

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 25 February 2009**

**BALCA No.:** 2008-PER-00164  
**ETA No.:** A-06206-42478

*In the Matter of:*

**CUELLAR, LLC/SHOP RITE,**  
*Employer,*

*on behalf of*

**HIPOLITO HERNANDEZ,**  
*Alien.*

**Certifying Officer:** Dominic Pavese  
Atlanta National Processing Center

**Appearances:** Joseph G. Cella, Esquire  
Cella & Associates, LLC  
Clifton, New Jersey  
*For the Employer and Alien*

Gary M. Buff, Associate Solicitor  
Clarette H. Yen, 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

**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 (“C.F.R.”)<sup>1</sup>.

## **BACKGROUND**

The Employer, Cuellar, LLC/Shop Rite, filed a labor certification application by mail on July 3, 2006. (AF 21-31)<sup>2</sup>. The CO had the application keyboarded into the electronic PERM system. (AF 11-20). The Employer was seeking to sponsor the Alien for the job of Meat Butcher.

Section F of the ETA Form 9089 requires a petitioning employer to identify information from the prevailing wage determination it was provided by the State Workforce Agency. In the instant case, the Form 9089 that the Employer submitted by mail answered in response to Section F-3, Occupation Title, “Not Provided.” (AF 24). Section F-4, Skill Level is blank. (AF 24). On the version that the CO had keyboarded into the electronic PERM system, both Sections are blank. (AF 12).

On November 2, 2006, the CO issued a denial letter. (AF 8-10). The CO stated that selections were not made on the Form 9089 for Section F-3, Skill level, and Section F-4, Job Title. The CO found that the application was not complete as required by Section 656.17(a) and therefore denied the application.

The Employer filed for reconsideration on November 14, 2006. (AF 6-7).<sup>3</sup> The Employer stated that “not provided” was listed for Job Title in Section F-3 because the

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<sup>1</sup> 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.

<sup>2</sup> In this decision, AF is an abbreviation for Appeal File.

<sup>3</sup> The Employer initially noted in the motion for reconsideration that the CO had reversed the category titles in the denial letter. This is true. Section F-3 asks for the Occupation Title, and Section F-4 asks for the Skill Level. The CO’s denial letter erroneously indicated that Section F-3 relates to the Skill Level and

State Workforce Agency (“SWA”) did not provide an occupation title when it provided the SOC/O\*NET (OES) Code of 51-3021. The Employer stated that since no occupational title was provided by the SWA, “not provided” was inserted at Section F-3. The Employer noted, however, that “Meat Butcher” was the job title provided to the SWA and was the job title listed on the application in Section H-3. Furthermore, the Employer stated that upon review of the ETA 9089, skill level 4 was clearly entered in Section F-4 of the application.

On April 9, 2008, the CO e-mailed the Employer, stating that in order to process the request for reconsideration the Employer must submit, within ten business days, a copy of the prevailing wage determination issued by the SWA. The e-mail warned: **“Note: Your failure to reply timely to this e-mail and provide the documentation requested will result in the denial being upheld and the case being sent to BALCA.”** (AF 5) (emphasis as in original).

The Appeal File contains no indication that the Employer ever responded to this e-mail. Evidently it did not, because on August 22, 2008, the CO denied reconsideration. (AF 1-2). The CO stated that Section F-3, occupational title, is a required entry on the application form. The CO further noted that the Employer did not submit the requested SWA prevailing wage determination. Similarly, the CO stated that Section F-4, skill level, is a required entry, and that the mailed-in version of the application did not contain this information. The CO noted that the Employer failed to submit the SWA prevailing wage determination as documentary evidence on this point as well. Since the Employer had failed to provide the occupational title and skill level on the ETA Form 9089, and since the Employer also failed to provide information necessary to cure these deficiencies, the CO denied reconsideration and forwarded the Appeal File to BALCA.

BALCA docketed the appeal on August 28, 2008, and issued a Notice of Docketing on September 4, 2008. The Employer filed a Statement of Intent to Proceed

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Section F-4 relates to the Job Title. However, this error in the CO’s determination letter did not cause the Employer to misunderstand the basis for the denial, and is not a material factor on appeal.

and a legal brief on September 17, 2008. The Employer argued that its records clearly showed that the Sections of the Form 9089 at issue were properly completed. It answered “Not Provided” for Section F-3, and “4” for Section F-4. In support of this argument, it attached a copy of the application. This version of the application displays “4” in Section F-4. (Exhibit A to Employer’s Brief). The Employer argued that the job occupation was not provided by the SWA prevailing wage report and, therefore, “not provided” was inserted on Section F-3 of the application. The Employer further argued that the application itself indicated a job title in Section H-3 of “Meat Butcher.” Therefore, the Employer contended that to deny the application for the sole reason that a selection for occupational title was missing would be to elevate “form over substance,” citing the Board decision in *Healthamerica*, 2006-PER-1 (July 18, 2006) (*en banc*). The Employer’s brief did not address the question of why the Employer did not provide a copy of the SWA prevailing wage determination as requested by the CO.

The CO filed a Statement of Position on October 17, 2008. The CO noted that the Employer had an opportunity to cure the incomplete entries by responding to the CO’s request for a copy of the SWA prevailing wage determination. It failed to do so at the time the CO was reviewing the motion for reconsideration, and still failed to do so with its Statement of Position filed with the Board. The CO cited other panel decisions of the Board in which denials were upheld where the employer submitted an incomplete application and failed to correct it by offering documentation to establish compliance with the regulations. *Bushman Associates, Inc.*, 2007-PER-14 (Mar. 8, 2007); *North County Cooling*, 2007-PER-93 (June 4, 2008); *Michelle Guevarra Pena PLLC*, 2007-PER-116 (June 4, 2008).

## DISCUSSION

The regulations at 20 C.F.R. § 656.17(a) require that an “employer who desires to apply for a labor certification on behalf of an alien must file a complete Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089).” 20 C.F.R. § 656.17(a). The regulations go on to say that “incomplete applications will be denied.” 20 C.F.R. § 656.17(a).

Section F-3 is a required entry on the ETA Form 9089 application. In the instant case, assuming that the SWA did not provide the Occupational Title on the prevailing wage determination form, the Employer’s answer to Section F-3 of “Not Provided” would have been a technically accurate response, but one that clearly was inadequate. At best, it was an acknowledgment that the Employer did not have information needed to complete that Section. We note that the mere fact that an employer writes something in a Section of the Form 9089 does not mean that it has completed the application in a meaningful way. For example, the denial of certification was affirmed in *Pacific Molding, Inc.*, 2008-PER-42 (June 12, 2008) where the employer provided the FEIN of its agent rather than its own FEIN. Moreover, in the instant case, it is not clear that it would have been an arduous task for the Employer to contact the SWA to obtain the missing Occupational Title information prior to filing the application with the CO. We also note that looking up the Occupation Title for SOC Codes on the O\*Net Code Connector web site at [www.onetcodeconnector.org](http://www.onetcodeconnector.org) is a fast and easy process. Using the Code Connector, it is easy to determine that the SOC Code provided by the SWA in this case, 51-3021.00, is for the Occupation Title “Butchers and Meat Cutters,” which appears to be exactly correct for the Employer’s job offer.

The Employer’s argument that denial of the application solely on this basis would elevate form over substance may have some merit. The CO in this case, however, did not simply dismiss the Employer’s argument that the SWA had not provided the Occupational Title with the prevailing wage determination, but gave the Employer a chance to document its position by submission of the SWA determination. The CO had

the authority to request the Employer to provide this document, and the Employer was required to retain it. *See* 20 C.F.R. § 656.10(f); § 656.17(a)(3); § 656.40(a).<sup>4</sup> Since the Employer did not address its failure to produce the SWA determination on appeal, we conclude that it has no defense for its failure. Thus, we affirm the CO's denial of certification based both on its failure to provide a meaningful response to Section F-3 of the Form 9089, and on its failure to produce the prevailing wage determination when specifically requested for that documentation by the CO.

Finally, we note that the Employer submitted a copy of the application along with its brief. This copy of the application includes "4" in Section F-4, Skill Level. In contrast, Section F-4 is blank on the mailed application copy included in the Appeal File. (AF 12). The copy mailed to the CO was date stamped, and does not appear to have been altered. Why the two copies of the application would have this discrepancy is puzzling. However, since we affirm the denial based on the Employer's failure to submit the requested prevailing wage survey, we need not resolve this anomaly.

## **ORDER**

Based on the foregoing, it is **ORDERED** that the Certifying Officer's denial of

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<sup>4</sup> Although these regulations speak of an employer's obligation to produce a document in the course of an audit, we decline to read the PERM regulations as limiting the CO to requesting production of a document during an audit. The Board held more than 20 years ago that if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *See Pacific Molding, Inc.*, 2008-PER-42 (June 12, 2008), citing *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc). Thus, we hold that the CO has the authority under the PERM regulations to request an employer to produce a relevant document when reviewing a motion for reconsideration or at other stages of the processing of the application, even if the CO is not proceeding under the audit procedure at 20 C.F.R. § 656.20 at the time of the document request.

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.