U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 September 2013

BALCA Case No.: 2010-PER-01433
ETA Case No.: A-08025-17223

In the Matter of:

APT-ADVANCED POLYMER TECHNOLOGY,
Employer

on behalf of

LUCARELLI, FRANK MARIO,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Laleh Sharifi, Esquire
Smith, Gambrell & Russell, LLP
Atlanta, Georgia
For the Employer

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

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

DECISION AND ORDER
AFFIRMING 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 at 20 C.F.R. Part 656.

BACKGROUND

On January 25, 2008, the Certifying Officer ("CO") accepted for filing the Employer's ETA Form 9089 for the professional position of "R&D Manager/Chemist." (AF 154-167).[1] The Employer indicated in box I.d that it advertised the position through its employee referral program, a job search website, and its own website. (AF 162). Box I.d. of the ETA Form 9089 indicates that employee referral program announcement ran from November 21, 2007 to December 5, 2007. *Id*. The CO issued an audit notification on March 27, 2008. (AF 155-157).

The Employer responded on April 25, 2008 with documentation of its recruitment efforts as well as a summary chart. (AF 40-154). The Employer's audit materials did not contain any documentation of use of an employee referral program. The summary chart did not mention the employee referral program. (AF 113). Instead, the employer had placed an advertisement with e-campusrecruiter.com sponsored by the University of Pittsburgh from November 14, 2007 to November 29, 2007. (AF 108-111). Printouts of the university advertisement were included in the audit response. *Id*. In its audit response, the employer did not include any discussion of the discrepancy between the ETA Form 9089 and the summary chart.

The CO denied certification of the Employer's application on March 5, 2010. (AF 37-39). Among other denial reasons, the CO found that the Employer had failed to include documentation of the recruitment conducted through its employee referral program although Section I.d.19 of the ETA Form 9089 stated that the employee referral program was one of the three additional recruitment methods used for this professional position pursuant to 20 C.F.R. § 656.17(e)(1)(ii). The Employer submitted a Motion for Reconsideration and/or Request for Review on March 25, 2010. (AF 3-36). In its motion, the Employer indicated it had completed the box for employee referral program recruitment due to a clerical error. The employer requested review, arguing the error was de minimis and immaterial to the substance of the application because, in fact, the Employer had run an additional advertisement with the University of Pittsburgh, which constituted a third professional recruitment action, in addition to the job search website and the Employer's own website. Additionally, the Employer submitted with the Request for Reconsideration a corrected ETA Form 9089 with box I.d.20 filled to indicate advertising ran with a campus placement office from November 14, 2007 to November 29, 2007. (AF 18).

The CO reconsidered, but upheld his denial and rejected the amended application on the basis that a request for reconsideration may only include documentation submitted in response to a request from the CO, or documentation the employer did not have an opportunity to present to

[1] Citations to the appeal file will be abbreviated "AF" followed by the page number.

the CO, but existed at the time the application was filed. The CO forwarded the file for review to the Board of Alien Labor Certification Appeals (BALCA).

In its brief on appeal, the Employer argued it had conducted its recruitment in compliance with the regulations but merely filled out the wrong section of the form. The Employer argued its clerical error was harmless in nature and did not represent a failure to recruit in good faith. The Employer cited *Yasmeena Corp.*, 2008-PER-73 (Nov. 14, 2008) and *Ben Pumo*, 2009-PER-40 (Oct. 29, 2009) to support its claim that errors made on the ETA Form 9089 by employers should be forgiven when they are not material. The Employer also argued on appeal that the Board recognized in *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc) that simple typographic or clerical errors in applications may be corrected through a motion for reconsideration. The CO's appellate brief did not address these issues.[2]

DISCUSSION

The regulations at 20 C.F.R. § 656.17(a) provide that an "employer who desires to apply for a labor certification on behalf on an alien must file a completed Department of Labor Application for Permanent Employment Certification form (ETA Form 9089)." The regulations go on to say that "[i]ncomplete applications will be denied." 20 C.F.R. § 656.17(a).

In the present case, the Employer cites *Yasmeena Corp.*, 2008-PER-73 (Nov. 14, 2008), *Ben Pumo*, 2009-PER-40 (Oct. 29, 2009), and *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc) in support of its argument that certain errors on the ETA Form 9089 are not material to the CO's review of the application, and therefore should not serve as a basis for denial. We do not accept the Employer's argument for several reasons.

New Final Regulations Published. At the time that the *HealthAmerica* decision cited by the Employer was issued, ETA had already published a Proposed Rule, Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, Permanent Labor Certification Program, 71 Fed. Reg. 7655 (Feb. 13, 2006) (hereinafter, "NPRM"). In the preamble to NPRM, the agency explains the intent of the rule to eliminate the time-consuming process of allowing employers to amend their applications: "Nothing in the streamlined regulation contemplates allowing or permits employers to make changes to applications after filing. The re-engineered program is designed to streamline the process and an open amendment process that freely allows changes to applications or results in continual back and forth exchange between the employer and the Department regarding amendment requests is inconsistent with the goal."

The Final Rule was issued effective July 17, 2007. The preamble to the Final Rule reiterated the Department's position that the PERM program was not designed to permit exchanges between an employer and the CO for the purpose of modifying an application and that

[2] The CO's decision on reconsideration included additional reasons for denial, which we do not reach in this decision.

the burden to submit an accurate application rests solely on a petitioning employer. 72 Fed. Reg. at 27915-16.

The regulations discuss the impact of the new rules on the Board's findings in *HealthAmerica*. "[The Board's decision] allowed the employer [in *HealthAmerica*] to modify its application to correct a mistake. To the extent the BALCA favored allowing the employer in *HealthAmerica* to present evidence that effectively changed the response to a question on the application, the BALCA's approach is inconsistent with the Department's objective and the NPRM proposal that applications cannot be changed or modified after submission." 72 Fed. Reg. at 27916. The regulatory history explains that ETA considered the costs associated with permitting employers the opportunity to modify their applications and determined that it would be a significant and costly resource drain on the PERM case management system and staff. 72 Fed. Reg. at 27918. Additionally, ETA rejected the argument that typographical errors were immaterial, noting that "typographical or similar errors are not immaterial if they cause an application to be denied based on regulatory requirements." 72 Fed. Reg. at 27917.

New Regulations Limit Evidence that can be offered in a Motion for Reconsideration. In the Federal Register publication of the Final Rule, one commenter favored allowing employers to provide new information in the request for reconsideration. In response, the drafters of the regulation stated that the pre-PERM practice did not contemplate consideration of "new evidence" in requests for reconsideration and that they were codifying that practice in the Final Rule. The regulatory history indicates ETA's intention to shore up the regulations to require, in effect, the submission of "letterperfect" applications that cannot be modified once filed, even to correct small errors, 20 C.F.R. § 656.11(b); and to impose evidentiary limitations on the type of documentation that can be used to support a motion for reconsideration. 20 C.F.R. § 656.24(g)(2). The regulatory history indicates that the amendments would cause the employer in *HealthAmerica* not to be able to cure the typographical error on the Form 9089.

In *Denzil Gunnels*, 2010-PER-628 (Nov. 16, 2010), the Board discusses how the new regulations limit the impact of *HealthAmerica*. "Recognizing that the NRPM would have prohibited the type of evidence allowed on reconsideration based on the criteria in *HealthAmerica*, the Final Rule effectively codified a modified version of *HealthAmerica* criteria for documentation held in the recordkeeping file in the form of a rule on reconsideration. This rule was intended to be an exception to the "no modification" rule, thereby "continuing to prohibit application modification but recognizing the appropriateness of an opportunity to present and consider evidence that was generated to comply with the record retention requirements of the PERM program" 72 Fed. Reg. at 27916. The rule governing reconsideration now provides, in relevant part:

> (g)(1) The employer may request reconsideration within 30 days from the date of issuance of the denial.
>
> (2) For applications submitted after July 16, 2007, a request for reconsideration may include only:

(i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or

(ii) Documentation that the employer did not have the opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of § 656.10(f).

(3) Paragraphs (g)(1) and (2) of this section notwithstanding, the Certifying Officer will not grant any request for reconsideration where the deficiency that caused denial resulted from the applicant's disregard of a system prompt or other direct instruction.

20 C.F.R. § 656.24(g) (2007). Thus, if the employer had the opportunity to submit clarifying information with the audit response, but failed to do so, that information could not be submitted with a request for reconsideration, because it would constitute "new evidence". The CO in the present case was under no obligation to consider the "new evidence" in the revised ETA Form 9089 submitted with the Employer's request for reconsideration.

Cases Cited by Employer Preceded the 2007 Regulatory Changes. *Yasmeena Corp.* and *Ben Pumo*, the two BALCA cases cited by the Employer to support the argument that immaterial mistakes and omissions on the ETA Form 9089 can be corrected through a Motion for Reconsideration, involved applications filed before July 16, 2007, and in fact the three reconsideration requests also pre-dated the 2007 amendments to PERM. Therefore the new more stringent procedures did not cover those cases. However, the present application was accepted for filing January 25, 2008, after the effective date of the 2007 amendments to the PERM regulations, and was covered by the more stringent procedures.[3]

Audit Response Failed to Explain the Inconsistency. In the case at hand, there was erroneous information provided on the ETA Form 9089 which was more than just a slight typographical error. The professional recruitment stated on the form was never carried out. During the review of audit response materials, the CO would look for the employee placement program materials and not finding it, would naturally consider the audit response to be incomplete. There was no mention on the ETA Form 9089 of advertisement in the University of Pittsburgh newspaper. Not only was the type of recruitment listed incorrectly, the dates of recruitment were also listed incorrectly. The submitted audit response materials contained inconsistent information and the Employer had an opportunity within the audit response to provide an explanation for the inconsistency, to point out the erroneous information and to explain what actually happened. Without this explanation, the CO would not be able to resolve

[3] Additionally, the facts in these two cases are distinguishable from the case at bar. In the cases cited by the Employer, documentation was in existence at the time the application was filed which clearly showed that the employer had satisfied the requirements of the application for permanent alien labor certification. In *Yasmeena Corp*. the absence of a date beside the employer's signature was not seen as material to any fact to be considered by the CO in determining whether to grant certification. Likewise in *Ben Pumo*, all of the information contained in the ETA Form 9089 supported the application. The few boxes which were not filled out were answers to questions which were answered elsewhere on the form and there was never any doubt about that information. By contrast, the present case presents a situation where there is a factual inconsistency in the documentation. The CO could not readily know which recruitment methods were undertaken without additional explanation from the Employer.

the discrepancy based solely on information provided in the application and the audit response. While the Employer argues that it was in functional compliance with the regulations, we have consistently noted that "PERM is an exacting process, and unforgiving of mistakes in filling out the application or misunderstandings about the regulatory requirements." *Richard M. Robinson*, 2007-PER-84 (Oct. 15, 2007).

In the instant case, the Employer's failure on the Form 9089 to correctly specify which form of recruitment it used was a material omission because it directly related to the substance of the application. A failure to accurately specify the types of recruitment used and the dates the recruitment ran deprives the CO of information necessary to make a determination. Incorrectly completing section I.d in such a way that confuses which recruitment methods an Employer used is a material omission.

The CO did not abuse his discretion in denying the application. Accordingly, we affirm the CO's denial.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED.**

For the Board:

Digitally signed by WILLIAM COLWELL
DN: CN=WILLIAM COLWELL,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

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.