



Issue Date: 09 January 2009

BALCA Case No.: 2009-PER-00011
ETA Case No.: A-06348-91070

In the Matter of

SOUTHERN OCCASIONS CATERING, LLC,
Employer,

on behalf of

FELIX SANCHEZ SOTO,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Mark Thompson
Owner
Pro se for the Employer

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, 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 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 Employer is sponsoring the Alien for a position as a "Food Preparation Worker." (AF 5). In its Form 9089 application, the Employer checked the box confirming that there was a Sunday edition of a newspaper available in the area of intended employment. However, the Employer's report of its newspaper advertisements indicated that the first advertisement was placed on Tuesday, August 22, 2006, and that the second advertisement was placed in a different newspaper on Saturday-Sunday, October 21-22, 2006. (AF 19-20).

The CO denied the application on January 19, 2007, on the ground that a Sunday edition of a newspaper was available but not used for the second required advertisement. (AF 13-15). The Employer then submitted a letter stating that it had re-advertised in a Sunday newspaper edition on January 28, 2007. The Employer filed a revised ETA Form 9089 in support of its letter. (AF 2-12). On October 2, 2008, the CO denied reconsideration because the 2007 newspaper advertisement was not in the record at the time the application was denied. (AF 1). The CO then forwarded an appeal file to BALCA.

BALCA issued a Notice of Docketing on October 10, 2008. The Employer filed a Statement of Intent to Proceed with the appeal, but did not file a brief, or suggest any argument as to why the CO's denial of reconsideration was in error. The CO filed a letter brief urging that the denial be affirmed.

DISCUSSION

A permanent labor certification issued by the Department of Labor is a required step for an employer to hire a foreign worker to work permanently in the United States. In most instances, before the U.S. employer can submit an immigration petition to the Department of Homeland Security's U.S. Citizenship and Immigration Services, the employer must obtain a certification from DOL that there are no qualified U.S. workers able, willing, qualified and available to accept the job at the prevailing wage for that occupation in the area of intended employment and that employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. To obtain such a certification, the employer must complete an Application for Permanent Employment Certification (ETA Form 9089), and must attest, in addition to a number of other conditions of employment, to having conducted recruitment prior to filing the application under the standards set forth in 20 CFR 656.17(e).

Under 20 C.F.R. § 656.17(e), with certain exceptions not relevant to the instant case, the Employer must have attested to having placed two print advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity. 20 C.F.R. § 656.17(e)(1)(i)(B) and 656.17(e)(2)(ii).

In the instant case, the CO's denial letter was based on the second advertisement not being run in a Sunday edition. The Form 9089 averred that the second advertisement was run on October 21-22, 2006. October 22, 2006 was a Sunday, so it is not clear whether the CO's denial was grounded in the fact that the advertisement was a weekend, rather than exclusively a Sunday classified edition, or whether the CO misspoke, and intended to cite the Employer on based its use of a Tuesday edition for the first advertisement. In either event, the Employer's response was not to argue that it had

followed the regulations in the recruitment reported in the original Form 9089, but to re-advertise in a Sunday edition newspaper in January 2007.

The regulation governing motions for reconsideration in effect at the time of the filing of the Employer's motion for reconsideration provided that "[t]he request for reconsideration may not include evidence not previously submitted." 20 C.F.R. § 656.24(g) (2005)).¹ In *HealthAmerica*, 2006-PER-1 (July 18, 2006)(en banc), the Board interpreted this provision to require that a document used to support a motion for reconsideration must "have been demonstrably in existence at the time of application." The Board also held in *HealthAmerica* that "a CO will not be found to have abused his or her discretion in denying a motion for reconsideration of a denial that was based on a pro forma computer check if the pre-existing documentation does not establish conclusively that the error was merely on the face of the Form 9089, and that there was actual compliance with the applicable substantive requirement." Thus, under PERM, the CO is not required to permit an employer to cure a deficiency by filing a motion for reconsideration supported by a new recruitment conducted after the CO denied the application.

Accordingly, the CO was not required to permit the Employer's failure to comply with the two-Sunday newspaper recruitment requirement to be remedied by running a new advertisement. Rather, the Employer's remedy is to file a new labor certification application.

¹ This subsection of the regulations was amended in 2007. See 72 Fed. Reg. 28903 (May 17, 2007). The amendments would not change the result if applied in this case.

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.