U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 September 2009

BALCA Case No.: 2009-PER-00153
ETA Case No.: C-07275-81210

In the Matter of

INNOPATH SOFTWARE,
Employer,

on behalf of

SHIVANATH MURALIDHAR MADHUGIRI,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Ronald R. Rose, Esquire
Rose Carson Kaplan Choi & White LLP
Palo Alto, California
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, 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.

BACKGROUND

The Employer is sponsoring the Alien for a position as a "Principal Software Engineer." (AF 73). On February 1, 2008, the CO issued an Audit Notification letter. (AF 69-71). Among other documentation, the CO directed the Employer to submit a copy of its Notice of Filing. (AF 69). The Employer supplied the Notice as directed. (AF 38).

The CO denied the application on February 27, 2008 on the ground that the Employer had not included its name on the Notice of Filing. (AF 8-10). In a letter received by the CO on March 28, 2008, the Employer's attorney filed a motion for reconsideration, arguing that "[b]ecause the Notice posting was posted in a conspicuous location for at least ten consecutive business days at the place of employment, there should be no confusion as to who the employer is or where the job is located. Thus, the fact that the name of the employer did not appear on the Notice Posting did not have an effect on the recruitment for this position." (AF 6). The Employer asserted that the absence of its name on the Notice should be considered a "harmless error" in accordance with *HealthAmerica*, 2006-PER-00001 (July 18, 2006). The CO summarily denied reconsideration on January 28, 2009 because the Notice did not list the hiring company as required by the regulations at 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(1). (AF 1-2).

The Board issued a Notice of Docketing on February 9, 2009. The Employer filed a statement of intent to proceed on February 19, 2009, but did not file an appellate brief.

The CO filed an appellate brief urging that the denial of certification be affirmed. Counsel for the CO explained that under the criteria set forth in *Stone Tech Fabrication*, 2008-PER-000187 (Jan. 5, 2009), "the lack of any facts surrounding the posting of the notice of filing supports the finding that the employer's assertions concerning the posting are insufficient to demonstrate compliance with the requirement of section 656.17(f) that the name of the employer be on the notice of filing."

DISCUSSION

The regulation at 20 C.F.R. § 656.10(d)(1) provides that for the basic labor certification process, an employer is required to give notice of the filing of its labor certification application and be able to document that the notice was provided. When the application is processed under the certification process described in 20 C.F.R. § 656.17, the notice "must contain the information required for advertisements by § 656.17(f)…." The very first item of information listed in section 656.17(f) is the name of the employer. 20 C.F.R. § 656.17(f)(1). Thus, in the instant case, the Notice of Filing should have included the Employer's name. The Employer does not argue that the name was listed on its Notice of Filing. Rather, its argument in essence is that since the Notice was posted in a conspicuous location at the place of employment, there should be no confusion as to who the employer is or where the job is located and that the absence of its name on the Notice should be considered a harmless error.

The Board has recognized that notions of fundamental fairness and procedural due process are applicable in PERM processing. In *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), the Board held that the CO abused his discretion in refusing to reconsider an application that contained an obvious typographical error in reporting the dates that an advertisement had been run where the application was in actual compliance with applicable regulations that a typographical error was made was readily proved by submission of newspaper tearsheets.

The Employer argues in the instant case that the absence of its name on the Notice of Filing should be considered a harmless error and that in accordance with *Health America*, a harmless error should not require it to completely go through the process of recruitment when it conducted the recruitment in good faith and the error does not affect the outcome of the recruitment. The Board stated in *Stone Tech Fabrication*, "[i]n some situations, the purpose of the Notice of Filing would be fully served without the name of the company on the Notice…" Slip op. 4. However, as in *Stone Tech Fabrication*, here we do not have enough information to simply accept the Employer's attorney's contention that the posting was adequate because it "was posted in a conspicuous location at the place of employment." In order to make out a compelling case for equitable relief, the Employer needed to do more than simply assert that "[n]o reasonable person would see the Notice Posting and be confused about who the employer is or where the job is located." (AF 6). As the CO stated in *Stone Tech Fabrication*:

> [I]t is not always the case that only one employer resides at a single facility or location. For instance, multiple employers may share an office, and a notice of filing posted in a common area in that office potentially could apply to either employer. Also, a contractor or subcontractor that is performing work at a third party facility may post its notice of filing at that facility because it serves as the "location of employment" for the contractor or subcontractor. Without the name of the employer, it would not be possible to tell to which employer the notice of filing applies. Accordingly, the requirement to list the name of the employer cannot be dismissed as unnecessary just because the notice of filing is posted in the employer's facility or location of employment.

Slip op. 3. Thus, in order to establish a compelling case for relief from the regulatory requirement that an employer's name must appear on a Notice of Filing, the Employer should have, for example, provided information about the size of the company, and whether the place it posts notices is used exclusively for company bulletins. Although we are averse to elevating form over substance, we cannot make arguments for employers and we cannot simply assume the truth of generalizations. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof).

Moreover, the Notice of Filing is not a mere technicality. The purpose of section 656.10(d) is to implement the statutory requirement provided by Section 122(b) of the Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649, 104 Stat. 4978, effective October 1, 1991, that provides 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)." *Voodoo Contracting Corp*., 2007-PER-1 (May 21, 2007) (quoting 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, supra*, this panel held 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).

Based on the foregoing, we decline to reverse the CO's denial of certification.

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.