U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 February 2009

BALCA Case No.: 2008-PER-00053
ETA Case No.: C-07047-11797

In the Matter of:

CENTRO CULTURAL CHICANO, INC.,
Employer,

on behalf of

ROXANA GIOMAR LINARES ARRIETA,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Patricia G. Mattos, Esquire
Mattos Law Office, Inc.
St. Paul, Minnesota
For the Employer

Gary M. Buff, Associate Solicitor
Vincent 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

JOHN M. VITTONE
Chief 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.[1] The following decision is based on the record upon which the Certifying Officer (CO) denied certification, the Brief of the Certifying Officer and the Brief of the Employer. 29 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On March 5, 2007, the Chicago National Processing Center (NPC) accepted for filing the Employer's application for permanent employment certification on behalf of the Alien for the position of "Education Director." (AF 97-108). On April 11, 2007, the CO informed the Employer that he would be auditing the application. (AF 93-96). Pursuant to the Audit Notification, the Employer provided the documentation underlying its application. (*See* AF 55-92). One of the documents provided was the Employer's Notice of Filing, which had been posted at the worksite from October 26 to December 6, 2006. As pertinent to this appeal, the Notice stated:

> Any individual may provide documentary evidence bearing on this application, with information on available workers and information wages and working conditions, to the local State Employment Service or Regional Certifying Officer, U.S. Department of Labor, whose names are as follows:
>
> **Local Office:** Minnesota Department of Economic Security
> Alien Labor Certification Unit
> 390 North Robert
> St. Paul, MN 55101
>
> **Regional Certifying Officer:** Marie C. Gonzalez
> Acting Regional Certifying Officer
> U.S. Dept. of Labor
> Employment and Training Admin.
> 230 South Dearborn Street, Rm. 605
> Chicago, IL 60604

[1] The Final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 77386, and are applicable to permanent labor certification applications filed on or after March 28, 2005. The regulations were amended on June 21, 2006, 71 Fed. Reg. 35522, and May 17, 2007, 72 Fed. Reg. 28903.

(AF 92).

On May 22, 2007, the CO denied the application because the Notice of Filing required by 20 C.F.R. § 656.10(d) did not provide the address of the appropriate Certifying Officer at the National Processing Center with jurisdiction over the application. (AF 105-107).[2]

By letter dated May 29, 2007, the Employer requested reconsideration. (AF 5-51). The Employer stated: "Enclosed, pursuant to your denial dated May 22, 2007, please find corrected cover letter reflecting your name as the officer who has jurisdiction over this application." (AF 5). The Employer attached a new copy of its audit response, but changed the name shown on the cover letter from Dominic Pavese to Jason Morris. (Compare AF 9 with AF 55).

On April 14, 2008, the CO issued a formal letter denying reconsideration. (AF 1-2). The found that the Employer had misunderstood the nature of the denial, which involved the Notice of Filing and not the audit response cover letter. The CO noted that the Chicago Regional Office of Foreign Labor Certification had closed in November 2004 and had never had jurisdiction over applications filed under Form 9089. The CO stated that "[a]s of March 28, 2005, the only appropriate Certifying Officers were at the Atlanta and Chicago National Processing Centers." The CO then forwarded an Appeal File to BALCA.

BALCA docketed the appeal on April 18, 2008, and issued a Notice of Docketing on April 22, 2008. The CO filed an appellate brief, received by the Board on May 29 2008, arguing that noncompliance with 20 C.F.R. § 656.10(d)(3)(iii) is grounds for denial of certification, citing *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007). The CO acknowledged the limited exception from this rule articulated in *Brooklyn Amity School*, 2007-PER-64 (Sept. 19, 2007), in which the employer had used the address for the New York CO responsible for pre-PERM applications. The CO, however, distinguished *Brooklyn Amity School* on the ground that the New York office had still been open at the

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[2] The address of the Chicago NPC is 844 N. Rush Street, 12th Floor, Chicago, IL 60611.

time (albeit for purposes of processing pre-PERM applications), whereas in the instant case the pre-PERM Chicago office had closed in November 2004, approximately two and a half years before the Employer filed its labor certification application, and two years before the Notice of Filing was posted and the job opportunity advertised. Thus, the CO argued that unlike the situation in *Brooklyn Amity School*, there was no one to receive and redirect phone calls or any other contact resulting from the posting of notice.

The Employer filed an appellate brief received by the Board on June 3, 2008. The Employer argued that it would violate the Administrative Procedure Act for the Department of Labor to deny the application because of a harmless error, "particularly in light of the fact that the contact information for the SWA was correct." (Employer's brief at 2). The Employer argued that this was informal adjudication, and that under *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the denial must be based on consideration of "relevant factors" derived from the statute itself. The Employer argued that the relevant statute was 8 U.S.C. § 1182 (a)(5)(A)(i)(I) (2005), which requires DOL to determine whether "there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor." The Employer argued that the denial was not based on availability of the position to U.S. workers, but because it mistakenly listed the previous address for the "appropriate Certifying Officer." The Employer noted that its Notice listed the correct address for the SWA and a Chicago address that still houses ETA offices, although not a Certifying Officer. The Employer argued in a footnote that "[n]o information is available as to when the CO moved and no vehicle exists for public notice when the office moves." (*Id.* at 3, n.1).

The Employer argued that the denial itself was not clear as to the issue involved, as mandated by due process, and therefore it should be permitted to remedy the error by reposting the Notice. The Employer argued that the error was de minimus and that the two offices that were listed could reasonably be expected to communicate regarding any complaints concerning PERM filings. The Employer argued that the facts of the instant case fit within the ruling in *Brooklyn Amity School*. The Employer argued that the instant case was even more compelling than the facts in *Brooklyn Amity School* because in that

case the CO was in an entirely different state, whereas here the CO had only relocated within the same city. The Employer argued that the case was distinguishable from *Voodoo Contracting* because here the Employer had not ignored the regulatory requirement entirely, but had attempted in good faith to comply.

DISCUSSION

The regulations at 20 C.F.R. § 656.10(d)(3) provides:

> (3) The notice of the filing of an Application for Permanent Employment Certification must:
>
> (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
> (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
> (iii) Provide the address of the appropriate Certifying Officer; and
> (iv) Be provided between 30 and 180 days before filing the application.

The purpose of section 656.10(d)(3) is to implement the statutory requirement provided by Section 122(b) of Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649, 104 Stat. 4978, effective October 1, 1991, that provided that "any person may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions with respect to the employment of alien workers and co-workers)." ETA, *Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 C.F.R. Part 656, 69 Fed. Reg. 77326, 77337-77338 (Dec. 27, 2004). Thus, we disagree with the Employer's argument on appeal that the lack of the correct address in the Notice of Filing was not related to a relevant statutory purpose, and we find no *Overton Park* violation by the CO.

In *Voodoo Contracting Corp.*, 2007-PER- 00001 (May 21, 2007), this panel held that the CO properly denied labor certification where a Notice of Filing only made a generic reference to the opportunity to provide documentary evidence to a regional CO, and failed to list an actual address to which persons could provide information.

In *Brooklyn Amity School*, 2007-PER-64 (Sept. 19, 2007), this panel vacated the CO's denial of certification where the employer listed the address for the New York CO's office instead of the appropriate National Processing Center in Atlanta. In that case, the job was in Brooklyn, the New York CO's office was the appropriate office for labor certification applications from Brooklyn before March 28, 2005, the office was open and accepting telephone calls at the time the Employer posted its Notice of Filing, only a few months had passed since the PERM regulations had gone into effect, and although the CO had defined what constituted an appropriate office in a FAQ posted on its web site, there was no instruction on what constituted the appropriate CO's office in the regulations themselves or in the ETA Form 9089 instructions. We limited the ruling in *Brooklyn Amity School* to the precise circumstances of that case.

In the instant case, despite some similarities in the circumstances, there is a significant difference from the facts in *Brooklyn Amity School*. First, in that earlier case the New York CO's office was still open for business and taking telephone calls at the time the employer posted its Notice of Filing. In Chicago, however, the entire foreign labor certification staff had been moved from the Chicago Regional Office on South Dearborn Street to a new National Processing Center on Rush Street. ETA had published a Notice in the Federal Register informing the public about this relocation of staff. 70 Fed. Reg. 1473 (Jan. 7, 2005). This notice was published shortly after the PERM final regulations were published, 69 Fed. Reg. 77326 (Dec. 27, 2004), almost three months before the PERM regulations went into effect on March 28, 2005, and approximately twenty-one months before the Employer in this case posted its Notice of Filing. The Notice informed the public that the National Processing Centers had been established on December 13, 2004 "to handle permanent labor certification cases to be filed under the soon-to-be effective regulation implementing the new permanent labor certification

program." Thus, although the CO had been housed in the Chicago Region V and processed pre-PERM labor certification applications from that location for many years, it had never processed any PERM applications, and had relocated all staff for both pre-PERM and PERM cases to the new Rush Street location over nineteen months before the Employer posted its Notice and well over two years before it filed its PERM application.

In the instant case ETA provided very clear and precise information in the Federal Register about the location of the CO's office in Chicago. In *Brooklyn Amity School*, there was still a CO housed at the location stated on the Notice of Filing, and only four months had passed since the effective date of the PERM regulations. In the instant case, the CO had moved to new offices, and there was no longer any CO staff housed at the Region V headquarters. The PERM regulations had been in effect for about nineteen months, and notice of the relocation of the CO's staff had been given over twenty-one months before the Employer posted its Notice of Filing. Thus, this case does not fit in the limited exception created by *Brooklyn Amity School*. Moreover, in *Voodoo Contracting Corp*., this panel ruled that the Notice of Filing requirement is not a regulation to be lightly dismissed under a harmless error finding.

The Employer included the Minnesota SWA on the Notice of Filing. But the regulation does not refer to providing an address for the SWA in a Notice of Filing. Under PERM, the role of SWAs is much more limited than it was under pre-PERM cases. The fact that the Employer included the correct address for the Minnesota SWA on its Notice of Filing does not excuse the failure to include the correct address for the federal Certifying Officer.

Finally, we reject the Employer's argument that it was denied due process because the ground for the denial was not clearly stated. The denial letter was clear. It stated: "<u>REASON FOR DENIAL</u>: The notice of filing of the ETA Form 9089 does not contain the address of the appropriate Certifying Officer at the National Processing Center with jurisdiction over the application. <u>AUTHORITY FOR DENIAL</u>: Per 20 CFR 656.10(d)(3)(iii), the notice must provide the address of the appropriate Certifying Officer." This language was not ambiguous.

Accordingly, we find that the CO correctly denied certification under 20 C.F.R. § 656.10(d)(3)(iii).[3]

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the panel:

A

JOHN M. VITTONE
Chief Administrative Law Judge

Administrative Law Judge Pamela Lakes Wood, dissenting.

I respectfully dissent. I do not find this case to be materially distinguishable from *Brooklyn Amity School*, 2007-PER-64 (Sept. 19, 2007). This case, like *Brooklyn Amity School*, involved the listing of an old address for the CO on the posted Notice of Filing as the sole basis for denial of labor certification. In contrast, *Voodoo Contracting*, 2007-PER-1 (May 21, 2007), concerned an ambiguous notice that provided no address whatsoever. Accordingly, I would reverse the CO's decision in the instant case for the reasons stated in *Brooklyn Amity School*.

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

[3] On April 4, 2008, ETA issued a FAQ announcing that effective June 1, 2008, all permanent labor certification applications (PERM) would be handled by the Atlanta National Processing Center (NPC), and all temporary applications (H-2A, H-2B, etc.) by the Chicago NPC. As a result of this centralization, any PERM application filed after June 1, 2008 must show the Atlanta National Processing Center address on the Notice of Filing required by 20 CFR 656.10(d). www.foreignlaborcert.doleta.gov/pdf/NPC_Specialization_FAQ_Round_1_final2.pdf; *see also* 73 Fed. Reg.11954 (March 5, 2008). Thus, under current PERM processing, there can be no ambiguity about the appropriate CO to list – the Atlanta National Processing Center is the only ETA office must be shown on the Notice of Filing for applications filed after June 1, 2008.

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.