

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 12 June 2007**

**BALCA Case No.: 2007-PER-00028**  
ETA Case No.: C-05089-00344

*In the Matter of:*

**PERFORMANCE IMPROVEMENT FOR INDUSTRY, INC.,**  
*Employer,*

*on behalf of*

**RICHARD ARLEN LUSSIER,**  
*Alien.*

Certifying Officer: Dominic Pavese  
Chicago Processing Center

Appearances: Robert Young, President  
*Pro Se or the Employer*

Gary M. Buff, Associate Solicitor  
Harry L. Sheinfeld, Counsel for Litigation  
Vincent C. Costantino, Senior Trial 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.<sup>1</sup>

## **BACKGROUND**

The Employer filed an application for permanent alien labor certification on April 27, 2005, for the position of Senior Technical Illustrator. (AF 11-21). The application indicated that that a job order had been placed with the State Workforce Agency (SWA) from February 2, 2005 through February 28, 2005. (AF 14). The CO denied certification on July 19, 2005, on two grounds, one of which was that a job order had not been placed with the SWA serving the area of intended employment for a period of 30 days, in violation of 20 C.F.R. § 656.17(e). (AF 8-10).

On August 12, 2005, the Employer's President wrote to the CO stating that he had tried to contact the Chicago Processing Center to find out how to be in compliance with this issue, and having not received a reply, placed a new job order with the SWA for the period from July 29, 2005 through August 30, 2005. (AF 4). The Employer attached to its letter a copy of a web page indicating that a SWA job order had been posted from July 29 to August 29, 2005. (AF 5-6).

On March 22, 2006, the CO sent an e-mail to the Employer indicating that reconsideration would not be granted, and that its options were to withdraw the request for reconsideration and file a new application, or continue with an appeal to BALCA. (AF 3). The e-mail noted that if a reply was not received in five business days, the matter would be forwarded to BALCA. (AF 3). The Employer apparently never responded to this e-mail.

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<sup>1</sup> 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).

On March 28, 2007, the CO issued a letter formally denying reconsideration. (AF 1-2). The CO accepted the Employer's explanation for one of the two grounds stated in the July 19, 2005 denial, but found that the Employer had not cured the SWA job order issue. The CO noted that the original SWA job order had a duration of less than 30 days, and wrote: "The employer has not cured this deficiency by providing evidence that it placed a 30-day SWA job order at least 30 days prior to submitting the application. A new job order, placed after this application was filed, can only be used to support a subsequent filing." (AF 1). The CO then forwarded the matter to this Board.

The Board issued a Notice of Docketing on April 3, 2007. The CO filed an Appellate Brief urging affirmance of the denial. The Employer did not file a brief.

## DISCUSSION

The regulation at 20 C.F.R. § 656.17(e)(3) 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 done 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.<sup>2</sup>

The Employer's original application was based on a SWA job order that lasted less than 30 days. The Employer's new SWA job order did not cure the error because it did not occur at least 30 days prior to the filing of the application.<sup>3</sup> Consequently, 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

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<sup>2</sup> The CO's Appellate Brief cites 20 C.F.R. § 656.17(e)(2)(i), which is the SWA job order requirement for non-professional positions. (CO's Brief at 3.) The Form 9089, however, indicates that this was an application for a professional position. (*See AF 14, Item I.a.1.*) In any case, the requirements of a mandatory 30 day SWA job order at least 30 days prior to the filing of the application are the same for both professional and non-professional positions.

<sup>3</sup> *See also* 20 C.F.R. § 656.24(g)(2) (a request for reconsideration cannot include evidence not previously submitted).

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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.