



Issue Date: 06 January 2009

BALCA Case No.: 2008-PER-00143

ETA Case No.: A-05164-07206

In the Matter of

MISHA CARPET CORPORATION,

Employer,

on behalf of

SMILJKA JESIC,

Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Janet A. Savrin, Esquire
Magier & Savrin
New York, New York
For the Employer and the Alien

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

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

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 CO accepted the Employer’s labor certification application for processing on June 17, 2005. (AF 1). The Employer, a manufacturer and distributor of oriental rugs and carpets (AF 60), is sponsoring the Alien for a position as a “Bilingual Budget Analyst.” (AF 41). One of the job requirements stated on the Employer’s application was fluency in Serbian. (AF 16; ETA Form 9089, Sections H-13 and H-14). On July 3, 2007, the CO issued an Audit Notification letter requiring the Employer to submit documentation justifying the business necessity for its foreign language requirement. (AF 32-25). On August 23, 2007, the CO issued a letter denying certification on the ground that the Employer had not provided a “copy of the ETA 9089 with original signatures and proof of business necessity.” (AF 11-13).

The Employer requested review of the denial. (AF 7-8). The Employer’s attorney stated that she had spoken to a member of the CO’s staff and learned that the Employer’s reply to the Audit Notification had not been associated with the CO’s file. The attorney argued, therefore, that failure to provide the requested documentation was not a valid basis for denial of the application. The Employer’s attorney presented documentation from Federal Express showing timely delivery of the reply. (AF 9-10). The Employer’s attorney stated in a cover letter to the reply:

Perhaps, because this PERM application was originally prepared and filed by another law firm when the PERM process was very new to all, the application appears not to have been completed accurately to represent the job requirements. Upon further review the employer wishes to amend the application (Form 9089) and delete the foreign language requirement.

Although the original job title and job description required fluency in the Serbian language, none of the applicants in the recruitment process were rejected because they were not fluent in the Serbian language. Therefore, it may not be necessary to readvertise for that reason only.

(AF 28). A letter from the Employer's President stated: "In response to your Audit Notification dated July 3, 2007 ... we hereby wish to amend the Foreign Labor Certification and Delete the foreign language requirement." (AF 36). Attached to the Employer's letter is a copy of the Employer's recruitment report. Contrary to the Employer's attorney's argument, the recruitment report stated that four U.S. applicants were rejected in part based on the inability to speak and write Serbian. (AF 37-39). The audit response also included a Job Order request showing the Serbian language requirement. (AF 60). The Employer's newspaper classified advertisement (AF 62-65) and web site advertisements (AF 66-79) also listed the Serbian language requirement.

The CO issued a letter of reconsideration on August 21, 2008. (AF 1-2). The CO withdrew the finding that the Employer had not provided a copy of the ETA 9089 with original signatures and proof of business necessity. The CO acknowledged that the Employer stated in its reply to the Audit Notification that it would like to amend its application to delete the foreign language requirement, but nonetheless found that the denial of certification was valid. The CO noted that the Job Order and print advertisements had included the language requirement and that four applicants had been rejected for failure to meet that requirement. The CO found that the Employer's "change to the minimum requirements necessary to perform the job constitutes new evidence not in the record on which the denial was based." The CO also found that removal of the requirement would result in a job opportunity for which the labor market had not been tested.

The Board docketed the appeal on August 25, 2008. The Employer argued in its appellate brief that because the CO had originally denied the application based on an erroneous belief that there had been an untimely response to the Audit Notification, the CO had not had an opportunity to review its response. The Employer argued: "Therefore the Certifying Officer did not have the opportunity to review employer's submission to

the audit and employer's request to either omit the foreign language requirement or have the opportunity to then provide the proof of the business necessity of the foreign language. In addition, the Certifying Officer could not consider requesting supplemental information or require supervised recruitment as provided in the audit procedures under Section 656." The Employer attached to its appellate brief documentation to prove the business necessity of the foreign language requirement. The Employer requested that BALCA remand for the CO to reconsider.¹

By letter postmarked October 16, 2008, the CO filed an appellate brief urging affirmance of the denial because the Employer had recruited for the job with overly restrictive requirements and had improperly excluded qualified domestic workers on that basis.²

DISCUSSION

The PERM regulations provide that "[a] foreign language requirement can not be included [as a job requirement], unless it is justified by business necessity." 20 C.F.R. § 656.17(h)(2). Thus, when the Employer in the instant case chose to recruit with a Serbian language requirement and rejected applicants in part for their lack of fluency in Serbian, it was obligated to establish the business necessity for the requirement.

As we understand the Employer's argument on appeal, since the CO has the authority under the audit procedures to request supplemental information and/or to require the employer to conduct supervised recruitment, *see* 20 C.F.R. § 656.20(d), and because the CO's original denial was based on the erroneous belief that the Employer

¹ When the Board docketed PERM appeals, it requires the petitioning employer to file a Statement of Intent to Proceed. In this case, the Employer filed such a statement, and included therewith argument similar to that presented in the later appellate brief. Attached to the statement was a letter from the Employer's Director of Operations indicating that the documentation of business necessity had been intentionally withheld from the Audit Notification response because the Employer wanted the CO to consider a deletion of the requirement.

² The CO requested that the Board grant leave to file his brief one day late because the assigned attorney from the Office of the Solicitor had been out on sick leave. The Employer has not filed an opposition to this request. For good cause shown, we accept the CO's brief for consideration.

failed to timely respond to the audit notification, the CO never reached the question of whether – after rejecting the request to amend the application to delete the foreign language requirement – he should request more information about the business necessity of the requirement and/or then direct supervised recruitment. This argument, however, depends on the CO exercising discretion that he was not obligated to exercise, and acting in a way that would have required him to do things that the Employer never asked him to do while the case was before the CO.

Upon close review of the Appeal File, it is beyond dispute that when the Employer responded to the Audit Notification directing the Employer to document the business necessity for its requirement of fluency in Serbian, it requested instead that it be permitted to amend the application to delete the foreign language. It did not ask at that time for an opportunity to establish business necessity for the requirement if the CO did not permit an amendment to the application. Rather, the request to be permitted to document business necessity was not made until after the appeal was docketed with this Board. We find that that Employer forfeited the opportunity to establish business necessity when it chose at the time of the audit only to request an amendment to the application rather than to present its documentation on business necessity.

Moreover, the regulation governing reconsideration in effect at the time that this application was filed provided that “[t]he request for reconsideration may not include evidence not previously submitted.” 20 C.F.R. § 656.24(g)(2).³ The regulations also provide in regard to the Board’s scope of review, that it “must review a denial of labor certification under § 656.24 ... 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.” Similar language in the pre-PERM regulations was held to prevent the Board’s consideration of additional evidence submitted in conjunction with a request for review. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (en banc). Thus, we find

³ Amendments to this regulation, which further restrict the type of evidence than can be considered on reconsideration, would not alter the Board’s decision in this matter even if applicable. See Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 28903 (May 17, 2007).

that the evidence the Employer submitted to the Board in an attempt to establish business necessity for its Serbian language requirement was not timely filed and cannot be considered on appeal.⁴

This appeal illustrates an important difference between PERM and pre-PERM processing – whether an employer’s offer to delete an unduly restrictive job requirement must be accepted by the CO.⁵ We hold that a CO is not obligated under the PERM regulations to grant an employer’s request during an audit to be permitted to amend its application to delete an unduly restrictive job requirement. The mere possibility that a CO might permit such an action before making a final decision on an audit, 20 C.F.R. § 656.20(d),⁶ is not grounds for finding reversible error in this case.⁷ As the CO noted, the

⁴ Since we find below that the CO did not abuse his discretion when he did not exercise the option under the audit procedures to request further information and/or direct supervised recruitment, we do not reach the issue of whether the Board would have the authority to remand to the CO for his consideration of the newly filed evidence on business necessity. See *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc) (noting that ETA may have intended to deprive BALCA of the authority to remand PERM cases).

⁵ Under the pre-PERM regulations, an employer generally had an opportunity to attempt to establish the business necessity for a job requirement and, if unsuccessful, readvertise the position if the employer had unequivocally agreed to readvertise in accordance with the requirements set forth by the CO in the NOF. See *Ronald J. O'Mara*, 1996-INA-113 (Dec. 11, 1997) (en banc). The instant PERM appeal presents a slightly different scenario in that the Employer was asking to amend its application to delete the foreign language requirement, and (at least on appeal) to be permitted to establish business necessity and/or readvertise if the CO denied amendment of the application.

⁶ The audit procedures only permit, and do not mandate, a CO to require an employer to engage in supervised recruitment. The Employer’s argument apparently recognizes that this is a discretionary decision for the CO in that the Employer only argues that the CO’s original error in finding that the reply to the audit was not timely submitted prevented the CO from considering the option of directing a supervised recruitment. The CO, however, reconsidered the denial. Thus, he was not prevented from considering such an option. He reconsidered, and did not exercise the option.

⁷ In *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), the Board noted that the PERM regulations eliminated the NOF-Rebuttal-Final Determination procedure provided for in the pre-PERM regulations. *HealthAmerica*, USDOL/OALJ Reporter at 16. In *HealthAmerica*, we also noted that the Department had proposed an amendment to the PERM regulations explicitly forbidding requests for modifications of applications. The Board quoted the preamble to the proposed rule:

The Department is also proposing to clarify procedures for modifying applications filed under the new permanent labor certification regulation. Under proposed Sec. 656.11(b), DOL clarifies that requests for modifications to an application submitted under the current regulation will not be accepted. This proposed clarification is consistent with the streamlined labor certification procedures of the new regulation. Nothing in the streamlined regulation contemplates allowing or permits employers to make changes to applications after filing. The re-engineered program is designed to streamline the process and an open amendment process that freely allows changes to applications or results in

Employer's recruitment postings and advertisements listed the Serbian language requirement and therefore may have caused otherwise qualified applicants not to apply for the job opportunity. Moreover, the Employer's recruitment report established that it rejected four U.S. applicants in part because they were not fluent in Serbian. With these circumstances, and without documentation before him to establish the business necessity of the Serbian language requirement, the CO was not being arbitrary in declining to proceed with further audit procedures under 20 C.F.R. § 656.20(d). The CO was not obligated to grant the Employer's request to delete the Serbian language requirement under the PERM regulations, and we find that the CO properly denied certification.

continual back and forth exchange between the employer and the Department regarding amendment requests is inconsistent with that goal. Further, the re-engineered certification process has eliminated the need for changes. The online application system is designed to allow the user to proofread and revise before submitting the application, and the Department expects and assumes users will do so. Moreover, in signing the application, the employer declares under penalty of perjury that he or she has read and reviewed the application and the submitted information is true and accurate to the best of his or her knowledge. In the event of an inadvertent error or any other need to refile, an employer can withdraw an application, make the corrections and file again immediately. Similarly, after an employer receives a denial under the new system, employers can choose to correct the application and file again immediately if they do not seek reconsideration or appeal. In addition, the entire application is a set of attestations and freely allowing changes undermines the integrity of the labor certification process because changing one answer on the application could impact analysis of the application as a whole.

HealthAmerica, USDOL/OALJ Reporter at 8-9, quoting ETA, Proposed Rule, *Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, Permanent Labor Certification Program*, 71 Fed. Reg. 7655 (Feb. 13, 2006). This amendment was published as a final rule on May 17, 2007. Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 28903 (May 17, 2007). Although this rule did not go into effect until after the Employer filed its application in the instant case, it reflects ETA's approach under the PERM rules, *i.e.*, to eliminate the back-and-forth exchange during processing of an application. Although we do not reach the issue, the revised 20 C.F.R. § 656.11(b) may prevent a CO from permitting an amendment to the application even though the CO directed a supervised recruitment.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

For the panel:

A

JOHN M. VITTON
Chief Administrative Law Judge

PAMELA LAKES WOOD, Administrative Law Judge, concurring.

I concur in the result based upon the failure by the Employer to offer to establish business necessity for the restrictive language requirement until after its request for the opportunity to delete the restrictive requirement had been denied twice. The position for which labor certification was sought was “Bilingual Budget Analyst” and, by deleting the Serbian language requirement, the Employer would be essentially seeking a different position, for which the labor market had not been tested. Thus, the request to delete the requirement was properly denied and the Employer’s offer to establish business necessity for a language requirement that it conceded was not necessary came too late. This case is therefore dissimilar from the pre-PERM case addressing the situation where an employer offers to readvertise if its rebuttal is not accepted. As the panel’s discussion goes far beyond the issues presented in this case, which has nothing to do with an exercise of discretion by the CO, I write separately.

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.