U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 December 2015

BALCA No.: **2012-PER-00404**
ETA No.: A-09258-64326

In the Matter of:

TERRENCE O'NEILL,
d/b/a
T.O.N. CONSTRUCTION,
Employer,

on behalf of

FLORES, DAVID,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Joseph A. Sena, Jr., Esquire
Law Offices of Joseph A. Sena, Jr.
White Plains, New York
For the Employer

Before: Paul R. Almanza, *Administrative Law Judge*; William S. Colwell, *Associate Chief Administrative Law Judge*, and Stephen R. Henley, *Chief Administrative Law Judge*

DECISION AND ORDER
DIRECTING GRANT 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" regulations found 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 is sponsoring the Alien for permanent employment in the United States for the nonprofessional position of "Stonemason." (AF 31-56).[2] A FedEx Express mailing label indicates that the Employer mailed its Form 9089 A*pplication for Permanent Employment Certificatio*n on September 11, 2009. (AF 56). The application indicates that the Employer placed a job order with the State Workforce Agency ("SWA") that was posted from March 17, 2009 to April 15, 2009. (AF 47). The Atlanta National Processing Center date-stamped the application as received on September 14, 2009 (AF 44) and assigned September 14, 2009 as the filing date. (AF 39).

The Certifying Officer ("CO") denied certification because the Employer's Form 9089 Application indicated that the SWA job order was posted more than 180 days from the date of the filing of the Form 9089 application in violation of 20 C.F.R. § 656.17(e)(1)(i). (AF 29-30).

The Employer filed a motion for review and reconsideration of the denial. (AF 2-28). The Employer attached documentation of its recruitment efforts and argued that all recruitment was conducted within the validity period of the prevailing wage determination and took place no more than 180 days since its inception. (AF 3). The Employer attached a FedEx invoice showing that it paid for Fed Ex Priority Overnight delivery on September 11, 2009. (AF 26). The tracking number on the invoice (AF 26) matches the tracking number on the mailing label. (AF 56).

The CO reconsidered, but found that the ground for denial was valid because the SWA job order started on March 17, 2009, but the application was not filed until September 14, 2009, which is in excess of 180 days. (AF 1).

On appeal the Employer filed a statement confirming its intention to pursue the appeal. Neither the Employer nor the CO, however, filed an appellate brief.

DISCUSSION

In the instant case, the Employer posted its application with Federal Express on Friday, September 11, 2009. The ANPC stamped the application as received on Monday, September 14, 2009. The CO denied the application because the SWA job order had been placed more than 180 days prior the filing date. In other words, the CO found that SWA job order started March 17, 2009 but the application was not filed until September 14, 2009, a total of 181 days.

The Employer's argument is that that the filing date for a mailed application should be the postmark date, not the date the application is stamped received. Consequently, the Employer submits it filed its application on day 178. The CO disagreed, finding the filing date is the date the application is marked received, not the postmark date. We need not decide this issue,

[2] In this Decision, "AF" is an abbreviation for "Appeal File."

however, because under the facts of the case, the Employer complied with the timing requirements of the regulation, even using September 14, 2009 as the filing date.

The regulation at 20 C.F.R. § 656.17(e)(2) [3] provides that "If the application is for a nonprofessional occupation, the employer must at a minimum, place a job order and two newspaper advertisements within 6 months of filing the application. The steps must be conducted at least 30 days but no more tha[n] 180 days before the filing of the application." While application of this regulation in most cases would not pose a problem, the two provisions are potentially contradictory, as this case demonstrates. Here, Employer did file its application within *6 months* of the March 17, 2009 SWA job order, because six months from March 17, 2009 is September 17, 2009. However, if calculating *by day*s, the Employer exceeded the regulatory limitation, because there were 181 days between March 17, 2009 and September 14, 2009.

Regulatory construction of Section 656.17(e)(2) allows for two possible outcomes in this case. We decline to penalize an employer for the inconsistency of the subparagraph, and approve the application, a result permitted by a fair reading of the text of the rule and one consistent with its purpose of balancing the need for timely applications with timely notice to prospective applicants.

ORDER

Based on the foregoing, **IT IS DIRECTED** that the Certifying Officer **GRANT** certification.

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

Administrative Law Judge, William S. Colwell, dissenting.

The majority decides this appeal based on finding that the regulation at Section 656.17(e)(2) is inconsistent regarding the date that a SWA job order must have occurred prior to

[3] The CO cited 20 C.F.R. § 656.17(e)(1)(i), which applies to professional positions, as the applicable regulation. This application was for a non-professional position, so 20 C.F.R. § 656.17(e)(2) is the applicable regulation. The CO's citation of the wrong regulation was harmless error because Sections 656.17(e)(1)(i) and 656.17(e)(2), both require that an employer place a SWA job order within 180 days of the filing of the application.

the filing of the PERM application. I disagree with this result. First, the Employer did not make this argument before the CO and therefore it is beyond the scope of what should be considered by the Board.[4] Second, the regulation is not inconsistent.

The regulation at 20 C.F.R. § 656.17(e)(2) says that an employer must "place" the job order within 6 months of the filing of the application. It goes on to say that the step–in this case the job order–must have been "conducted" no more than 180 days before the filing of the application. Thus, a reasonable construction of the regulation is that an employer must place (i.e., take the steps necessary for getting a job order placed) within 6 months of the filing of the application for the job order, and that the job order itself must be conducted (i.e., actually run) within 180 days of the filing of the application. Under this construction of the regulation, the CO correctly determined that the job order was not "conducted within 180 days of the filing of the complaint." I would, therefore, decide the appeal on the ground presented by the Employer.

The Employer's argument was that its application was filed when postmarked, rather than when received by the CO. Under § 656.17(c), however, the filing date for a mailed application is the date the CO stamps the application as received, not the postmark date. *See Café Vallarta*, 2007-PER-29 (June 12, 2007). As the panel in *Café Vallarta* noted, an employer which chooses not to use the ETA's electronic process for filing a Form 9089 must build in sufficient time for transmittal by postal service or other courier, and for initial processing by the CO's mail room staff, to ensure that its recruitment advertisements will comply with the timing requirements of Section 656.17(e). Thus, although the Employer paid for next day delivery, it was foreseeable that the application would not be accepted for processing until the following Monday when the ANPC's docket staff would be present to receive and process mail.

Because the beginning date of the job order was more than 180 days prior to the filing of the application, I would affirm the CO's denial of certification.

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

[4] *See* 20 C.F.R. § 656.26(a)(4)(i) (request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based); 20 C.F.R. § 656.27(c) (Board's review is limited to the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs submitted).

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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.