

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 December 2007

In the Matters of:

SUBHASHINI SOFTWARE SOLUTIONS,

Employer,

on behalf of

**PHANI BABU
JOSYULA,**

BALCA No.: 2007-PER-00043

ETA Case No.: C-05294-45367

**SRINIVAS RAO
VYDHYA,**

BALCA No.: 2007-PER-00044

ETA Case No.: C-05294-45092

and

**SUDHAKAR
NARAPARAJU,**

BALCA No.: 2007-PER-00046

ETA Case No.: C-05293-44604

Aliens.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Rahul V. Reddy, Esquire
Houston, Texas
For the Employer

Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
Vincent C. Costantino, Senior Trial Attorney (in 2007-PER-43)
R. Peter Nessen, Attorney (in 2007-PER-44 and 46)
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

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

These appeals arise 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 In these appeals, the Certifying Officer (CO) returned the Employer's original applications for permanent alien employment because they were not on an ETA Form 9089 bearing an official DOL logo. By the time that the Employer re-submitted the applications using forms bearing the logo, its recruitment steps had been conducted more than 180 days before the date the applications were filed. Thus, the applications were denied based on failure to comply with 20 C.F.R. § 656.17(e). The Employer requested that the CO reconsider and use the date of receipt of the original applications as the date of filing. The CO, however, denied reconsideration, and the Employer sought review by this Board. Because the same or substantially similar evidence is relevant and material to these three appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11. We reverse and grant certification.

BACKGROUND

The Employer submitted by regular mail applications for permanent alien labor certification for the position of Computer and Information Services Manager. (AF1 44; AF2 58; AF3 25).² The CO date-stamped the Employer's attorney's cover letter on

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).

² AF1 refers to the Appeal File in the Josyula application. AF2 refers to the Vydhya application. AF3 refers to the Naraparaju application.

October 11, 2005. It does not appear that the CO date-stamped the applications themselves.³ Rather, the CO returned the applications to the Employer unprocessed because the applications were found to be draft applications lacking the DOL logo.

The Employer resubmitted the applications, and they were accepted for processing on October 19, 2005. (AF1 42; AF2 38; AF3 1). On October 25, 2005 (AF3 6-8), and November 23, 2005 (AF1 23-25; AF2 38-40), the CO issued denial determinations. A common ground for denial of the applications was that the additional recruitment steps the Employer took for hiring for professional occupations were conducted more than 180 days before the date the application was filed, in violation of 20 C.F.R § 656.17(e).⁴

The Employer's representative then requested review by BALCA. (AF1 5; AF2 5-6; AF3 4-5). The Employer argued:

The additional recruitment step under 656.17(e) was not conducted more than 180 days before the date the application was filed. This application was filed on October 11, 2005 as demonstrated by the date stamp on the enclosed ETA Form 9089. The application filed on October 11, 2005 was returned because it did not contain the DOL logo. We submitted the same application on the proper ETA 9089 form and requested at that time that the filing date of the application be deemed October 11, 2005.

(AF1 5; AF2 5; AF3 5-6). The Employer argued that the application filing date was October 11, 2005, when the application was first received by the CO.

On April 20, 2007 (AF1 1-2; AF2 1-2; AF3 1-2), the CO issued letters denying

³ Only one of the Appeal Files contains a copy of the original submission. In Case No. 2007-PER-44, the Employer's attorney attached a copy of the original application as an Exhibit to the Employer's motion for reconsideration. The cover letter was date stamped by the CO (AF2 9), but the application itself was not. (AF21 10). In the place where the DOL logo normally appears, the application contains a ^ symbol.

⁴ The CO raised additional deficiencies regarding all three applications, but accepted the Employer's contentions in regard to those additional deficiencies on reconsideration.

reconsideration and forwarding the matters to this Board. In these letters, the CO rejected the Employer's argument that the additional recruitment steps were not late, and asserted that the priority date is assigned to the ETA Form 9089 when the form is accepted for processing, which in these cases was October 19, 2005.

The Board issued Notices of Docketing on May 11, 2007. The Employer submitted "Statements of Intent to Proceed," but did not submit any additional legal argument.⁵ The Office of the Solicitor submitted briefs on behalf of the CO in all three appeals. The CO argued that an ETA Form 9089 without a DOL logo does not comply with the regulation at section 656.17(a) and was properly returned to the Employer. Moreover, the CO argued that pursuant to section 656.17(c), the filing date is equated with the date on which the CO accepted the application. Addressing what may seem like a minor error, the CO wrote:

The CO recognizes that, but for Subhashini's filing of [an] incorrect form, the recruitment documented at Section I-16 would have complied with § 656.17(e)(1)(i). This situation underscores the importance of using the official ETA Form 9089. The fact that the absence of the DOL logo may seem like a minor deficiency is o[f] no import. Once it became clear, through the absence of the logo, that the official form was not being used, the Certifying Officer was under no obligation to parse the form to find other potential deficiencies. That would place an unwarranted administrative burden on the system and require virtually impossible line-drawing as to what departures from the required form will be permitted.

CO's Brief in Case No. 2007-PER-46, at n.3. The same argument was made in the CO's Brief in Case No. 2007-PER-43, at n.4 and Case No. 2007-PER-44, at n.4.

DISCUSSION

In the instant appeals, the Employer's recruitment would have been timely if the date that the applications were originally received by the CO was considered to be the

⁵ We note that Notices of Docketing mailed to Srinvas Vydhyia and Sudhakar Naraparaju were returned as undeliverable by the U.S. Postal Service.

filing date. The recruitment, however, was stale by the time that the applications were re-submitted. We find that, under the precise circumstances of these cases, fundamental fairness mandates that the Employer be permitted to have the applications processed as if they were filed when first received by the CO, and therefore to preserve the timeliness of its recruitment efforts under 20 C.F.R. § 656.17(e).

In *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), the Board held that the CO should have reconsidered the denial of a PERM application based on a pro forma computer check indicating that the employer had not complied with the two-Sunday publication rule where newspaper tear sheets conclusively established that the apparent violation was merely an unintentional typographical error on the Form 9089. In *HealthAmerica*, the Board listed factors that convinced it that fundamental fairness and procedural due process compelled vacating the denial based on the purported violation of the publication rule. We find that a number of those same or similar factors are also present in the instant cases.

First, although we acknowledge that requiring an agency to give notice of the impropriety of every potential error may be expecting too much, we find that the notice of the logo requirement was inadequate in the instant case. On the record before us, we find that the first time that the Employer became aware that its applications would be rejected based on the absence of the DOL logo was when the CO returned the applications unprocessed. We find no support for the CO's assertion that a Form 9089 submitted without a DOL logo does not comply with the regulation at section 656.17(a). The regulation at 20 C.F.R. § 656.17(a) states only that "an employer who desires to apply for a labor certification on behalf of an alien must file a completed Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089).... Incomplete applications will be denied." This regulation does not state that a DOL logo must appear on the form being used. Moreover, we have also reviewed the instructions to ETA Form 9089 and the accompanying FAQs, and find no instructions or directive mandating that a DOL logo appear on forms that are mailed into the CO rather than submitted through ETA's on-line system. Thus, the CO's refusal to process applications

not bearing a DOL logo is not grounded in any explicit regulatory or interpretative requirement of which we are aware.⁶

Second, the Employer presented the cover letters to the original submissions showing that the CO date-stamped the cover letters on October 11, 2005 – a date on which the Employer’s recruitment documentation would have been in compliance with the timing requirements of the PERM regulations. Thus, they conclusively establish that the employer’s recruitment would be timely, but for the error in using applications not bearing a DOL logo.

Third, there is no reason to find that the Employer’s documentation was an after-the-fact fabrication. Moreover, there is no evidence that the Employer was misrepresenting its applications or acting in bad faith. The CO presented no evidence that the applications were in any way deficient except for the absence of DOL logos on the printed pages.

Finally, in this case, as in *HealthAmerica*, the denial of reconsideration would be an injustice and would not satisfy the requirements of due process. The consequences to the Employer were out of proportion to the mistake. To deny labor certification for such an error would be to elevate form over substance, to lose perspective of the relative weight of the offense compared to the consequences to the petitioning Employer, and to offend the concept of fundamental fairness.

⁶ The CO’s refusal to accept the applications for processing, therefore, appears to be grounded in policy – essentially that without a DOL logo, the CO cannot know whether an official form was used and whether it might contain other potential deficiencies. But we are not finding that the CO improperly refused to process the original applications. Rather, our focus is on whether the CO improperly refused to reconsider the denials once the Employer presented proof that its recruitment would have been timely, but for its error in submitting applications not bearing the DOL logo.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denials of labor certification in the above-captioned matters are **REVERSED**.

For the panel:

A

PAMELA LAKES WOOD
Administrative Law Judge

JOHN M. VITTONI, Chief Administrative Law Judge, dissenting.

I respectfully dissent. Without a DOL logo on the applications, it was reasonable for the CO to conclude that they were not on official Department of Labor ETA Form 9089. Since the DOL logo is an integral part of the application, the applications without the logo were incomplete under 20 C.F.R. § 656.17(a), and thus properly automatically denied.⁷

The Employer's argument that it should be permitted to use the October 11, 2005 attempted filings for purposes of gauging compliance the timing of recruitment requirements specified under section 656.17(e), is essentially a plea for equitable relief. I recognize that the denials of the applications based on the non-conforming forms resulted in the Employer's recruitment becoming stale, and a need for the Employer to conduct a new recruitment to support new applications. I also recognize that this is a heavy burden for what may have been an innocent mistake. However, I agree with the CO that it would

⁷ In *Café Vallarta*, 2007-PER-29 (June 12, 2007), this panel ruled that under 20 C.F.R. § 656.17(c), "an application not submitted electronically is deemed filed on the date on which the ETA Processing Center applied its date stamp memorializing receipt of the application." In the instant cases the applications were submitted by mail rather on-line. The CO did not actually date stamp the original, non-conforming applications, but only the attorney's cover letter. In *Café Vallarta*, we carefully reviewed the regulatory history of section 656.17(c), and found that the intent of the final rule was that "incomplete" applications will be "denied" and not processed.

place an unwarranted burden on the CO to review non-official forms to ensure that they accurately duplicate the official ETA 9089 form. Moreover, I agree with the CO that if such an error was forgiven, it would be difficult to define what departures from the required form will be permitted.

I believe that *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), is distinguishable. Simply put, an obvious typographical error cannot be equated with failure to use the official ETA 9089 form. Unlike *HealthAmerica* where the Employer produced evidence to establish actual compliance with the regulations at the time of the filing of its application, in the instant cases the Employer used non-official forms to file the applications, and thus cannot establish that it was actually in compliance with section 656.17(a) insofar as it did not use the Department of Labor's ETA Form 9089. Thus, I would affirm the CO's denials of labor certification.

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.