

**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: 17 December 2007**

**BALCA Case No.: 2008-PER-00014**  
ETA Case No.: C-06174-31937

*In the Matter of:*

**LAM GARDEN CHINESE RESTAURANT,**  
*Employer,*

*on behalf of*

**YPOLITO CAMPILLO SALAZAR,**  
*Alien.*

Certifying Officer: Dominic Pavese  
Chicago Processing Center

Appearances: Tom Travis, Esquire  
Little Rock, Arkansas  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Stephen R. Jones, 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. VITTONI  
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.<sup>1</sup> In this case, the Employer filed an application for permanent alien labor certification for the position of Specialty Cook, Foreign Food. (AF 12-31). On June 26, 2006, the CO denied the application because it was filed less than 30 days after the end of the job order placed with the State Workforce Agency (SWA) in violation of 20 C.F.R. § 656.17(e). (AF 9-11).

By letter dated July 23, 2006, the Employer requested review arguing that it had placed a job order with the SWA from February 9, 2006 to March 9, 2006, and therefore the CO was in error about the length of the job order. The Employer also speculated that the mistake occurred because of a keystroke error by the CO's staff when entering the application into the CO's computer system. (AF 4). In support of its argument, the Employer submitted a letter from its attorney to the SWA asking that a job order of 30 days duration be placed. (AF 6).

The CO denied reconsideration in a letter dated October 19, 2007. (AF 1-2). The CO explained that because February only has 28 days, the SWA job order lasted less than 30 days.

BALCA docketed the appeal on October 23, 2007, and issued a notice of docketing on October 25, 2007. The Employer submitted a letter stating its position on appeal, which was received by the Board on November 9, 2007. The Employer continued to argue that it had correctly placed the job order with the SWA and that a mistake must have been made by the CO. The CO submitted a letter brief, which was received by the Board on November 20, 2007. The CO argued that the Employer's SWA job order had only run 29 days. The CO conceded that it appeared that the Employer had asked the SWA for a 30-day duration for the job order, but that "there is no evidence that

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<sup>1</sup> 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 request was fulfilled.” The CO stated that “[f]or the purpose of determining compliance, attention has been focused exclusively, properly, on the start and end dates documented in the application itself.” CO’s Brief at 2. The CO also pointed out the Employer had not acknowledged, much less sought to remedy the defect in its application, which distinguished this case from *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc).

## **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.

In the instant case, the SWA job order only ran for 29 days in violation of section 656.17(e)(2)(i). The Employer's attorney failed to recognize the nature of the deficiency, even after the CO clearly stated the problem in the letter denying reconsideration. However, it is obvious that the SWA, when placing the job order on behalf of the Employer, overlooked the fact that in 2006 February had only 28 days. Moreover, the Employer's documentation establishes that it expressly asked for a 30-day job order.

Thus, we view the issue presented by this appeal to be whether the CO abused his discretion by refusing to vacate a denial that, at its core, was based on an error introduced by the SWA, which caused a one-day deficiency in the length of the job order.

Under pre-PERM caselaw, an employer's reliance on erroneous information supplied by the local employment service did not estop a CO from denying certification. *Inner City Drywall Corp.*, 1990-INA-192 (June 24, 1991). However, the pre-PERM caselaw also permitted a CO to take into account a local employment service's errors. Thus, the Board held that although a CO is not bound by the actions or statements of a local employment service, when evaluating an application he or she may take into account misleading information provided by a local employment service. Thus, where the local employment service's advice injects the employer's application with a fatal defect, a CO has the discretion to permit the employer to correct that defect. *Sverdrup Technology, Inc.*, 1988-INA-310 (Mar. 27, 1990); *see also Bob's Exxon*, 1989-INA-259 (May 2, 1991) (CO afforded the employer the opportunity to repost the job with the state agency because local employment service had forwarded only three of forty applicants).

In the instant case, the CO's position is that the Employer violated the regulation, and it has no discretion to overlook that error, even though the SWA may have been to blame. (*See* CO's Brief at 2). We find that the CO's position that he was required to "focuse[] exclusively ... on the start and end dates documented in the application itself" was in error. Rather, we find nothing in the PERM regulations that limits the CO's discretion to take into account errors that may have been principally the result of a SWA's actions rather than those of the Employer.

Here, it was an error by the SWA in neglecting to take into account the short length of February that caused the job order to be a day short. Although it is possible that the one day shortfall in the SWA job order may have resulted in a U.S. applicant or applicants being overlooked, the possibility that the deficiency materially affected the recruitment is not great. The CO did not raise any other deficiencies concerning the application, and there is no evidence that the Employer was seeking to deceive the CO or to avoid compliance with the regulatory requirements. Rather, the Appeal File contains the Employer's attorney's letter to the SWA that expressly requested a job order of 30-days duration. Under these precise circumstances, we find that the CO abused his discretion in refusing to grant certification upon reconsideration. We limit the ruling in this case to the precise circumstances presented.

### **ORDER**

Based on the foregoing, **IT IS ORDERED** the Certifying Officer **GRANT CERTIFICATION**.

For the panel:

**A**

**JOHN M. VITTON**  
Chief Administrative Law Judge

**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.