

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 June 2008

BALCA Case No.: 2007-PER-00116
ETA Case No.: A-05293-44710

In the Matter of:

MICHELLE GUEVARRA PENA PLLC
Employer,

on behalf of

NORMA CAPATI BALANOVA
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: David L. McPherson, Esquire
McPherson and Associates, LLC
Sacramento, California
For the Employer and Alien

Gary M. Buff, Associate Solicitor
Stephen R. Jones, 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 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 October 1, 2007. 29 C.F.R. § 656.27(c) (2005).

STATEMENT OF THE CASE

On October 18, 2005, Michelle Guevarra Pena PLLC (“Employer”) filed an Application for Permanent Employment Certification on behalf of Norma Capati Balanova (“Alien”) for the position of “Housekeeper/Child Care Nanny.” (AF 22-31). The job duties were described as:

Housekeeping duties such as, cleaning, laundry, shopping, preparing meals, cleaning after meals. Child care, personal care of the children, bathing, laundry, assisting with school work, preparing the meals, preparing them for bed. To assist when there are emergencies.

(AF 29). The Employer required that an applicant have three months of prior experience.

(AF 28). The offered wage was \$8.00 per hour. (AF 28).

On February 14, 2006, the CO denied certification on twelve grounds. (AF 19-21). Seven of the grounds arise from the PERM regulations at 20 C.F.R. § 656.17(a), which require an 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 C-5 (number of employees in area of employment); F-2 (SOC code); I-3 (date alien selected); I-12 (date of second Sunday advertisement); J-2 (alien’s current address); J-13 (year relevant education completed); and L-2 (alien’s date signed). (AF 21). The eighth ground upon which the CO denied certification 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). (AF 7-8). The ninth ground upon which the CO denied certification was that the

¹ The Final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 773826, 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.

Employer failed to place the SWA job order at least 30 days but not more than 180 days before the filing of the application. The tenth ground upon which the CO denied certification was that the application indicated that the Alien did not meet the actual minimum requirements under 20 C.F.R. § 656.17(i). The eleventh ground upon which the CO denied certification was that the application indicated that a live-in contract had not been executed between the Employer and the Alien. The twelfth ground the CO gave for denial of certification was that the prevailing wage was invalid because its expiration date was “less than 90 days or more than 1 year” from the date the prevailing wage determination was made. (AF 21).

On March 17, 2006, the Employer filed a request for reconsideration. (AF 3-18). The Employer’s request for reconsideration, dated March 7, 2006, stated:

This office is the Agent of Record. In addition, has completed the application Form ETA 9089. Each field has been completed that has been required.

If you need the supporting documents, feel free to contact this office. In addition, should you have any questions or concerns please contact this office.

(AF 3).

On September 4, 2007, the CO denied reconsideration. (AF 1-2). The CO informed the Employer that her reasoning with respect to Section C-5; F-2; J-2 and L-2 had been accepted and Sections I-2A; I-2B; I-3; I-4; and I-5 were not applicable because the application was not for a professional occupation. (AF 1). However, the CO asserted that the Employer’s request for reconsideration did not overcome all deficiencies noted in the determination letter. The CO stated:

Specifically, the employer failed to enter the date of the second Sunday advertisement on Section I-12; the response provided for Section J/Question 13 is invalid. Although this question requests the year (example 2007) the alien completed their education, the employer indicated “high school” as the response; alien has the work experience was not entered on J-18; the advertisements on I-10 did not occur within the allowable time stated in 656.17(e) (at least 30 days, but no more than 180 days from the date the application was filed); Section H-

18A does not indicate a live-in contract has been executed between the employer and alien; the prevailing wage expiration date at Section F-8 is less than 90 days or more than 1 year from the determination date; and Section K does not indicate when/where the alien gained 3-6 months experience in the job offered. In addition to the above, the employer indicated in Section I/Question 6 the date June 2003. The start date for the SWA job order is greater than 180 days from the case filed date and there was no end dater for the Job Order on I-7.

(AF 1). The Employer's request for reconsideration did not provide any explanation for the omissions on ETA Form 9089. Therefore, the CO concluded that the denial reasons remained valid. This matter was forwarded to BALCA on September 4, 2007 and a Notice of Docketing was issued on September 18, 2007. The CO filed a timely brief. The Employer filed a Statement of Intent to Proceed with the appeal, but did not file an appellate brief.

DISCUSSION

We affirm the CO's denial of certification. Certification will be denied where an employer submits an incomplete ETA Form 9089 for review and fails to correct extensive and material omissions when offering documentation to establish compliance with the regulations. *Bushman Associates Inc.*, 2007-PER-00014 (Mar. 8, 2007). The regulations at 20 C.F.R. § 656.17(a) require that an "employer who desires to apply for a labor certification on behalf of an alien must file a complete 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 "incomplete applications will be denied." 20 C.F.R. § 656.17(a). In the instant case, the Employer offered an incomplete ETA Form 9089. The Employer's omissions on ETA Form 9089 were extensive and material. Moreover, the Employer failed to correct her omissions by offering documentation in her request for reconsideration to correct or establish compliance with the regulations.

An employer must complete all recruitment efforts at least 30 days but not more than 180 days before the ETA Form 9089 is filed. 20 C.F.R. § 656.17(e)(2). In the

instant case, the Employer's application indicated that the advertisement used for her recruitment efforts did not occur within the allowable time stated in Section 656.17(e). Specifically, the application states on Section I-10 that the first advertisement was on "06/01/2003", however, the application was filed on October 18, 2005. Hence, recruitment efforts occurred more than 180 days before the application was filed. In addition, the Employer did not enter the date of the second Sunday advertisement on Section I-12. (AF 26). More particularly, Section 656.17(e) requires an employer to place a SWA job order at least 30 days but not more than 180 days before the filing of ETA Form 9089. Here, the application was accepted for processing on October 18, 2005 (AF 1 and 19) and the application states that the SWA job order was placed on "06/01/2003" (AF 25), which is more than 180 days before the application was filed. Moreover, the Employer provided no end date for this SWA job order on I-7. (AF 25). The Employer's request for review failed to establish compliance with Section 656.17(e). Based on the Employer's application and request for reconsideration, the CO reasonably concluded that the Employer's recruitment efforts and the placement of the SWA job order took place more than 180 days before the application was filed.

An alien beneficiary must meet the actual minimum requirements necessary to perform the job offered. Section 656.17(i). In the instant case, the Alien's qualifications listed in Section J of ETA Form 9089 did not meet the actual minimum requirements provided by the Employer on ETA Form 9089. The Employer's response to Section J/Question 13 was "high school" which is invalid because this question requests the year that the alien completed his or her education (example 2008). The Employer failed to indicate that the Alien has the necessary work experience on Section J-18. (AF 27). Moreover, the Employer also failed to indicate when and where the Alien gained the 3-6 months of experience in the job offered on Section K. (AF 27-28). The Employer, in her request for reconsideration, failed to establish compliance with Section 656.17(i). Based on the invalid response on Section J and the omissions on Section J-18 and Section K, the CO reasonably concluded that the Employer's application indicated that the Alien did not meet the Employer's actual minimum requirements.

An employer filing an application for a live-in household domestic service worker must provide, in the event of an audit, documentation which must include an executed employment contract. 20 C.F.R. § 656.19. In the instant case, the Employer failed to produce an executed employment contract. The Employer's application indicated that the job opportunity was for a live-in household domestic service worker. However, Section H-18A did not indicate that a live-in contract had been executed between the Employer and Alien. (AF 25). Based on the Employer's failure to produce an executed employment contract and failure in her request for reconsideration to offer documentation to establish compliance with Section 656.19, the CO reasonably concluded that the Employer's application indicated that no employment contact had been executed.

The expiration date for the prevailing wage can not be less than 90 days or more than 1 year from the date that the prevailing wage determination was made. Section 656.40(c). In the instant case, the prevailing wage expiration date on Section F-8 is "09/30/2008" and the prevailing wage determination date on Section F-7 was "10/01/05". Based on Section F-8 and Section F-7, the expiration date of the prevailing wage was more than 1 year from the date the determination was made. The Employer, in her request for reconsideration, failed to establish compliance with Section 656.40(c). Therefore, the CO reasonably concluded that the Employer's application was not in compliance with Section 656.40(c).

In sum, it is patent that the Employer did not file a complete ETA Form 9089. In addition, the Employer, in her request for reconsideration, did not address the above grounds upon which the CO denied her application. Furthermore, the Employer did not present documentation to correct or establish compliance with the applicable regulatory provisions. The applicable regulatory provisions at 20 C.F.R. §§ 656.17(a), 656.17(e), 656.17(i), 656.19, and 656.40(c), are explicit. Accordingly, the CO properly denied 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.