

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: 08 March 2007

BALCA Case No.: 2007-PER-00014
ETA Case No.: C-05200-15191

In the Matter of:

BUSHMAN ASSOCIATES, INC.,
Employer,

on behalf of

LUIZ MARIA CORVANTES,
Alien.

Certifying Officer: Dominic Pavese
Chicago, Illinois

Appearance: Jonathan Bushman
Pro Se for the Employer and the Alien

Gary M. Buff, Esquire
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 The following decision is based on the record upon which the Certifying Officer (CO) denied certification and the Brief of the Certifying Officer, filed on January 9, 2007. 20 C.F.R. § 656.27(c) (2005).

STATEMENT OF THE CASE

On July 14, 2005, the Employer – a farm – filed an Application for Permanent Employment Certification on behalf of the Alien for the position of General Laborer.² *AF 9-28.*³ The job duties included grading (sorting), bagging and boxing of potatoes. The offered wage was \$6.50 per hour. *AF 10-11.*

On July 28, 2005, the CO denied certification on sixteen grounds. *AF 7.* Fourteen of the grounds arise from the PERM regulations at 20 C.F.R. § 656.17(a), which require the Employer to file a completed Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089). The Employer failed to make selections for the following questions on the ETA Form 9089: Section F-2 (SOC code); F-4 (Job Title); F-5 (Prevailing wage); F-5 (prevailing wage type); F-6 (Prevailing wage source); F-8 (Prevailing wage expiration date); H-7 (Alternate field of study acceptable); H-8 (Alternate combination of education and experience); H-9 (Foreign educational equivalent acceptable); H-10 (Related occupational experience acceptable); I-6 (Start date for the SWA Job Order); I-7 (End date for the SWA Job Order); J-13 (Year relevant education completed); J-23 (Alien). *AF 7.* The next ground upon which the CO denied certification was that the Prevailing Wage source was the Occupation Employment Statistics survey issued prior to March 8, 2005.⁴ *AF 7.* The CO explained that the PERM regulations require that the Employer use a prevailing wage determination issued on or after

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 handwritten version of the application was signed on July 6, 2005 by the Employer. *AF 27.*

³ AF is an abbreviation for “Appeal File.”

⁴ It is unclear how the CO made this determination because the prevailing wage determination section of the ETA Form 9089 was left completely blank by the Employer. *AF 10.*

March 8, 2005. *AF 7*. The final reason the CO gave for denial was that the advertisements used for the Employer's recruitment effort did not occur within the allowable time under 20 C.F.R. § 656.17(e), which prescribes that the Employer recruit at least 30 days but not more than 180 days before the date the application was filed. *AF 7-8*.

The Employer requested a review of the CO's denial on August 29, 2005. *AF 4*. The Employer explained that the potato operation "cannot afford the higher wages that other companies and factories can" and noted that the starting wage is from \$6.50 to \$7.00 per hour. *AF 4*. The Employer went on to restate the duties of the position and explained that it had used "word of mouth" and advertisements in "various newspapers" to no avail. *AF 4*.

On April 4, 2006, the CO informed the Employer that one or more of the reasons for denial remained valid and that it could either withdraw the ETA Form 9089 or appeal to the Board of Alien Labor Certification Appeals (BALCA). *AF 3*. The Employer did not respond and the CO finally denied the Employer's request for reconsideration on November 19, 2006. *AF 1-2*. The final denial contained a slightly different list of reasons than the July 28, 2005, denial. The incomplete sections of the ETA Form 9089 were listed as: Section F-2 (SOC code); F-3 (Job Title),⁵ F-5 (Prevailing wage); F-5 (Prevailing wage type); F-6 (Prevailing wage source); F-7 (Prevailing wage determination date),⁶ F-8 (Prevailing wage expiration date); H-7 (Alternate field of study acceptable); H-8 (Alternate combination of education and experience); H-9 (Foreign educational equivalent acceptable); H-10 (Related occupational experience acceptable); I-6 (Start date for the SWA Job Order); I-7 (End date for the SWA Job Order); I-10 (Date of first advertisement is less than 30 days from case filed date or greater than 180 days from case filed date),⁷ J-13 (Year relevant education completed). Failure to complete Section J-

⁵ It appears that the July 28, 2005, denial contained a typographical error, stating that the Employer had failed to complete "Section F-4, Job title." *AF 7*. This was corrected on the final denial and listed as "Section F-3, Occupational Title." *AF 1*.

⁶ Section F-7 was not listed as a reason for denial of certification in the July 28, 2005, denial. *AF 7*. However, it is part of the section relating to prevailing wage that the Employer failed to complete apart from the notation "N/A" [not applicable].

⁷ The CO states that the Employer wrote the answer in as "January, 2005" on the original ETA Form 9089. *AF 2*. The CO explained that the instructions for that section require that the date be entered in the mm/dd/yyyy format. *AF 2*. In fact, the date is listed as "01/01/2005" on the typewritten version of ETA Form 9089. *AF 12*.

23 (Whether the alien is currently employed by Employer) was not listed as a reason for denial, although it had been listed in the July 28, 2005, denial. *AF 2*. The CO did not address the prevailing wage source issue except to say that one was not listed on the ETA Form 9089, under Section F-7.⁸ *AF 1*. The matter was forwarded to BALCA on November 30, 2006.

DISCUSSION

We affirm the CO's denial of certification. The Employer offered an incomplete ETA Form 9089, failing to answer many of the questions asked. The regulations at 20 C.F.R. § 656.17(a) require that an "employer who desires to apply for a labor certification on behalf on an alien must file a completed Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089)." 20 C.F.R. § 656.17(a). The regulations go on to say that "[i]ncomplete applications will be denied." 20 C.F.R. § 656.17(a). The ETA Form 9089 omissions are extensive, some are material, and the Employer failed to correct them by offering documentation to establish compliance with the regulations.

Additionally, the Employer failed to comply with 20 C.F.R. § 656.17(e), which requires that the Employer recruit at least 30 days but not more than 180 days before the date the application was filed. 20 C.F.R. § 656.17(e)(2). According to the handwritten application signed by the Employer on July 6, 2005, the Employer advertised for the position in *The Northerner* in "January, 2005." *AF 22*. According to the typewritten application filed on July 14, 2005, the Employer placed the advertisement on "01/01/2005." *AF 12*. In either format, it is clear that the Employer placed the advertisement more than 180 days before the application for certification was officially filed on July 14, 2005. As a result, the Employer failed to comply with the regulations and the CO's denial of certification must be affirmed.

⁸ As a result, any prevailing wage determination issue (apart from the failure to complete that portion of the application) will not be discussed in this decision.

ORDER

IT IS ORDERED that Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

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 (20) 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 at the following address:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400N
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties and 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.