U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 09 January 2009

BALCA Case No.: 2008-PER-00148
ETA Case No.: A-05319-53409

In the Matter of

ELETHERIA RESTAURANT CORPORATION,
d/b/a
ZODIAC CAFE,
Employer,

on behalf of

MARTHA RENTA,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Niko Paul
ALTRA Consulting Services LLC
Astoria, New York
For the Employer

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 involves an appeal of the denial by an Employment and Training Administration, Office of Foreign Labor Certification, Certifying Officer ("CO") of permanent alien labor certification 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.

BACKGROUND

The Employer, a Greek restaurant/nightclub, is sponsoring the Alien for a position as a "Singer of Greek Songs." (AF 75). The Employer's Form 9089 application indicated that the job was advertised in the Daily News on August 21, 2005 and August 28, 2005. (AF 77-78). On September 18, 2006, the CO issued an Audit Notification letter. (AF 47-50). Among other items, the CO directed the Employer to submit a copy of its recruitment documentation. (AF 48). The Employer's response to the Audit Notification did not include tear sheets, an affidavit of publication from the publisher, or any other evidence documenting the advertisements in the Daily News, (AF 43-73), except for the Employer's recruitment report, which stated that the advertisements had been run in the Daily News on August 21, 2005 and August 28, 2005. (AF 67).

The CO denied the application on January 18, 2007 on the ground that the Employer had failed to provide evidence of print advertisements. (AF 25-27). By letter dated February 13, 2007, the Employer requested reconsideration/review. (AF 2-24). The Employer stated that it was resubmitting its audit response, and stated that "[w]e have complied with each and everyone [sic] of your requests, and we do not understand what could have happened to part of the documentation sent to you in the aforementioned audit response letter." (AF 2).[1] On August 21, 2008, the CO issued a letter of reconsideration affirming the denial. (AF 1). The CO wrote: "Per 20 CFR

[1] The motion for reconsideration/review contained in the Appeal File at AF 2-24 is not identical to the audit response found at AF 43-73. Specifically, none of the recruitment documentation is found in the motion for reconsideration/review.

65.17(e)(i)(3), [sic[2]] documentation of the print advertisement can be satisfied by furnishing copies [of] the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper. Since the only documentation included with both the audit and appeal response that provides evidence of print advertisements is a statement from the employer indicating two Sunday advertisements had been conducted with The Daily News, the Certifying Officer has determined this reason for denial is valid." (AF 1).

The Board issued a Notice of Docketing on August 27, 2008. The Employer filed a letter brief, which was received by the Board on October 15, 2008. The Employer's agent resubmitted the February 13, 2007 cover letter to the Employer's motion for reconsideration/review, and added: "Unfortunately, the only remaining document reflecting evidence of the print advertisements is a copy of the Daily News Classified Advertising Statement, of which I enclose a copy." Attached to the letter brief is a fax from the Daily News to the Employer's agent indicating that the advertisements had been run as stated in the ETA Form 9089.

The CO filed an appellate brief, which was also received by the Board on October 15, 2008. The CO urged that the denial of certification be affirmed because the Employer had failed to furnish copies of the newspaper advertisements or proof of publication furnished by the newspaper.

By letter dated October 21, 2008, and received by the Board on October 24, 2008, the CO filed a motion to strike the attachment to the Employer's brief because it was new evidence not in the record before the CO. The CO cited 20 C.F.R. § 656.27(c) and BALCA caselaw for the proposition that BALCA can only review the record made before the CO and cannot consider new evidence. The CO noted that the Employer had two opportunities while the matter was before the CO to submit this documentation (i.e., after the audit notification and with the motion for reconsideration) but failed to do so.

[2] The CO undoubtedly intended to cite 20 C.F.R. § 656.17(e)(i)(3).

The Board has no record of a response from the Employer to the CO's motion to strike.

DISCUSSION

A permanent labor certification issued by the Department of Labor is a required step for an employer to hire a foreign worker to work permanently in the United States. In most instances, before the U.S. employer can submit an immigration petition to the Department of Homeland Security's U.S. Citizenship and Immigration Services, the employer must obtain a certification from DOL that there are no qualified U.S. workers able, willing, qualified and available to accept the job at the prevailing wage for that occupation in the area of intended employment and that employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. To obtain such a certification, the employer must complete an Application for Permanent Employment Certification (ETA Form 9089), and must attest, in addition to a number of other conditions of employment, to having conducted recruitment prior to filing the application under the standards set forth in 20 C.F.R. § 656.17(e).

Under 20 C.F.R. § 656.17(e), with certain exceptions not relevant to the instant case, the Employer must have attested to having placed two print advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity. 20 C.F.R. § 656.17(e)(1)(i)(B) and 656.17(e)(2)(ii). The regulations further provide that the documentation of the two-Sunday newspaper advertisement requirement "can be satisfied by furnishing copies of the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper." 20 C.F.R. § 656.17(e)(1)(i)(B)(3); *see also* 20 C.F.R. § 656.17(e)(2)(ii)(C).

In the instant case, the Appeal File is consistent with the CO's finding that the neither the audit response nor the motion for reconsideration contained copies of the newspaper advertisements or proof of publication furnished by the newspaper. On

appeal, the Employer does not squarely address this finding by the CO or argue that the CO erred in finding that the documentation was not included with the audit response or motion for reconsideration, but rather provides a copy of proof of publication from the Daily News.

If this documentation had been timely submitted to the CO, reconsideration might have been granted. However, as the CO argued in the motion to strike, the Board's scope of review is limited to the record made before the CO. 20 C.F.R. § 656.27(c); *5th Avenue Landscaping, Inc*., 2008-PER-27 (Feb. 11, 2008).

Moreover, under pre-PERM caselaw, a long line of Board decisions held that where the CO requests a document or information which has a direct bearing on the resolution of an issue and the document is obtainable by reasonable effort, the employer must produce it. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc). An employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification. *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (en banc). Similarly, under PERM, if the CO audits an application, the Employer is compelled to provide the reasonably requested documentation. The audit regulations provide that "failure to provide documentation in a timely manner constitutes a refusal to exhaust available administrative remedies" and results in BALCA review not being available. 20 C.F.R. § 657.20(a)(i) and (ii).[3] Moreover, the audit regulations state that "[a] substantial failure by the employer to provide required documentation will result in that application being denied…." 20 C.F.R. § 657.20(b).

Thus, we find that the proof of publication from the Daily News was not submitted in a timely manner, and grant the CO's motion to strike. Based on the record before him, the CO properly denied certification.

[3] The Board held similar language in the pre-PERM regulations to be non-jursidictional and subject to waiver in appropriate circumstances, *Madeline S. Bloom*, 1988-INA-152 (Oct. 13, 1989) (en banc). The Employer in the instant case, however, has presented no equitable grounds to support a waiver of the time limit for providing audit documentation.

ORDER

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.