

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 27 June 2007**

**BALCA No.:** 2007-PER-00037  
**ETA No.:** C-06163-27065

*In the Matter of:*

**SPECTRUM FOODS, INC.**  
**d/b/a**  
**PREGO RISTORANTE,**  
*Employer,*

*on behalf of*

**MARIO GUADALUPE**  
**CORTES-MELGOZA,**  
*Alien.*

**Certifying Officer:** Dominic Pavese  
Chicago Processing Center

**Appearances:** Hope Villasenor, Human Resources/Risk Management Manager<sup>1</sup>  
Irvine, California  
*Pro se for the Employer*

Gary M. Buff, Associate Solicitor  
Harry L. Sheinfeld, Counsel for Litigation  
R. Peter Nessen, 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

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<sup>1</sup> Moza Yontov, Paralegal, was listed as the Employer's representative in the ETA Form 9089. However, the Employer's request for reconsideration was filed by the Employer's Human Resources/Risk Management Manager.

## **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>2</sup>

### **BACKGROUND**

The Employer filed this application for permanent alien labor certification for the position of Restaurant Cook on April 10, 2006. (AF 19, 20).<sup>3</sup> On July 19, 2006, the Certifying Officer (CO) issued a denial determination based on six grounds. (AF 6-8). Three grounds were later successfully rebutted. One of the grounds not successfully rebutted was that a selection was not made on the Form 9089 for Section J-13 (year that relevant education completed). The other two grounds not successfully rebutted were that the first and second advertisements used for the recruitment did not occur at least 30 days, but no more than 180 days from the date the application was filed, in violation of 20 C.F.R. § 656.17(e).

By a letter dated August 7, 2006, the Employer's representative requested reconsideration. (AF 4-5). The Employer's representative responded with a correction for Section J-13, stating that the answer should be "7<sup>th</sup> grade." (AF 4). Regarding the issue of the date of the advertisements, the Employer requested that it be given the opportunity to repeat its recruitment efforts while preserving the Alien's priority date. (AF 5).

On December 18, 2006 (AF 3), the CO sent an e-mail to the Employer's representative indicating that reconsideration had been denied by the CO, and that the

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<sup>2</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).

<sup>3</sup> AF refers to the Appeal File.

Employer's options were to (1) withdraw the request for reconsideration/request for review and file a new application or (2) continue with an appeal to BALCA. The Employer's representative did not respond to the e-mail.

On April 4, 2007, the CO issued a letter formally denying reconsideration and forwarding the matter to this Board. (AF 1-2). In this letter, the CO rejected the Employer's correction to Section J-13 since the Employer did not provide the calendar year of the qualifying education completion. The CO also denied the Employer's request for repetition of recruitment efforts.

The Board issued a Notice of Docketing on April 24, 2007. The Board did not receive a statement of position or a brief from the Employer in response. The Board received a brief from the CO on May 30, 2007. The CO argued that the Employer's request to re-advertise while keeping its filing date had two problems:

First, there is no authority in the regulations allowing an employer to re-advertise and keep its priority date. Second, any recruitment done now, after the filing, would clearly be in violation of 20 C.F.R. § 656.17(e)(2), as the recruitment would clearly not take place "at least 30 days . . . before the filing of the application."

(CO's Brief at 2). The CO also argued that the correction to Section J-13 provided by the Employer was inadequate for the CO to review the Alien's completed education.

## **DISCUSSION**

Regarding the issue involving Section J-13, the Employer clearly did not complete the application according to the instructions. In "ETA Form 9089 – Instructions," the directions for J-13 state explicitly state "Enter the year the relevant education was completed by the alien. Enter the year in yyyy format." The Employer's later correction of "7<sup>th</sup> grade" did not provide the CO the information he needed about the date of completion of the Alien's education. This information is required by 20 C.F.R § 656.17(i)(3), which states:

If the alien beneficiary already is employed by the employer,<sup>4</sup> in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer.

The purpose of this requirement is so the CO can determine whether the Alien had the necessary education to qualify for the position before he started working for the Employer. Without information about the year of completion, the CO could not verify the date the Alien met the educational requirements. The answer of "7<sup>th</sup> grade" does not inform the CO of when the Alien completed the relevant education.

Regarding the issue involving the improper advertising dates, the Employer does not dispute in the motion for reconsideration that it had placed the advertisements more than 180 days prior to the date of the application, and therefore not within the required time period. The Employer instead asks for leniency, requesting that it be given the chance to repeat recruitment efforts and re-advertise. The Employer also asks that the Alien's priority date be preserved while the Employer re-advertises.

A CO is under no obligation to permit an employer whose application is not supported by recruitment documentation meeting the timing requirements of 20 C.F.R. § 656.17(e)(2) to conduct a new recruitment after filing of the application. In fact, permitting the Employer to fix deficiencies in its application after it has been filed, yet retain the priority date, would conflict with the intentions set forth in the ETA's Final Rule, which reads:

*3. Filing Date and Refiling of Pending Cases to New System*

\* \* \*

*a. Filing Date*

\* \* \*

In the preamble to the NPRM (see 67 FR at 30470), we stated

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<sup>4</sup> In this case, the Alien has been working for the Employer since June 1, 1990. (AF 24).

applications that are not accepted for processing will not be date-stamped to minimize the administrative burden and to discourage employers from filing incomplete applications merely to obtain a filing date. We do not believe it is unreasonable to require the employer to enter all required information on the application form. Further, employers could immediately refile any application that is rejected for processing, so any delay in obtaining a filing date will be minimal and largely in the employer's control.

*ETA, Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 69 Fed. Reg. 77326, 77353 (Dec. 27, 2004). To allow employers to file incomplete or deficient applications, knowing that they can later fix or complete them – while keeping the same priority date – might encourage employers to file such applications simply to lock-in a priority date.

Moreover, the regulation at 20 C.F.R. § 656.17(e)(2) also requires that the advertisements be completed at least 30 days before filing. As the CO stated in his brief, any recruitment efforts after the application has already been filed would violate this part of the regulation.

Accordingly, we find that 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.