U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 January 2011

BALCA Case No.: 2009-PER-00481
ETA Case No.: A-07199-57719

In the Matter of:

MANDY DONUTS CORP.,
Employer,

on behalf of

VICTOR GARCIA-RAMIREZ,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Esperanza Torres
Immigration & American Citizenship Organization
For the Employer

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

Before: **Johnson, Rae and Vittone**
Administrative Law Judges

PAUL C. JOHNSON, JR.
Acting Associate Chief Judge

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

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.

BACKGROUND

On May 2, 2007, the Certifying Officer (CO) accepted for processing the Employer's application for permanent alien labor certification for the nonprofessional position of Baker. (AF 118, 122, 124).[1] The CO denied the application on September 27, 2007 on the ground that the Employer could not be verified as a bona fide business entity. (AF 118-120). The Employer requested reconsideration under cover letter dated October 13, 2007, attaching thereto evidence of its existence as a business entity. (AF 94-117). In response, the CO issued an Audit Notification. (AF 91-93). The CO directed the Employer to submit, among other items, documentation of the Employer's recruitment efforts. The CO also specifically directed the Employer to provide "[a] copy of the job order placed with the [State Workforce Agency] SWA serving the area of intended employment downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the content of the job order …." (AF 93).

Under cover letter dated March 9, 2009, the Employer filed its audit response. (AF 48-90). Attached as Exhibit F to the audit response was (1) a copy of a fax transmission from the Employer's agent to the New Jersey Department of Labor dated February 5, 2007, showing that the Employer had made a job order request of the SWA on that date, (AF 74) and (2) a copy of the job order form. (AF 75-76).

[1] AF is an abbreviation for "Appeal File."

On April 20, 2009, the CO denied certification on the ground that the Employer's documentation of the SWA job order was not the documentation requested in the Audit Notification letter. (AF 45-46).

The Employer requested reconsideration under cover letter dated May 20, 2009. (AF 2-46). The Employer argued that the denial turned on the nature of the proof of publication of the SWA job order, and that its fax confirmation sheet and copy of the original of the job order were in compliance with the regulatory documentation requirement. (AF 2-3). The Employer reported that when it contacted the SWA to request a certified copy of the job order, it was informed that all records were purged after 18 months (i.e., prior to the date of the Audit Notification). The Employer noted that its attempts to find further documentation of the publication of the SWA job order was also hampered by the demise of the America's Job Bank, under which the job order had run. On September 2, 2009, the CO issued a letter of reconsideration finding that the denial was proper because the Employer was required to retain documentation supporting the application for five years under the regulations. (AF 1).

The CO forwarded this matter to BACLA, and the Employer filed a statement confirming its intent to pursue the appeal,[2] and a letter arguing that the Employer had recruited in good faith, that the delay caused by the CO's initial denial for failure to verify the Employer as a bona fide business entity hampered its ability to get third party confirmation of publication of the SWA job order, and that the regulations do not specify what constitutes acceptable documentation of proof of publication of the SWA job order.

The CO filed a Statement of Position, arguing that the Employer failed to provide the specific supporting documentation of the SWA job order that was requested in the audit notification letter. The CO noted that under the regulations, employers are required to retain documentation to support their application for five years, and a substantial

[2] We noted that the copy of the Board's Notice of Docketing served on the Alien was returned by the United States Postal Service as undeliverable.

failure to provide required documentation in response to an audit notification will result in denial of the application. Regarding the Employer's argument that it was hampered from documenting the SWA job order because of the SWA's 18-month purging of records, the CO cited regulatory history of the PERM regulations to the effect that an employer must have its documentation assembled at the time the application is filed, and on-hand, ready to be submitted if necessary to support the application.

DISCUSSION

An employer sponsoring an alien for permanent employment certification under the basic certification process must conduct certain pre-filing recruitment within time frames specified by the PERM regulations. One of the required pre-filing recruitment steps for a nonprofessional occupation to place a job order with the State Workforce Agency ("SWA") serving the area of intended employment. 20 C.F.R. § 656.17(e)(2). According to the regulations governing placement of a SWA job order: "The start and end dates of the job order entered on the application serve as documentation of this step." 20 C.F.R. § 656.17(e)(2)(i).

The regulations also provide that all documentation supporting the permanent employment certification application must be retained by the petitioning employer for five years from the date of filing of the application. 20 C.F.R. § 656.10(f). The Employer must be prepared to furnish the supporting documentation in the event of an audit of the application by the CO. 20 C.F.R. § 656.17(a)(3); *see also* Final Rule, *Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 69 Fed. Reg. 77326, 77327 (Dec. 27, 2004). When conducting an audit, the CO is required to state what documentation must be submitted by the employer. 20 C.F.R. § 656.20(a)(1). A substantial failure by the employer to provide the required documentation will result in denial of the application. 20 C.F.R. § 656.20(b).

We agree with the Employer's agent that the issue in this matter concerns what constitutes adequate documentation of a petitioning employer's compliance with the SWA job order recruitment step. We also agree with the Employer's agent that, other than entry of the start and end dates of the job order on the Form 9089 application, the regulations are silent on what type of documentation is sufficient to establish that the job order was placed in compliance with the regulations. In the instant case, the CO clearly wanted concrete evidence that the job order was actually run rather than merely evidence that the job order was placed. But we are not convinced that the regulations permit the CO to require such documentation.

We begin with the text of the regulation itself, which only calls for "placement" of a SWA job order. The regulations also refer to "placement" of newspaper advertisements. But, unlike the documentation requirements of newspaper advertisements, which require actual copies of newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper, the regulations do not mandate that an employer obtain and retain specific documentation of the SWA job order that was actually run. Rather, the regulation only states that "the start and end dates of the job order entered on the application serve as documentation of [placement of a SWA job order for 30 days]." The regulatory history, in fact, indicates that the drafters of the regulations did not contemplate that documentation from the SWA confirming actual placement of the SWA job order would be required to be retained by an employer:

> 3. Sending and Responding to the Audit Letter
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> * * *
>
> To account for possible delays in mail delivery, and for other delays caused by circumstances beyond the control of the employer, we have extended the response time [for replying to an audit letter] to 30 days. Employers' responses must be sent within the 30-day time limit, but need not be received by DOL by that date. As stated in the preamble to the proposed rule, the employer is expected to have assembled the documentation required before filing the application. None of the commenters stated this expectation is unreasonable.

> One commenter stated some records may be purged in the state systems after a short period of time, such as 30 or 60 days, making it impossible to retrieve information by the time an audit is requested. The *Application for Permanent Employment Certification* requires the employer to provide the start and end date of the job order on the application form to document the job order has been placed. Gathering additional information on the job order from the SWA will not be necessary; therefore, no extension of the response time is warranted for this purpose.

69 Fed. Reg. at 77359 (emphasis added).

In order to verify that an employer has complied with the conditions it must attest to when filing a permanent labor certification application, *see* 20 C.F.R. § 656.10(c), it would be perfectly reasonable in an audit for the CO to require an employer to produce a copy of the job order that was actually placed. But, where neither the regulations nor any other rule or instruction suggests that an employer must retain documentation establishing that the SWA job order was actually run as opposed to merely placed, it is unreasonable for the CO in assessing the response to the audit notification to demand such documentation. *See generally Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc) (CO's documentation request must be reasonable). *See also Lam Garden Chinese Restaurant*, 2008-PER-14 (Dec. 17, 2007) (forgiving the employer for an error by the SWA in neglecting to consider the short length of February that caused the job order to be a day short).

Based on the foregoing, we find that the Employer adequately documented the placement of the SWA job order.[3]

[3] While we share Judge Rae's concerns over the issues of the Employer's name and actual job requirements, we note that the CO has waived those issues as he did not deny certification for those reasons and did not address them on appeal.

ORDER

IT IS ORDERED that the Certifying Officer's denial of labor certification in the above-captioned matter is **VACATED** and **REMANDED** to the Certifying Officer to **GRANT** certification.

For the panel:

A

PAUL C. JOHNSON, JR.
Acting Associate Chief Judge

Robert B. Rae, Administrative Law Judge, concurring in part and dissenting in part.

I concur with the majority's analysis of the documentation requirements of the regulation at 20 C.F.R. § 656.17(e)(2)(i). Rather than remanding this matter with a direction to grant certification, however, I would have permitted the Certifying Officer to inquire further into whether the job is clearly open to U.S. workers and whether the Employer engaged in good-faith recruitment. *See Daisy Schimoler*, 1997-INA-218 (March 3, 1999) (en banc) (Board may direct the CO on remand to consider an issue not previously considered). While the Employer's business is "Mandy Donuts, Corp.," it followed up with applicants by holding itself out to be "Dunkin Donuts," which raises the question of whether the applicants may have been confused about the identity of the employer with the job opening. (AF 84-90).

The Appeal File also suggests that the Employer may have misrepresented the actual minimum requirements for the position. First, it is unclear whether the Alien meets the Employer's minimum requirements of a high school diploma and 24 months of experience as a baker. On the Employer's application, it lists the high school that the

Alien graduated from as "Senior Citizen" High School, which is an unusual name for a high school. (AF 126). Second, since it appears that Mandy Donuts, Corp. is a Dunkin' Donuts franchise, it is unclear whether the job was properly classified under SOC/O*Net Code 51-3011.01. *See Dunkin' Donuts*, 2008-INA-2 (Mar. 25, 2008) (pre-PERM decision affirming CO's classification as Dunkin' Donuts position as "Doughnut Maker" rather than "Pastry Chef" under the Dictionary of Occupational Titles.").[4] I would have permitted the CO to inquire into both the Alien's qualifications, and into whether the job's 24 month experience requirement is an unduly restrictive job requirement.

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.

[4] The SOC/O*Net Code 51-3011.01 (Bakers, Bread and Pastry), is no longer in use, and has been replaced by the Code 35-1011.00 (Chefs and Head Cooks). *See* online.onetcenter.org/link/summary/35-1011.00?redir=51-3011.01 (visited Dec. 20, 2010). Code 35-1011.00 has a SVP Range of 6.0 to < 7.0. Code 51-3011.00 (Bakers), in contrast, has an SVP range of 4.0 to < 6.0which permits a maximum lapsed time of preparation up to and including 1 year, as opposed to the 2 years required by the Employer. *See PV Bakery, Inc.*, 2009-PER-292 (Feb. 2, 2010).