

U.S. Department of Labor

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

BALCA No.: 2007-PER-00035
ETA No.: C-05304-48176
In the Matter of:

RICHMOND PRINTING LLC,
Employer,

on behalf of

MARIA FELIX RAMOS-LOPEZ,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: George R. Willy Esquire
Sugar Land, Texas
For the Employer

Gary M. Buff, Associate Solicitor
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.¹

BACKGROUND

The Employer filed an ETA Form 9089 on November 8, 2005 seeking permanent alien labor certification on behalf of the Alien for the position of "Bindery Leadperson." (AF 15). The Certifying Officer (CO) denied the application on November 17, 2005 on two grounds, one of which was that advertisements used for the recruitment did not occur within the allowable time specified in 20 C.F.R. § 656.17(e), *i.e.*, at least 30 days, but no more than 180 days, before the filing of the application. The second ground was that the expiration date for the prevailing wage was either less than 90 days or more than one year from the date the prevailing wage determination was made, in violation of 20 C.F.R. § 656.40(c). (AF 11-13).

By letter dated November 21, 2005, the Employer requested BALCA review and reconsideration by the CO. (AF 4-5). In regard to the timing of the recruitment issue, the Employer argued:

The case was ready to file prior to November 8, 2005, however, there was difficulty getting into and out of the online system. The system would prompt: 'your session has ended,' even though we did not end the session. This happened numerous times two (2) weeks prior to when the labor certification was filed and because of this complication there was a slight delay in filing the application in accordance to calendar days. This delay was only a matter of four (4) **calendar** days. Four days which would cause the sponsor and alien the hardship of filing another case and the costs associated with it. If we go by business days, this application was filed in 128 business days, which is under the 180-day requirement. 20 CFR 656.17(e) states that: Mandatory recruitment steps must be conducted at least 30 days but no more than 180 days before the filing of the PERM

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).

application. ***However, this rule does not signify whether this is calendar or business days.***

The permanent online system is fairly new and imperfect. Because of this, there are bound to be delays as every party is trying to work with the system and follow all directions in the appropriate manner. If this case is going to be judged by calendar days, we humbly request your due discretion and consideration upon the fact that there were circumstances with the permanent online system which were beyond our control.

This labor certification case was followed to the tee with deliberation and good faith recruitment. We urge that you take this into consideration and weigh the consequences for the employer and alien.

(AF 5) (emphasis as in original). The Employer also argued that the expiration date for the prevailing wage shown on the ETA 9089 was wrong because of a clerical typographical error. The Employer submitted a copy of the State Workforce Agency's prevailing wage determination to establish the correct expiration date. (AF 8).

In a letter dated April 3, 2007, the CO accepted the Employer's explanation in regard to the expiration date for the prevailing wage, but found that the timing of the recruitment was a valid ground for denying the application. (AF 1-2). Specifically, the CO found that the first Sunday newspaper advertisement occurred on May 8, 2005, which was more than 180 days before the ETA Form 9089 filing date of November 8, 2005. The CO then forwarded the application to BALCA. (AF 1-2).

The Board issued a Notice of Docketing on April 24, 2007. On May 15, 2007 the Board received a Statement of Position from the CO stating that the facts supporting the CO's denial were readily apparent in the Appeal File. Counsel for the Employer filed an appellate brief on May 24, 2007, arguing that the filing of the application four calendar days beyond the date at which the recruitment was no longer within the regulatory time frame should be forgiven as a matter of fundamental fairness, citing *HealthAmerica*, 2006-PER-1 (July 18, 2006)(en banc). Counsel also reiterated the arguments made in the Employer's motion for reconsideration/request for review.

DISCUSSION

Among other requirements, most employers applying for permanent alien labor certification are required to have conducted recruitment by placing a job order with the appropriate State Workforce Agency, and by running a print advertisement. These mandatory recruitment steps must occur at least 30 days, but no more than 180 days, before the filing of the application. *See* 20 C.F.R. §§ 656.17(e)(1)(i), 656.17(e)(2). In the instant case, the Employer does not dispute that its first newspaper advertisement occurred 184 calendar days prior to the filing of its application, but argues that it would be unfair to deny the application because it was having difficulty filing the application online in the weeks prior to the actual filing.

While the Employer may have experienced difficulty with the then new on-line PERM filing system timing out its sessions, its argument that such difficulty should excuse its failure to file in time to prevent its recruitment from becoming stale is not so compelling as to find that the CO abused his discretion in refusing to waive the 180-day requirement. *See, e.g., Augusta Bakery*, 1988-INA-297 (Jan. 12, 1989) (en banc) (CO did not abuse his discretion in a case arising under the pre-PERM regulations in refusing to consider an untimely rebuttal). The Employer does not claim that it was actually prevented from filing its application in time to preserve the timeliness of its recruitment efforts. Nor does the Appeal File contain any evidence that the Employer attempted to contact the CO about the problem, or made an effort to use an alternative means of filing, such as filing by mail. Unlike *HealthAmerica, supra*, the Employer's error was not a mere typographical error misreporting a date that actually was in compliance with the applicable regulation.² Rather, the Employer's recruitment was four days overage by the time it filed the application. Short of evidence that the PERM on-line system prevented a timely filing or made it unreasonably difficult to perfect such a filing, we find that the CO

² We observe by way of comparison that the CO accepted in the instant case the Employer's documentation showing that the Employer had made a typographical error regarding the expiration of the prevailing wage determination. That circumstance is similar to *HealthAmerica*.

did not abuse his discretion in refusing to reconsider the denial based on the Employer's excuse that the on-line system had been timing it out.

The Employer also contended that section 656.17(e) should be interpreted to permit an employer's recruitment to have occurred within 180 "business" days of the filing of the application. We find this contention to be untenable. This Board has followed the standard rule of regulatory interpretation that words in regulations are to be given their ordinary and commonly understood meaning, unless a contrary meaning is clearly intended. *See Marion Graham*, 1988-INA-102 (Feb. 2, 1990) (en banc). There is no apparent reason to interpret section 656.17(e) as meaning that business rather than calendar days were intended when referring to the acceptable time frame of mandatory recruitment steps. Moreover, in the one instance where the PERM regulations reference business days, it is clearly stated. *See* 20 C.F.R. § 656.10(d)(ii).

Accordingly, we affirm the CO's denial of the application under 20 C.F.R. § 656.17(e)(2).

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.