

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 16 November 2010

In the Matter of

CVS RX SERVICES, INC.,
Employer,

on behalf of

LALITHA PRASAD RAO
THUNGATHURTHI,

BALCA Case No.: 2010-PER-01108
ETA Case No.: A-09096-37711

and

SANJAYKUMAR
KANTILAL SHAH,
Aliens.

BALCA Case No.: 2010-PER-01275
ETA Case No.: A-09267-65948

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Mahsa Aliaskari, Esquire
Laura Foote Reiff, Esquire
Greenberg Traurig, LLP
Santa Monica, California
For the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones, Attorney
Jonathan R. Hammer, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER
VACATING DENIAL OF LABOR CERTIFICATION

PER CURIAM. These matters each involve an appeal of the denial 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. Because these cases involve the same Employer, similar facts and identical legal issues, they have been consolidated pursuant to 29 C.F.R. § 18.11. The issue in each of these cases is whether the CO properly denied certification on grounds that Employer advertised in a professional journal pursuant to 20 C.F.R. 656.17(e)(1)(i)(B)(4) for a profession that did not require an advanced degree or experience.

STATEMENT OF THE CASE

On December 31, 2009, the Certifying Officer ("CO") accepted for processing Employer's Form 9089 Application for Permanent Employment Certification for the professional position of "Pharmacist." (AF 538, 552-540).¹ On the Form 9089, Employer specified that the job opportunity required a bachelor's degree in Pharmacy and a "Valid Florida Pharmacist license or ability to obtain a license." (AF 541-542). Employer indicated that its two mandatory print advertisements were a Sunday advertisement in the *Orlando Sentinel* and a journal advertisement in *Pharmacy Today*. (AF 543). Employer also indicated that the application was for a professional occupation, listing three additional recruitment steps required for professional occupations. (AF 544).

On June 7, 2010, the CO denied certification because, pursuant to the regulation at 20 C.F.R. § 656.17(e)(1)(i)(B)(4), a professional journal could only be used as the second mandatory print advertisement if the job involved in the application requires experience and an advanced degree. (AF 538-539). The CO acknowledged that

¹ AF is an abbreviation for Appeal File. For purposes of efficiency, the Appeal File referred to herein corresponds with BALCA Case No. 2010-PER-01275 unless otherwise indicated. The Appeal File and subsequent filings corresponding to 2010-PER-01108 are identical in all material respects.

Pharmacy Today is a pharmaceutical journal and might well be used to advertise pharmaceutical positions, but found that use of a professional journal for the second mandatory print advertisement was not permitted for the instant case because the job offer only required a bachelor's degree and no experience.

Employer's Vice President for Pharmacy Professional Services requested review of the denial by letter dated June 22, 2010. (AF 534-537). Employer described the fierce demand and competition among retail pharmacy chains, hospitals and research facilities for pharmacists and requested that the CO recognize that Pharmacy degree requirements have been changed to require 6 years in a PharmD program and that the requirements for licensure in the profession have inherent experience requirements. Employer asked the CO to exercise his discretion to allow a journal advertisement in lieu of a second Sunday advertisement, arguing that such efforts expanded the recruitment pool in light of the professional nature of the occupation. Employer also described, in detail, the vast demand across the country for qualified pharmacists and its consequent difficulty of obtaining applicants for the position. On July 2, 2010, Employer re-submitted the letter along with exhibits documenting its arguments. (AF 1-544). In BALCA Case No. 2010-PER-1108, Employer submitted only the initial four-page letter described above, without any attached documentation.

In both cases, the CO forwarded the appeal files immediately to BALCA without reconsideration of Employer's arguments. The Board issued a Notice of Docketing and both parties in each case filed timely appellate briefs.²

The CO asserts on appeal that, because Employer indicated that the job opportunity required a bachelor's degree in Pharmacy, "[i]t is irrelevant that a Pharmacist position normally requires an advanced degree, CVS is not requiring an advanced degree, and therefore does not fit within [Section 656.17(e)(1)(i)(B)(4)]." In BALCA Case No. 2010-PER-1108, the CO filed a brief letter on appeal on October 4, 2010, asserting that the denial is valid because Employer indicated on the application that the job opportunity

² In BALCA Case No. 2010-PER-1275, identical documentation of Employer's arguments to its appellate brief was submitted as exhibits attached to Employer's Request for Review, consisting of AF 1-533. For easy reference, we will refer to this documentation by the Exhibit Number associated with each document as they are appended to Employer's brief in BALCA Case No. 2010-PER-1275 unless otherwise noted.

did not require an advanced degree and then “substituted an advertisement in a professional journal for the mandatory second newspaper advertisement, contrary to the explicit requirements of 20 C.F.R. § 656.17(e)(1)(i)(B)(4).”

Employer argues on appeal that the reason it stated that its minimum requirements for the job opportunity were a bachelor’s degree and licensure is because it was trying to recruit based on the largest applicant pool, which would include pharmacists who were “grandfathered in” to the profession after the requirements changed in 2000 to require a doctorate degree in pharmacy (“PharmD”), instead of a mere bachelor’s degree. Employer asserts that the transition between the two requirements, initiated by the American Association of Colleges of Pharmacy, began in the 2000-2001 academic year and was completed in the 2004-2005 academic year, citing in support relevant accreditation standards and guidelines. *See* Brief of Employer at 6-7, Exhibit 6. Employer also asserts that though the licensure requirements for pharmacists vary from state to state, every state requires a specified number of hours of experience in a practice setting before the license can be awarded, citing the *Bureau of Labor Statistics Occupational Outlook Handbook, 2010-11 Ed.* and relevant portions of the Florida and Virginia statutes, the jurisdictions in the two cases at bar. *Id.* at 8, Exhibit 4. Employer did not include an explicit experience requirement on its application because the timing in which an applicant for licensure completes the requirement can vary by applicant; moreover, Employer did not require experience in addition to licensure. *Id.* at 9.

Employer argues that because it utilized appropriate recruitment efforts based on the standard, rather than the minimum, industry requirement for a licensed pharmacist, its recruitment satisfied the legislative intent behind the regulations, which is to recruit from the largest pool of qualified U.S. workers. *Id.* at 11-12. In support, Employer cites *EPI Limited Partnership*, 2008-PER-4 (Apr. 28, 2008), and the regulatory history to the original PERM regulations, *ETA Final Rule, Labor Certification for the Permanent Employment of Aliens in the United States*, 69 Fed. Reg. 77326, 77345 (the regulation “allows an employer discretion in using a professional journal. If a journal advertisement is appropriate for the job opportunity, the employer may choose, but is not required, to

use a journal advertisement in lieu of one of the Sunday print advertisements.”).³ Employer argues that the CO’s interpretation of the regulations creates an unjust result in that had Employer stated its minimum educational requirement as a “doctoral degree,” it would have actually excluded qualified applicants that were “grandfathered” into the profession under the old accreditation requirements and yet would avoided denial on the ground cited by the CO. *Id.* at 13.

Additionally, Employer raises the procedural argument that the CO’s immediate denial of the application, without further inquiry into whether the Employer was actually requiring an advanced degree and experience, violated due process and fundamental fairness, citing U.S. Supreme Court precedent and the Board’s decision in *HealthAmerica*, 2006-PER-1 (Jul. 18, 2006). *Id.* at 14-16.

DISCUSSION

The relevant regulation governing pre-filing recruitment for professional occupations states:

If the job involved in the application requires experience and an advanced degree, and a professional journal normally would be used to advertise the job opportunity, the employer may, in lieu of one of the Sunday advertisements, place an advertisement in the professional journal most likely to bring responses from able, willing, qualified and available U.S. workers.

20 C.F.R. 656.17(e)(1)(i)(B)(4). The CO denied the application because Employer placed one of its required advertisements in a professional journal and indicated on its application that it required a Bachelor’s degree and no experience. The CO did not consider Employer’s argument, presented for the first time on appeal, that the job opportunity in fact does require an advanced degree and experience.

³ We note that the issue presented on appeal is not whether Employer failed to establish that it conducted the proper recruitment for a professional occupation, but whether the job opportunity on the Form 9089 required an advanced degree and experience.

Although the CO has not contested the propriety of our consideration of Employer's request for review and appended documents⁴ in each of the above-captioned cases, we find that we cannot consider these submittals for their merits because, as a technical matter, they are not in the record before the Board. *See* 20 C.F.R. §§ 656.26(a)(4)(i) (the request for review, statements, briefs, and other submissions of the parties must contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based) and 656.27(c) (The Board must review a denial . . . on the basis of the record upon which the decision was made, the request for review, and any position statements or legal briefs of the parties). However, on appeal, Employer makes the argument that, notwithstanding its indications regarding the education and experience requirements of the job opportunity on the Form 9089, the position nonetheless required "an advanced degree" and experience. In both cases, the CO did not consider this argument because rather than treat Employer's ambiguously-styled "request for review" as a request for reconsideration,⁵ he forwarded the matter for immediate BALCA review.

In a recent panel decision in *Denzil Gunnels d/b/a/ Gunnels Arabians*, 2010-PER-628 (Nov. 16, 2010), we held that an employer's right to procedural due process is violated when the CO construes an ambiguous "request for review" as a request for direct BALCA review and immediately forwards the case to the Board with the consequent effect of denying an employer its sole opportunity to supplement the record on appeal. Here, Employer never had the opportunity to present to the CO the argument that the job opportunity in fact required an advanced degree and experience, an opportunity that did not arise until after it received initial notice that its application was deficient in the form

⁴ We cannot consider the documents because they are attendant to the legal argument that Employer was unable to present to the CO. However, we note that while the procedural history of the cases at bar could potentially preclude us from considering certain types of documentation pursuant to 20 C.F.R. §§ 656.24(g), 656.26(a)(4)(i), and 656.27(c), it does not bar consideration of the type of documentation here, which is offered in support of a legal argument that was preserved for appeal because it was raised before the CO, the submission of which does not purport to amend the content of any answer to the Form 9089. *See Gunnels*, 2010-PER-628, slip op. at 11, n.7.

⁵ Here, in both cases, the subject line of Employer's post-denial letter was "Request for Review of Form ETA 9089 Denial." The letter began: "Dear Mr. Carlson" and its content specifically invoked the Department's authority to grant certification in the exercise of agency discretion based on its arguments. We find that this letter was not a clear request for BALCA review.

of the CO's denial letter.⁶ As in the *Gunnels* decision, we are compelled to return the case for further processing to allow Employer the opportunity to preserve his argument on appeal by first presenting it to the CO.

ORDER

IT IS ORDERED that the Certifying Officer's denial of Employer's application for labor certification in the above-captioned matter is **VACATED** and **RETURNED** for further processing consistent with this opinion.

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

⁶ In 2010-PER-1275, we find that the CO's assertion in his position statement on appeal, that "[i]t is irrelevant that a Pharmacist position normally requires an advanced degree, CVS is not requiring an advanced degree," contains observations extrinsic to the CO's initial denial reason that the requirements stated on the form did not fulfill the predicate to engage in recruitment under Section 656.17(e)(1)(i)(B)(4). However, it does not actually address the argument that Employer makes here: that the minimum degree required qualifies as an advanced degree.

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.