



Issue Date: 17 July 2009

BALCA Case No.: 2008-PER-00247
ETA Case No.: C-05275-38257

In the Matter of:

MEDICAL CARE PROFESSIONALS, INC.,
Employer,

on behalf of

VIOLA GAGUI,
Alien.

Certifying Officer: William Carlson
Chicago Processing Center

Appearances: Arthur Evangelista, Esquire
Evangelista & Oliverio
San Bernardino, California
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, Vittone and Wood**
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

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. In this case, certification was granted. However, the Certifying Officer ("CO") based the date of acceptance for processing on the date of filing of the Employer's PERM application, rather than the date of the filing of the Employer's earlier pre-PERM application, which had been withdrawn and re-filed as a PERM application. The determination of the date of filing is important because it is considered the Alien's priority date when filing a visa petition.

BACKGROUND

The Employer – a professional nursing agency – filed a pre-PERM ETA Form 750A application for permanent alien labor certification on August 14, 2002 for the position of "Certifying Nursing Assistant." (AF 41-42). Neither the State Workforce Agency nor the Certifying Officer assigned an Occupational Code or Occupational Title to the position. (AF 41). The job duties were:

Render nursing care to patients in private homes, under physician's direction. Observe symptoms, administer emergency measures, administer medications and injections, advise patient and family as to health information, maintain equipment and supplies, and cooperate with community agencies dealing with patient.

(AF 41). The offered rate of pay was \$10 per hour. The Employer required a high school education, and two years of experience in the job offered or two years of experience in the related occupation of "Nursing Assistant." The address where the Alien was to work was stated to be "Various client locations."

On October 2, 2005, the Employer filed a Form 9089 under the PERM regulations for the same Alien for the position of "Caregiver," SOC/O*Net Code (OES) Code 31-1011.00. (AF 49-57). The job duties were:

Giving personal care to client [sic] in form of baths, oral hygiene, shampoo; changing of client bed & linens as needed; assist in preparing meals for and feeding client; meeting safety requirements for clients including reporting any significant changes to the supervising [sic] nurse; answering calls from clients; attending to client and nurse [sic] requests; observing client and reporting and documenting observations.

(AF 50). The offered rate of pay was \$12 per hour. (AF 49). The Employer required no education, and 36 months of experience in the job offered. (AF 49-50). The address where the Alien was to work was shown as the same as the Employer's street address.

The Dallas Backlog Elimination Center confirmed in a letter dated November 9, 2006, that the Employer had withdrawn the pre-PERM application prior to establishment of a job order. (AF 40).

On March 1, 2007, the CO issued a letter to the Employer denying certification. (AF 43-45). However, on March 14, 2007, the CO issued a second letter to the Employer granting certification. (AF 46-47). The letter granting certification listed the date the application was accepted for processing as October 2, 2005 – the date of the PERM application.

On July 15, 2008, the Employer sent a request for review of the assigned filing date to the Board of Alien Labor Certification Appeals ("BALCA"). (AF 3). BALCA forwarded the appeal request to the CO for processing under 20 C.F.R. § 656.26.¹ (AF 2). In the request, the Employer argued that it was entitled to retain the filing date of the pre-PERM application pursuant to 20 C.F.R. § 656.17(d), because the job opportunity was identical and it timely withdrew the pre-PERM application.

On September 29, 2008, the CO issued a letter of reconsideration, in which he found that the Employer was not entitled to retain the pre-PERM priority date because the applications were not identical. Specifically, the CO pointed out that the occupation titles

¹ The regulations contemplate that requests for review be filed with the CO whose denial decision is being contested rather than directly with BALCA.

and the rates of pay were different. (AF 1). The CO forwarded an Appeal File to BALCA.

On appeal, the Employer argued that the reason for the CO not allowing it to retain the priority date from the pre-PERM application was not revealed until the CO's letter of reconsideration. The Employer argued that despite the different titles, the job duties were the same, and that the difference in titles only reflected industry practice at the time of the filing of the pre-PERM application. The Employer argued that the increase in the wage offer only reflected an increase in the prevailing wage from 2002 to 2005.

The CO filed an appellate brief arguing that the difference in the occupation titles and wage offer were valid grounds for finding that the applications were not identical. The CO also noted other discrepancies in the applications, such as the education and experience required, and different descriptions of the job duties, which had not previously been raised.

DISCUSSION

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

(d) *Refiling Procedures.* (1) Employers that filed applications under the regulations in effect prior to March 28, 2005, may, if a job order has not been placed pursuant to those regulations, refile such applications under this part without loss of the original filing date by:

(i) Submitting an application for an identical job opportunity after complying with all of the filing and recruiting requirements of this part 656; and

(ii) Withdrawing the original application in accordance with ETA procedures. Filing an application under this part stating the employer's desire to use the original filing date will be deemed to be a withdrawal of the original application. The original application will be deemed withdrawn regardless of whether the employer's request to use the original filing date is approved.

(2) Refilings under this paragraph must be made within 210 days of the withdrawal of the prior application.

(3) A copy of the original application, including amendments, must be sent to the appropriate ETA application processing center when requested by the CO under § 656.20.

(4) For purposes of paragraph (d)(1)(i) of this section, a job opportunity shall be considered identical if the employer, alien, job title, job location, job requirements, and job description are the same as those stated in the original application filed under the regulations in effect prior to March 28, 2005. For purposes of determining identical job opportunity, the original application includes all accepted amendments up to the time the application was withdrawn, including amendments in response to an assessment notice from a SWA pursuant to § 656.21(h) of the regulations in effect prior to March 28, 2005.

In the instant case, the CO erred in basing the denial of the priority date partly on an increase in the wage offer. The regulation does not require the wage offer to be identical. Thus, we hold that an increase in a wage offer to reflect the prevailing wage when the PERM application is filed is not a reason to impose a loss of the pre-PERM filing date on the Employer.²

The CO correctly observed that the job titles were not identical. The original pre-PERM application, however, had not yet been assigned an occupational title or occupational code when it was re-filed under PERM. Based on the job duties, it appears that the occupational title assigned under the Dictionary of Occupational Titles would have been sufficiently similar to the O*Net-SOC title, 31-1011.00 “Home Health Aides” to conclude that the occupational titles had not changed.³

Thus, the reasons given by the CO for finding that the applications were not identical were inadequate grounds for denying retention of the priority date.

² We do not reach the issue of whether a decrease in the wage offer, or an increased offer that does not meet the current prevailing wage, would support a denial of retention of the pre-PERM application filing date.

³ See www.onetcodeconnector.org/ccreport/31-1011.00.

In his appellate brief, the CO for the first time pointed out additional discrepancies in the applications, such as the education and experience required, and different descriptions of the job duties. The regulations, however, provide that “[t]he request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based.” 20 C.F.R. § 656.26(a)(2). They also provide that “[t]he Board of Alien Labor Certification Appeals must review a denial of labor certification . . . on the basis of the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs submitted.” 20 C.F.R. § 656.27(c). Moreover, the Board has long recognized that an employer must be provided with adequate notice of the regulatory violations found. *See, e.g., Carlos Uy III*, 1997-INA_304 (Mar. 3, 1999) (en banc) (pre-PERM BALCA decision). *See also Loews Anatole Hotel*, 1989-INA-230 (Apr. 26, 1991) (en banc) (pre-PERM decision in which the Board held that the panel erred when it decided the case on a ground not cited by the CO, although within the scope of the cited regulation). Here, the Employer was not provided adequate notice of the additional discrepancies in the applications pointed out by the CO for the first time in his appellate brief, and those deficiencies did not form a basis for the denial of the earlier priority date. Therefore, the new grounds cannot be considered by the Board.⁴

Accordingly, because the grounds upon which the requested priority date was denied have been rebutted, we hold that the certification must be amended to allow the filing date to relate back to the date of the pre-PERM application.

⁴ For the same reason, the timeliness issue raised by the dissent cannot be considered, as it was not addressed by either party and the record on that issue does not appear to be complete. (*See, e.g., AF 56* (form “enclosed” with March 14, 2007 letter bears “9/29/2008” date)).

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer issue an amended labor certification bearing a filing date of August 14, 2002.

For the panel:

A

Pamela L. Wood
Administrative Law Judge

John M. Vittone, Chief Administrative Law Judge, dissenting.

I respectfully dissent on two grounds.

First, the regulation at 20 C.F.R. § 656.26(e)(4) provides that if an appeal is not taken within 30 days of the denial determination, the denial shall become the final determination of the Secretary. In *Raspberry Moon, Inc.*, 2007-INA-16 (June 12, 2007), this panel dismissed an appeal where almost one year had passed from the date that the CO "denied" use of the pre-PERM application's priority date, and the date that the Employer requested review. In the instant case, the CO granted certification bearing the PERM filing date on March 14, 2007. The Employer did not request review of the PERM filing date on the certification until July 15, 2008 – well over a year after the CO made the priority date determination. Thus, the time period for requesting BALCA review expired long before the Employer requested review. Under section 656.26(e)(4), the determination not to retain the priority date from the pre-PERM application became the final decision of the Secretary by operation of law when it was not timely appealed. The panel does not have the authority to reopen the issue now.

Second, assuming arguendo that grounds exist to reopen a final decision of the Secretary more than a year after-the-fact, the applications are plainly not identical within

the meaning of 20 C.F.R. § 656.17(d), and I do not believe that the CO's failure to specify the correct discrepancies in the ruling on reconsideration should estop the CO denying the earlier priority date.

I agree with the lead decision that the two grounds specified by the CO in the ruling on reconsideration – differences in the wage rates and in the job titles – were unsupportable reasons for finding that the applications were not identical within the meaning of 20 C.F.R. § 656.17(d). But it is crystal clear that the applications have different educational and experience requirements. I note particularly that the Employer raised the experience requirement by an entire year. These significant and material changes in the job requirements unambiguously render the applications not identical under 20 C.F.R. § 656.17(d). See *B&M Auto Service Inc.*, 2008-PER-122 (Oct. 28, 2008) (denial of earlier priority date affirmed where applications differed as to educational requirements); *M & K Enterprises*, 2008-PER-91 (Oct. 29, 2008) (denial of earlier priority date affirmed where applications differed as to experience requirements).

Under pre-PERM law, a CO's ruling on a motion for reconsideration was not required to include a detailed explanation. See *Richard Clarke Associates*, 1990-INA-80 (May 13, 1992) (en banc) (a CO is required to state clearly whether he has denied an employer's request for reconsideration, or has granted the request and, upon reconsideration, affirmed his denial of certification; but the CO is not required to provide a statement of reasons for the denial of a motion for reconsideration which merely lets a prior denial stand). Thus, although in a perfect world the CO would have stated all the possible reasons for finding that the applications were not identical in his ruling on reconsideration, his not doing so is not a valid ground for shielding the Employer from obvious deficiencies in its legal position.

If there was some chance that the Employer could rebut all of the discrepancies noted by the CO in his appellate brief, due process would compel the panel to permit the Employer an opportunity to file an additional brief. But, given that there can be no dispute that that the Employer raised the experience requirement by a full year when it

filed the Form 9089, and that under 20 C.F.R. § 656.17(d) the applications shall be considered identical only if job requirements are the same for both applications, I would find as a matter of law that the applications were not identical, and therefore the CO correctly granted certification showing the filing date of the PERM application.