



Issue Date: 05 January 2009

BALCA Case No.: 2008-PER-00218

ETA Case No.: A-05294-45108

In the Matter of

TEKKOTE,
a division of
JEN-COAT, INC.,
Employer,

on behalf of

FORTUNATO CABRERA-GARCIA,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Florence D. Nolan Esquire¹
Basile Birschwale and Pellino, LLP
Ridgefield, New Jersey
For the Employer and the Alien

Gary M. Buff, Associate Solicitor
Frank P. Buckley, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

¹ Ms. Nolan filed the Employer's appellate brief. In the brief she stated that she had sent a G-28 Notice of Entry of Appearance to the Department of Labor on August 7, 2008. The Appeal File does not contain the August 7, 2008 G-28. However, a G-28 was filed by Ms. Nolan at the time she filed the Employer's Statement of Intent to Proceed with the appeal. The Employer's reconsideration request was filed by Victor M. Pizarro, Esquire. (AF 3, 4, and 8) The Appeal File does not contain documentation indicating that Mr. Pizarro filed a motion to withdraw as counsel. Accordingly, he will be retained on the service list.

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 CO accepted the Employer’s labor certification application for processing on October 17, 2005. (AF 1). The Employer is sponsoring the Alien for a position as a “Slitting Supervisor” (AF 38). On January 13, 2006, the CO sent the Employer an Audit Notification. (AF 33-36). The Audit requested, among other items, a copy of the Employer’s Notice of Filing. (AF 33). In response, the Employer filed the requested documents, one of which was the requested Notice of Filing. (AF 48). On October 24, 2006, the CO issued a denial letter. (AF 9-11). One of the grounds for denial was that the Notice of Filing did not contain the address of the appropriate CO at the National Processing Center with jurisdiction over the application, as required by 20 C.F.R. § 656.10(d)(3)(iii). (AF 11).

By letter dated November 21, 2006, the Employer submitted a “Reconsideration Request.” (AF 3-8). The request included a notice of entry of appearance of a new attorney. However, it did not respond to or contain any argument concerning the grounds for denial stated by the CO in the October 24, 2006 denial letter.

On September 20, 2008, the CO issued a letter of reconsideration finding that the denial of certification was valid. (AF 1-2). The CO noted that the Reconsideration Request did not address the issue of failure to include the address of the appropriate CO

on the Notice of Filing. The CO then forwarded an Appeal File to BALCA. BALCA issued a Notice of Docketing on September 25, 2008.

The Employer's new attorney filed an appellate brief arguing that the failure to include the address of the appropriate CO on the Notice of Filing was harmless error. In the brief the attorney stated that "[i]n the September 20, 2008 formal disapproval of labor certification, [the] Certifying Officer cites the failure to include the address for the Certifying Officer as a reason for denial. What the September 20, 2008 disapproval fails to note is that as soon as Tekkote learned of this typographical error, it immediately agreed to repost the notice of filing. This offer of Tekkote received absolutely no response from the DOL." The Employer's brief then argued that the failure to include the CO's address was a mere typographical error, akin to the typographical error made by the employer in *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), and the employer's use of an ETA Form 9089 which was missing the official DOL logo in *Subhashini Software Solutions*, 2007-PER-46 (Dec. 18, 2007). Finally, the Employer argued that the denial of labor certification based on a typographical error was a denial of due process.

The CO filed an appellate brief noting that the Board had ruled on the issue of failure to include the address of the appropriate CO on the Notice of Filing in *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007).

DISCUSSION

The regulation at 20 C.F.R. § 656.10(d)(3) provides:

(3) The notice of the filing of an Application for Permanent Employment Certification must:

(i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;

(ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;

(iii) Provide the address of the appropriate Certifying Officer; and

(iv) Be provided between 30 and 180 days before filing the application.

The purpose of section 656.10(d)(3) is to implement the statutory requirement provided by Section 122(b) of Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649, 104 Stat. 4978, effective October 1, 1991, that provided that "any person may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions with respect to the employment of alien workers and co-workers)." ETA, *Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 69 Fed. Reg. 77326, 77337-77338 (Dec. 27, 2004). In *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007), this panel found that this regulatory requirement to provide the address of the appropriate CO is a reasonable means of implementing this statutory purpose.

In the instant case, the Employer's Notice of Filing made no reference whatsoever to the opportunity to contact a federal Certifying Officer about the labor certification application, and therefore was clearly in violation of the regulation at 20 C.F.R. § 656.10(d)(3)(iii). The Employer's "Reconsideration Request" did not contain any argument on the merits of this reason for denial. Thus, based on the record before him, the CO properly affirmed on reconsideration the denial of certification.

The Employer's second new attorney made arguments in the appellate brief that were not presented to the CO at the time of the request for reconsideration. Assuming *arguendo* that such new arguments are within the Board's authority to consider on appeal,² they are not convincing.

² See 29 C.F.R. § 656.27(c) (limiting the Board's scope of review to the record made before the CO, the request for review, and any Statement of Position or legal briefs). Under pre-PER law, the Board interpreted a similar regulation as permitting general legal argument in briefs, but not permitting employers to present wholly new arguments not made before the CO. See, e.g., *Cynthia Bartky*, 1990-INA-440 (May 9, 1991) (panel did not consider counsel's assertions, made after issuance of the Final Determination, that a live-in worker was needed to "discourage crime" and for lack of available public transportation).

First, the Employer argues that the omission of the appropriate CO's address on the Notice of Filing was a mere typographical error and that denial on this basis would constitute a denial of due process. Essentially the same arguments were made by the employer in *Voodoo Contracting Corp.* and rejected by this panel. In that decision, the panel wrote that "the Notice of Filing requirement is an implementation of a statutory notice requirement designed to assist interested persons in providing relevant information to the CO about an employer's certification application. It is not a regulation to be lightly dismissed under a harmless error finding. Nor does its enforcement offend fundamental fairness or procedural due process." Slip op. at 9-10 (footnote omitted). Moreover, this was not a mere typographical error as in *HealthAmerica*. Nor was it a non-substantive error such as using a form without a DOL logo as in *Subhashini Software Solutions*. Rather, the omission of the CO's address went to one of the core reasons for making an internal posting notifying workers of the labor certification application. Omission of the address defeated the statutory and regulatory purpose of giving interested persons the appropriate address to which they might provide documentation bearing on the labor certification application.

Second, the Employer's attorney stated in the appellate brief that the Employer immediately offered to repost the Notice of Filing. The Appeal File contains no evidence that such an offer was made. Rather the Employer's letter in response to the denial determination only reports that it had hired a new attorney. The Appeal File contains no discussion of the merits of the denial before the CO by the Employer or his attorney. Moreover, the CO's letter of reconsideration indicates that the Employer had not responded to the Notice of Filing issue (or other issues). Thus, although the Employer's attorney clearly believes that such an offer was made,³ there is no evidence that the CO was aware of it.

³ We note that assertions by an employer's attorney that are not supported by underlying statements by a person with knowledge of the facts, do not constitute evidence. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (en banc).

Moreover, assuming arguendo that the Employer made such an offer, the CO was under no obligation to permit such a reposting after the filing of the Form 9089. We recognize that a CO has the authority under the audit procedures to direct a supervised recruitment. See 20 C.F.R. § 656.20(d)(2). This authority, however, is discretionary.

Based on the foregoing, we find that the CO properly denied certification. Because we affirm the CO on the Notice of Filing issue, we do not reach the other grounds for denial stated in the CO's ruling on reconsideration.

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.