

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 27 June 2007

BALCA No.: 2007-PER-00040
ETA No.: C-05165-07365

In the Matter of:

ALPINE STORE INC.,
Employer,

on behalf of

AZIZ BABU MOMIN,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Rahul V. Reddy, Esquire
Houston, TX
For the Employer

Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
Frank P. Buckley, 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,

BACKGROUND

The Employer submitted this application for permanent alien labor certification for the position of Store Manager. (AF 31).² The application was filed on June 10, 2005. (AF 29). On September 8, 2005, the Certifying Officer (CO) issued a denial determination regarding the application based on four grounds. (AF 16-18). Three grounds were later successfully rebutted. The ground not successfully rebutted was that a selection was not made on the Form 9089 for Section H-8 (alternate combination of education and experience), making the application incomplete and subject to denial pursuant to 20 C.F.R. § 656.17(a).

By a letter dated October 4, 2005, the Employer's representative requested reconsideration. (AF 4-5). The Employer's representative characterized the omission on the form as a "slight error" which did not warrant a denial, and for which a "simple Request for Evidence" would have resulted in correction of the omission.

On April 20, 2006 (AF 3), the CO sent an e-mail to the Employer's representative indicating that reconsideration had been denied by the CO, and that the Employer's options were to (1) withdraw the request for reconsideration/request for review and file a new application or (2) continue with an appeal to BALCA. The Employer's representative sent a reply e-mail choosing to pursue the BALCA appeal.

On April 4, 2007, the CO issued a letter formally denying reconsideration and forwarding the matter to this Board. (AF 1-2). In this letter, the CO rejected the Employer's assertion that the error on the submitted form was only minor and did not merit a denial.

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 AF refers to the Appeal File.

The Board issued a Notice of Docketing on April 24, 2007. The Board did not receive a statement of position or a brief from the Employer in response. The Board received a brief from the CO on May 25, 2007.

DISCUSSION

In the instant case, the Employer did not make a selection for Section H-8 on the ETA Form 9089. The Employer's failure to complete the form by entering the required information about the Employer's alternative education or experience requirements prevented the CO from being able to determine whether the job requirements match the education requirements that the Employer will accept.

The specific information sought by Section H-8 concerns alternate combinations of education or experience that can substitute for the primary requirements specified on the Sections H-4 through 7-A. This information is linked to the regulations at 20 C.F.R § 656.17(h)(4)(i) and (ii) which state that the "alternative experience requirements must be substantially equivalent to the primary requirements." In the Final Rule regarding the PERM regulations, ETA explained the reasoning behind 20 C.F.R § 656.17(h)(4). In the discussion of comments, ETA wrote:

8. Alternative Experience Requirements

* * *

[A]lternative requirements and primary requirements must be substantially equivalent to each other with respect to whether the applicant can perform the proposed job duties in a reasonable manner. There may also be other equally suitable combinations of education, training or experience education, training or experience which could qualify an applicant to perform the job duties in a reasonable manner, but which the employer has not listed on the application as acceptable alternatives. Therefore, even when the employer's alternative requirements are substantially equivalent but the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, the alternative requirements will be considered unlawfully tailored to the alien's qualifications unless the

employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

ETA, Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"], 20 CFR Part 656, 69 Fed. Reg. 77326, 77353 (Dec. 27, 2004). Because the Employer did not document the possible alternative requirements on the form, the CO was prevented from being able to determine whether any additional requirements the Employer is willing to accept are substantially equivalent to the primary requirements that the Employer listed, or if the Alien could reasonably perform the job duties under these alternative requirements. The CO also was prevented from being able to ensure that the alternative requirements the Employer could hire the Alien under were not unlawfully tailored to match the Alien's education or experience.

Section H-8 is also linked to the regulation at 20 C.F.R § 656.17(i)(1), which states that the “job requirements [...] must represent the employer’s actual minimum requirements.” In failing to indicate whether the Employer will accept other combinations of education or experience, the CO was prevented from determining whether the job requirements that the Employer described correspond to its actual minimum requirements.

In the Employer’s request for review, the Employer argued that the omission on the form could have been easily remedied by a “simple Request for Evidence.” (AF 4). However, as the CO pointed out, the regulations do not provide for the use of such a device. (CO’s Brief 3, Footnote 2). Moreover, the regulation at 20 C.F.R § 656.17(a) provides:

[A]n employer who desires to apply for a labor certification on behalf of an alien must file a completed Department of Labor Application for Permanent Employment Certification form (ETA Form 9089) [...] Incomplete applications will be denied.

Thus, the burden is clearly on employers to ensure that they are submitting complete applications to the CO. The CO is under no obligation to gather the information needed

to perfect an application.³

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.

³ We also note that in its response to the CO's notice of denial, the Employer still did not provide an answer to question H-8, but only argued that the CO could have made a request for evidence.