



Issue Date: 18 December 2007

BALCA Case No.: 2007-PER-00067
ETA Case No.: A-05158-06033

In the Matter of:

SYNCSORT INCORPORATED,
Employer,

on behalf of

GANESH IYER,
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Barry Silberzweig, Esquire
New York, New York
For the Employer

Gary M. Buff, Associate Solicitor
R. Peter Nessen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

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 Title 20,

Part 656 of the Code of Federal Regulations.¹ In this case, the Employer filed an application for permanent alien labor certification for the position of Market Research Analyst. (AF 55-67). The Certifying Officer (CO) accepted the application for processing on June 7, 2005. (AF 1).² On July 19, 2005, the CO issued a letter denying the application because it was filed less than 30 days after the end of the job order placed with the State Workforce Agency (SWA) in violation of 20 C.F.R. § 656.17(e). (AF 52-54).

By letter dated August 9, 2005, the Employer requested review, essentially conceding that the application had been filed too early, but arguing that the application should nevertheless be approved because the Employer had conducted a full and complete recruitment effort, and because more than 30 days had now passed since the completion of the SWA job order. (AF 4). Implicit in the Employer's argument is the contention that because 30 days had now passed, and the job order did not produce any new U.S. applicants, and the recruitment effort was otherwise full and complete, the application could now be certified.

The CO denied reconsideration in a letter dated July 12, 2007. (AF 1-2). BALCA docketed the appeal on July 16, 2007, and issued a notice of docketing on August 9, 2007. The Employer submitted an appellate brief, which was received by the Board on August 23, 2007, and which reiterated the arguments made in its earlier request for review. The CO submitted a letter brief, which was received by the Board on September 5, 2007. The CO argued that the Board should reject the Employer's argument because what the Employer is asking BALCA to do is rewrite the regulations.

¹ The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

² The PERM application was based on a conversion from a pre-PERM application, and sought to take advantage of the pre-PERM filing date of June 10, 2002. (AF 3).

DISCUSSION

The regulation at 20 C.F.R. § 656.17(e) provides, in pertinent part:

(e) *Required pre-filing recruitment.* [With certain exceptions, a]n employer must attest to having conducted the following recruitment prior to filing the application:

(1) *Professional occupations.* If the application is for a professional occupation, the employer must conduct the recruitment steps within 6 months of filing the application for alien employment certification.

(i) *Mandatory steps.* Two of the steps, a job order and two print advertisements, are mandatory for all applications involving professional occupations, except applications for college or university teachers selected in a competitive selection and recruitment process as provided in Sec. 656.18. The mandatory recruitment steps must be conducted at least 30 days, but no more than 180 days, before the filing of the application.

(A) *Job order.* Placement of a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application shall serve as documentation of this step.

* * *

Thus, the placement of a job order with a SWA is mandatory; it must have been completed at least 30 days, but no more than 180 days before the filing of the application; and it must have been at least 30 days in duration. The start and end dates of the job order must be entered on the ETA Form 9089 to document the timing of the SWA job order.

The Employer's application showed an end date for the SWA job order that was only seven days prior to the date it filed the Form 9089. The Employer clearly was in violation of the regulatory requirement and does not deny the violation in its request for review. Rather, it is essentially arguing that its overall efforts resulted in a full and complete recruitment, and that since the 30 day period expired without any new applicants being identified, the application is now certifiable.

A similar argument was made by the employer in *Luyon Corp.*, 2007-PER-27 (June 12, 2007), which argued that it had made a harmless clerical error when it submitted the application only three days after the end date for the SWA job order. In that case, the employer also argued that, because the CO had not issued a denial until too late to preserve the timeliness of its recruitment effort, due process mandated that the application be granted. The panel rejected the employer's argument, holding that filing an application prior to 30 days after the end of the SWA job order was not a mere clerical error, but a substantive violation of the regulation at 20 C.F.R. § 656.17(e)(1)(i).

The regulatory history of section 656.17(e) indicates that the requirement that the application be filed at least 30 days after the end of the mandatory recruitment steps was purposeful -- to ensure that "employers make a current and complete test of the labor market..." ETA, Proposed Rule, Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"], 20 CFR Part 656, 67 Fed. Reg. 30466, 30471 (May 6, 2002).³ In her letter denying reconsideration, the CO explained that the purpose of the regulation is to ensure that "the employer has sufficient time to receive resumes, make contact with any applicant(s), conduct interviews, and make decisions regarding any U.S. applicants who may have applied for the job opportunity in response to the recruitment effort." (AF 1).

In other words, filing before the end of the 30 day period reflects an employer's indifference to whether U.S. applicants are given adequate consideration for the job opportunity. The requirement is not a mere formality, but reflects ETA's judgment that employers should take time and care in finalizing their recruitment. Moreover, if BALCA were to hold that applications could be certified once the 30 day period has expired and no qualified U.S. applicants are referred, it would essentially write section 656.17(e)(1)(i) out of the regulations, and add an administrative burden on the CO to accept and review inchoate applications.

³ In contrast, "[u]nlike the mandatory steps, one of the additional recruitment steps may consist solely of activity that takes place within 30 days of the filing of the application." 67 Fed. Reg. at 30471.

The Employer clearly violated 20 C.F.R. § 656.17(e)(1)(i) by submitting the application too early. The fact that once the 30 day period expired, it appeared that no harm was occasioned by the Employer violation is insufficient to excuse the violation. Thus, we affirm the CO's denial of labor certification.

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:

A

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 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.