



Issue Date: 29 October 2008

BALCA Case No.: 2008-PER-00091
ETA Case No.: C-06326-83076

In the Matter of:

M & K ENTERPRISES,
(formerly known as
H.M.K. Enterprises),
Employer,

on behalf of

TAE JUNG,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Wilton A. Hom, Esquire
Farmington Hills, Michigan
For the Employer

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

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.¹ In this case, the Employer – a restaurant – filed a pre-PERM application for permanent alien labor certification on April 27, 2001 for the position of Sushi Chef. (AF 9-12). This application stated a requirement of two years of experience in the job offered. (AF 9).

On November 22, 2006, the Certifying Officer (“CO”) accepted for processing the Employer’s PERM application. The CO granted the certification, and set the Alien’s priority date based on the date the PERM application was accepted for processing rather than the date that the pre-PERM application was filed. The CO did so because the pre-PERM and PERM applications were not identical. Specifically, they listed different requirements related to education and experience. (AF 6-7).

On January 27, 2007, the Employer moved for reconsideration on the priority date determination arguing that a scrivener’s error had been made in the ETA Form 9089, Section H.6A., regarding the education and experience requirements. The Employer stated that “[i]nstead of typing 3.0 (referring to 3 years), it was typed as 30 [months].”

On July 10, 2008, the CO denied reconsideration, finding that regardless of whether the requirement typed on ETA Form 9089 was three years or 30 months, it was not identical to the original requirement of two years of experience. The CO then forwarded an Appeal File to BALCA. The Employer’s attorney filed a letter dated July 30, 2008, in which he repeated the scrivener’s error argument. The CO filed a letter brief dated September 8, 2008 arguing that the CO’s denial of reconsideration was correct because the length of experience requirement in the two forms was not identical.²

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.

² The CO’s letter brief also noted several other discrepancies between the pre-PERM and the PERM application, such as different job duties, and different names and addresses for the Employer. We also note that on appeal, the Employer has provided a letter showing yet a third address for the location where the

DISCUSSION

The regulation at 20 C.F.R. § 656.17(d) clearly supports the CO's decision not to retain the pre-PERM priority date. Section 656.17(d) provides:

(d) *Refiling Procedures.* (1) Employers that filed applications under the regulations in effect prior to March 28, 2005, may, if a job order has not been placed pursuant to those regulations, refile such applications under this part without loss of the original filing date by:

(i) Submitting an application for an identical job opportunity after complying with all of the filing and recruiting requirements of this part 656; and

(ii) Withdrawing the original application in accordance with ETA procedures. Filing an application under this part stating the employer's desire to use the original filing date will be deemed to be a withdrawal of the original application. The original application will be deemed withdrawn regardless of whether the employer's request to use the original filing date is approved.

(2) Refilings under this paragraph must be made within 210 days of the withdrawal of the prior application.

(3) A copy of the original application, including amendments, must be sent to the appropriate ETA application processing center when requested by the CO under § 656.20.

(4) For purposes of paragraph (d)(1)(i) of this section, a job opportunity shall be considered identical if the employer, alien, job title, job location, job requirements, and job description are the same as those stated in the original application filed under the regulations in effect prior to March 28, 2005. For purposes of determining identical job opportunity, the original application includes all accepted amendments up to the time the application was withdrawn, including amendments in response to an assessment notice from a SWA pursuant to § 656.21(h) of the regulations in effect prior to March 28, 2005.

Alien will work. However, we base our decision on appeal solely on the ground stated in the CO's letter denying reconsideration.

In the instant case, the pre-PERM application listed a requirement of two years of experience in the job offered. As the CO found, regardless of whether the Employer's PERM application was intended to list three years or 30 months of experience in the job offered in Section H.6. of the PERM application (see AF 27), the applications were not identical in regard to the length of required experience. The Employer's argument on appeal does not even acknowledge that there is a difference between 24 months and 30 months or two years and three years. The applications were plainly not identical in regard to the length of the experience required regardless of whether a scrivener's error occurred. Accordingly, the CO correctly applied the regulations to set the priority date based on the date that the PERM application was accepted for processing.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's determination of the filing date for the approved PERM labor certification in the above-captioned matter is hereby **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.