicitly states that evidence is barred by § 656.24(g)(2)(i)-(ii), the CO does not actually consider the evidence if he merely describes and quotes the evidence. *New York City Department of Education*, 2012-PER-3766 (May 29, 2015).

2. If, however, the CO analyzes whether the evidence would rectify the reason for denial, he has actually considered the evidence and it is part of the record, even if he also states the evidence is barred by § 656.24(g)(2)(i)-(ii). *Id.; Take Solutions, Inc.*, 2010-PER-449 (Sept. 8, 2010).

3. If the CO does not state whether evidence is barred by § 656.24(g), "acknowledgement" of the evidence by the CO is enough for BALCA to consider it part of the record on which the decision was made. *New York City Department of Education*, 2012-PER-2753 (June. 19, 2015).

While the CO in this case determined that the evidence submitted on reconsideration "can not be utilized" to prove the Employer's NOF listed its name, the CO did not explicitly state the evidence was barred by § 656.24(g)(2)(i)-(ii) and it is not clear the CO intended to invoke § 656.24(g)(2)(i)-(ii).[4] Accordingly, mere acknowledgment of the evidence by the CO is sufficient for it to be considered part of the record. The CO in this case did far more than acknowledge the documentation submitted on reconsideration, he accepted it as proof that the NOF was posted in accordance with the regulation at 20 C.F.R. § 656.10(d)(3)(iv). We find the NOF documentation submitted by the Employer with its motion for reconsideration was part of the record upon which the CO denied certification and therefore is part of the record before BALCA.

The Employer's Notice of Filing

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

[4] A reasonable interpretation of the CO's language is that the documentation submitted on reconsideration "can not be utilized" because it does not cure the deficiency. In other words, the documentation is insufficient rather than explicitly prohibited.

application by posting a Notice of Filing ("NOF") at the facility or location of employment.[5] 20 C.F.R. § 656.10(d)(1)(ii). The NOF is not a mere technicality, but 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 § 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 this case, the NOF submitted with the Employer's audit response failed to comply with § 656.10(d)(4), while the NOF submitted with the Employer's request for reconsideration complied with the regulation. The Employer has not offered an explanation for this discrepancy. Instead, it asserts the NOF submitted with its request for reconsideration is the same document it submitted with its audit response. (AF 6). Further complicating the matter, the Employer's request for reconsideration also included a photograph of a NOF posted on a bulletin board at the job site. While the photograph is not entirely legible, it is clear that neither of the NOFs submitted by the Employer is the document in the photograph.[6]

The Employer bears the burden of proving that it has satisfied all regulatory requirements before labor certification can be granted. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). The Employer in this case has not met its burden because it has presented two contradictory NOFs without explanation, along with a photograph that suggests neither NOF was displayed. It is impossible to determine from the record which NOF was actually posted in connection with the Employer's application or whether the Employer has complied with the regulatory mandates. Accordingly, we affirm the CO's denial of labor certification.[7]

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

[6] In particular, we note that both NOFs submitted by the Employer are titled "NOTICE OF FILING" while the document in the photograph is titled "JOB POSTING." Furthermore, the formatting of the document in the photograph does not match either of the documents submitted by the Employer.

[7] Because we affirm denial on this ground, we do not reach the other reasons cited by the CO.

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 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.