

U.S. Department of Labor

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

BALCA Case No.: 2007-PER-00099
ETA Case No.: A-06009-72706

In the Matter of:

GOLDEN BRIDGE RESTAURANT LLC,
Employer,

on behalf of

CANHAO WU,
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Clement Ng
Pro se 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 In this case, the Employer filed an application for permanent alien labor certification for the position of Restaurant Cook. (AF 7-16). The Certifying Officer (CO) accepted the application for processing on January 9, 2006. (AF 1). The ETA Form 9089 indicated at Items I.c.6. and I.c.7. that a State Workforce Agency (SWA) job order was started on December 1, 2005 and ended on December 30, 2005. (AF 10).

On January 26, 2006, the CO issued a letter denying the application because it was filed less than 30 days after the end of the job order placed with the SWA in violation of 20 C.F.R. § 656.17(e). (AF 4-6).

By letter dated February 15, 2006, the Employer requested review. (AF 3). The Employer confessed to making an inadvertent mistake in submitting the application too early, but sought a grant of certification on the ground that 45 days had now passed without any success in finding applicants. (AF 3).

The CO denied reconsideration in a letter dated July 13, 2007, and forwarded the matter to BALCA as an appeal. (AF 1-2). BALCA docketed the appeal on August 2, 2007, and issued a notice of docketing on August 16, 2007. The Employer submitted an appellate brief, which was received by the Board on August 31, 2007. The Employer reiterated that it believed it had only made an “inadvertent technical mistake,” that it never received any resumes or inquiries for the job resulting from the SWA job order, that it had advertised the job in the New York Times for two consecutive Sundays, and that it never intended to violate any rules or regulations or block any qualified U.S. citizen or resident from applying.

The CO submitted a letter brief, which was received by the Board on September 19, 2007. The CO argued that the fact that over 45 days had now passed from the end of

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).

the SWA job order did not remedy the deficiency with the application, citing *Luyon Corp.*, 2007-PER-27 (June 12, 2007).

DISCUSSION

The regulation at 20 C.F.R. § 656.17(e) 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:

* * *

(2) *Nonprofessional occupations.* If the application is for a nonprofessional occupation, the employer must at a minimum, place a job order and two newspaper advertisements within 6 months of filing the application. The steps must be conducted at least 30 days but no more that 180 days before the filing of the application.

(i) *Job order.* Placing 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 serve as documentation of this step.

Thus, the placement of a job order with a SWA is mandatory; it must have been completed 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. The start and end dates of the job order must be entered on the ETA Form 9089 to document the timing of the SWA job order.

The Employer conceded that it submitted its application too soon after the end of the SWA job order, but essentially argues that it should be forgiven this error because, as it turned out, the SWA job order did not produce any qualified candidates, and it otherwise complied with the regulations.

A similar argument was made by the employer in *Luyon Corp.*, 2007-PER-27 (June 12, 2007), which argued that it had made a harmless clerical error when it

submitted the application only three days after the end date for the SWA job order. In that case, the employer also argued that, because the CO had not issued a denial until too late to preserve the timeliness of its recruitment effort, due process mandated that the application be granted. The panel rejected the employer's argument, holding that filing an application prior to 30 days after the end of the SWA job order was not a mere clerical error, but a substantive violation of the regulation at 20 C.F.R. § 656.17(e)(1)(i).

The regulatory history of section 656.17(e) indicates that the requirement that the application be filed at least 30 days after the end of the mandatory recruitment steps was purposeful -- to ensure that "employers make a current and complete test of the labor market..." ETA, Proposed Rule, Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"], 20 CFR Part 656, 67 Fed. Reg. 30466, 30471 (May 6, 2002).² In her letter denying reconsideration, the CO explained that the purpose of the regulation is to ensure that "the employer has sufficient time to receive resumes, make contact with any applicant(s), conduct interviews, and make decisions regarding any U.S. applicants who may have applied for the job opportunity in response to the recruitment effort." (AF 1).

In other words, filing before the end of the 30 day period reflects an employer's indifference to whether U.S. applicants are given adequate consideration for the job opportunity. The requirement is not a mere formality, but reflects ETA's judgment that employers should take time and care in finalizing their recruitment. Moreover, if BALCA were to hold that applications could be certified once the 30 day period has expired and no qualified U.S. applicants are referred, it would essentially write section 656.17(e)(1)(i) out of the regulations, and add an administrative burden on the CO to accept and review inchoate applications.

The Employer clearly violated 20 C.F.R. § 656.17(e)(1)(i) by submitting the application too early. The fact that once the 30 day period expired, it appeared that no

² In contrast, "[u]nlike the mandatory steps, one of the additional recruitment steps may consist solely of activity that takes place within 30 days of the filing of the application." 67 Fed. Reg. at 30471.

harm was occasioned by the Employer violation is insufficient to excuse the violation. Thus, we affirm the CO's denial of labor 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.