

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 February 2009

BALCA Case No.: 2007-PER-00118
ETA Case No.: A-05250-30292

In the Matter of:

FORM-CO SUPPLY, LLC,
Employer,

on behalf of

DIPRAJ RAMDATH,
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Joanne C. Guy, Esquire
Law Offices of Scott and Guy, P.A.
North Miami Beach, Florida
For the Employer and Alien

Gary M. Buff, Associate Solicitor
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

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

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, the Brief of the Certifying Officer, and the Brief of the Employer. 29 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On September 13, 2005, Form-Co Supply, LLC ("Employer") filed an online Application for Permanent Employment Certification on behalf of Dipraj Ramdath ("Alien") for the position of "Designer Engineer" (AF 71-80).

On April 20, 2006, the Atlanta Certifying Officer ("CO") issued an Audit Notification letter. (AF 66-70). The Employer submitted its documentation by letter dated May 3, 2006. (AF 16-65). Among the documentation submitted was a copy of the Employer's Notice of Filing. The Notice of Filing indicated that it was posted at the Employer's worksite from July 8, 2005 to August 18, 2005. In regards to the CO's address, it states:

This notice is posted in connection with the filing of an application for Permanent Alien Labor Certification.

Any person may provide documentary evidence bearing on the application to the Division of Foreign Labor Certification, Employment and Training Administration at address: Division of Foreign Labor Certification Employment and Training Administration, 200 Constitution Avenue, NW, Room C-4313, Washington, D.C. 20210

(AF 31).

On February 14, 2007, the CO denied the application on the ground, *inter alia*, that the Notice of Filing of the ETA Form 9089 did not contain the address for the

¹ The Final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 77386, and are applicable to permanent labor certification applications filed on or after March 28, 2005. The regulations were amended on June 21, 2006, 71 Fed. Reg. 35522, and May 17, 2007, 72 Fed. Reg. 28903.

appropriate CO at the National Processing Center with jurisdiction over the application, as required by 20 C.F.R. § 656.10 (d)(3)(iii). (AF 12-15).

The Employer filed a motion for reconsideration on March 23, 2007. (AF 3-4). In the motion, the Employer's attorney argued:

In short a Request for Review is being sent due to the error made on the part of the Department on its decision. When I tried to get in contact with them they stated that I still had to make this request. In short the denial was based on an incorrect address on the internal office 10 day posting. In fact there are two addresses posted on this posting, a Washington address and the Atlanta address. The address they stated was missing was not missing it was on the second sheet. Due to the fact that they can not fit on the same page a second page was attached. The first address is the Washington address and the second the Atlanta one. In fact the Washington address is the main federal address and the place of jurisdiction being the Atlanta address was also listed. It was for this reason that the case was denied.

As such I do not know if you can look into this case. But any attention and/or review would be appreciated. This case should not be denied solely on this basis. Please review the same and give us an opportunity to get a proper review. It appears as we have always had problems with this case from the beginning, first be misplace by the Service, the Audit and now this. Again, please give my client an opportunity to be heard.

(AF 3-4).

On February 14, 2007, the CO denied reconsideration. (AF 1-2). The CO found that the Notice of Filing submitted in support of the Employer's ETA Form 9089 did not contain the address for the appropriate CO because the only address provided was for the Division of Foreign Labor Certification in Washington D.C.² Moreover, the CO determined that the Employer had amended its Notice of Filing submitted with its request for reconsideration to include the address for the Atlanta National Processing Center on a second page that was not included on the Notice of Filing submitted with the Employer's response to the Audit Notification.

² This office has been renamed as "Office of Foreign Labor Certification."

The CO then forwarded the case to BALCA. BALCA issued a Notice of Docketing on September, 18, 2007. The Employer filed a Statement of Position urging that the CO's denial be vacated and certification granted. The Employer argued that both the Washington and the Atlanta regional office addresses were on the Notice of Filing submitted on May 3, 2006. In support, the Employer attached another copy of the Notice of Filing as Exhibit C. Alternatively, the Employer argued that the address for the Department of Labor listed for the Washington D.C. office "would in fact be reflective of an agent and/or parent to the Atlanta regional office. This would be considered one and the same. Hence a report to one office would lead to a report in the other office."

The CO filed a Statement of Position urging that the denial be affirmed. The CO argued that the PERM regulation at 20 C.F.R. § 656.17(d)(3)(iii) requires the Notice of Filing to include the address of the appropriate CO, and that the Employer "amended" the Notice of Filing submitted with its request for reconsideration. Specifically, "the amended notice was not complete, was in different format than the one submitted with the audit response, and did not take place during the recruitment period."

DISCUSSION

The regulations at C.F.R. § 656.10(d)(3) provides:

(3) The notice of the filing of an Application for Permanent Employment Certification must:

- (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

The purpose of section 656.10(d)(3) is to implement the statutory requirement provided by Section 122(b) of Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649, 104 Stat. 4978, effective October 1, 1991, that provided that "any person may submit

documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions with respect to the employment of alien workers and co-workers)." ETA, *Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States* ["PERM"], 20 C.F.R. Part 656, 69 Fed. Reg. 77326, 77337-77338 (Dec. 27, 2004).

The Employer made two arguments with its request for reconsideration.

First, the Employer asserted that the addresses for both the Washington D.C. office and the Atlanta NPC were in fact listed on the Notice of Filing it submitted on May 3, 2006 in response to the audit. However, upon review of the Appeal File, we find that the Notice of Filing submitted on May 3, 2006 was materially different from the Notice of Filing submitted with the motion for reconsideration and the Employer's appellate brief. Specifically, the document filed in response to the audit was only one page, did not have a page number shown at the bottom, was signed by the Employer's manager, had a handwritten note "There were no applicants for the position posted" on its face, and had handwritten notations of the date posted and date removed. (AF 31). In contrast, the document filed in support of the motion for reconsideration and the Employer's appellate brief was two pages in length, had page numbers typed on the bottom of both pages, was not signed by the Employer's manager, did not contain a handwritten note about the lack of applicants responding to the notice, and did not have handwritten notations of the date posted and date removed. (AF 6; Appendix C to Employer's appellate brief). On this basis, we find the Notice of Filing submitted in response to the audit notification did not contain an address showing the Atlanta NPC. Also, because this version did not include page numbering, we conclude that it was more likely the version that was actually posted, and that persons viewing the Notice of Filing would only have been directed to the Division of Foreign Labor Certification headquarters in Washington, D.C. rather than also to the Atlanta CO's office.

The Employer's second argument is grounded on a parent/agent relationship between the headquarters and the CO's office, and the assumption that a report to one office would lead to a report in the other office.

In *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007), this panel held that the CO properly denied labor certification where a Notice of Filing only made a generic reference to the opportunity to provide documentary evidence to a regional CO, and failed to list an actual address to which persons could provide information. However, the decision in *Voodoo Contracting Corp.* did not address the issue of which CO's office was appropriate, but rather was based on the failure of employer to list an address for any CO's office on its Notice of Filing.

In *Brooklyn Amity School*, this panel vacated the CO's denial of certification where the employer listed the New York Department of Labor address instead of the appropriate National Processing Center. In that case, the New York CO's office was the appropriate office for labor certification applications from Brooklyn before March 28, 2005, the office was open and accepting telephone calls at the time the Employer posted its Notice of Filing, and only 120 days had passed since the establishment of the Atlanta and the Chicago National Processing Center.

The circumstances are not similar. The Employer listed the address of the Division of Foreign Labor Certification headquarters in Washington D.C. instead of the Atlanta National Processing Center. Although the headquarters probably would have forwarded information provided by a person bearing on the application to the appropriate CO, the regulations very clearly state that the Notice of Filing shall state the address of the CO – not the headquarters. In *Brooklyn Amity School*, the employer's Notice listed a CO's office in New York City for a position in Brooklyn, albeit the CO's office that was wrapping up the processing of pre-PERMs applications rather than accepting filings of PERM applications. Thus, the employer sent interested persons to a CO's office at a location that may have arguably been an appropriate CO's office. ETA's headquarters in Washington, D.C. was not, to our knowledge, a place at which an application for labor

certification for a position in Florida would have been filed, either under the pre-PERM regulations or the PERM regulations. Thus, there was no reasonable basis for an applicant to believe that listing ETA's Division of Foreign Labor Certification headquarters on its posted Notice of Filing would have been in compliance with 20 C.F.R. § 656.10(d)(3)(iii), even if PERM was a relatively new set of regulations at the time.

Thus, this case does not fit in the limited exception created by *Brooklyn Amity School*. Moreover, in *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007), this panel ruled that the Notice of Filing requirement is not a regulation to be lightly dismissed under a harmless error finding. Accordingly, we find that the CO correctly denied certification under 20 C.F.R. § 656.10(d)(3)(iii).³

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the panel:

A

JOHN M. VITTON
Chief Administrative Law Judge

³ On April 4, 2008, ETA issued a FAQ announcing that effective June 1, 2008, all permanent labor certification applications (PERM) would be handled by the Atlanta National Processing Center (NPC), and all temporary applications (H-2A, H-2B, etc.) by the Chicago NPC. As a result of this centralization, any PERM application filed after June 1, 2008 must show the Atlanta National Processing Center address on the Notice of Filing required by 20 CFR 656.10(d). www.foreignlaborcert.doleta.gov/pdf/NPC_Specialization_FAQ_Round_1_final2.pdf; *see also* 73 Fed. Reg. 11954 (March 5, 2008). Thus, under current PERM processing, there can be no ambiguity about the appropriate CO to list – the Atlanta National Processing Center is the only ETA office must be shown on the Notice of Filing for applications filed after June 1, 2008.

Administrative Law Judge Pamela Lakes Wood, dissenting.

I respectfully dissent. There are some discrepancies in the Employer's submissions that make it unclear what information was displayed on the posted notice. Nevertheless, I do not find this case to be materially distinguishable from *Brooklyn Amity School*, 2007-PER-64 (Sept. 19, 2007). This case, like *Brooklyn Amity School*, involved the listing of an incorrect address for the CO on the posted Notice of Filing as the sole basis for denial of labor certification. In contrast, *Voodoo Contracting*, 2007-PER-1 (May 21, 2007), concerned an ambiguous notice that provided no address whatsoever. Accordingly, I would reverse the CO's decision in the instant case for the reasons stated in *Brooklyn Amity School*.

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.