

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 July 2011

BALCA Case No.: 2010-PER-00993
ETA Case No.: A-09203-56566

In the Matter of:

CONTRACT INTERIORS, INC.,
Employer

on behalf of

DAVID JEYATHILAK SUNDERSINGH,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Emily A. Chen, Esquire
American Services Network, P.C.
Chicago, Illinois
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: Krantz, Sarno, Bergstrom
Administrative Law Judges

DECISION AND ORDER
VACATING AND REMANDING 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 (“C.F.R.”).

BACKGROUND

On July 22, 2009, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “SW Developer/Solutions Architect.” (AF 15-31)¹ On March 8, 2010, the CO denied the application on the ground that Employer had failed to place two print advertisements in the newspaper of general circulation or a professional journal, as required by 20 C.F.R. § 656.17(e)(1). (AF 13-14) Employer requested review on April 7, 2010, submitting proof of publication in the San Jose Mercury News. (AF 1-12)

The CO forwarded the case to BALCA on June 17, 2010, and BALCA issued a Notice of Docketing on August 6, 2010. The Employer filed a Statement of Intent to Proceed on August 19, 2010, and filed an appellate brief asserting that the Bay Area News Group is the publishing entity for multiple newspapers, including the San Jose Mercury News, the newspaper of general circulation with a Sunday edition in the area of intended employment. The CO did not file a Statement of Position.

DISCUSSION

An employer that files an application for permanent alien labor certification for a professional position must place two newspaper advertisements as part of its effort to recruit U.S. workers for the job opportunity in the application. § 656.17(e)(2). The regulations require

¹ In this decision, AF is an abbreviation for Appeal File.

[p]lacing an advertisement 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 and most likely to bring responses from able, willing, qualified, and available U.S. workers.

20 C.F.R. § 656.17(e)(1)(i)(B)(1). On its ETA Form 9089, Employer stated that there was a Sunday edition of the newspaper in the area of intended employment, and the advertisements were placed in the “Bay Area News Group” on March 29 and April 5, 2009. (AF 18-19)

Employer’s denial determination stated “[r]esearch indicates that the Bay Area News Group is a provider of local news, information and services. Specifically, it does not qualify as either a newspaper of general circulation or a professional journal.” The CO denied the application for this reason, stating that it was not compliant with § 656.17(e)(1).

An employer is permitted to request reconsideration of a denial of labor certification, as Employer did here. The applicable regulations provide that the request 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 an 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).

20 C.F.R. § 656.24(g)(2)(i)-(ii). Employer submitted proof of publication in the San Jose Mercury News, the newspaper of general circulation with a Sunday edition in the area of intended employment. Employer also explained in its request that the Bay Area News Group is the publishing entity for multiple newspapers, including the San Jose Mercury News. Employer listed the Bay Area News Group because that is the name reflected on the tear sheets, and it anticipated that if an audit were to take place, the name on the tear sheets and Form 9089 would need to match.² This is not documentation that the Department received in response to a request,

² Employer also addressed the listing of Bay Area News Group as a typographical error. However, this appears to be not so much a typographical error as a good faith effort to comply with the regulations, listing the publishing entity reflected on the tear sheet. Further, Employer’s reliance on *HealthAmerica* with respect to typographical errors is misguided, as, after *HealthAmerica*, the Employment and Training Administration (“ETA”) amended the

because an audit was not issued, so it cannot be considered under § 656.24(g)(2)(i). However, because there was no audit, we do find this to be documentation that Employer did not have an opportunity to present previously to the CO, but that existed at the time the application 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). The documentation also appears to be directly on point in response to the CO's ground for denial.

The PERM regulations restrict BALCA's review of a denial of labor certification to evidence that was part of the record upon which the CO's decision was made. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c); *Eleftheria Restaurant Corp.*, 2008-PER-143 (Jan. 9, 2009); *5th Avenue Landscaping, Inc.*, 2008-PER-27 (Feb. 11, 2009); *Tekkote*, 2008-PER-218 (Jan. 5, 2008). However, where the CO has treated the employer's request for reconsideration as a request for review³ in a way that prevents the employer from having the opportunity to present its argument, this rule would violate the employer's right to procedural due process. *Denzil Gunnels d/b/a/ Gunnels Arabians*, 2010-PER-628 (Nov. 16, 2010). In such a situation, it is appropriate for BALCA to remand the case to the CO.

In this case, forwarding the Appeal File immediately to the Board had the effect of depriving the employer of its full opportunity to develop the record for appellate review where the type of evidence offered is the type that could have been considered by the CO on reconsideration. In this circumstance, we will return the matter to the CO for further processing so that the Employer will have a fair opportunity to present its evidence to the finder of fact. Following *Denzil Gunnels*, the CO is found to have abused his discretion by treating what is substantively a request for reconsideration as a request for BALCA review, because it had the effect of precluding the employer from developing the necessary factual record upon which the denial of certification is properly based under the amended regulations.

regulations, rejecting 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." ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives for Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27916 (May 17, 2007).

³ Under 20 C.F.R. § 656.24(g)(4), "[t]he Certifying Officer may, in his or her discretion, reconsider the determination or treat it as a request for review under § 656.26(a)." Note, however, that when an employer unambiguously requests BALCA review, it makes a tactical decision to have the Board rather than the CO review the denial of certification, and the employer is deemed to understand the consequence. *See Denzil Gunnels*, 2010-PER-628, slip op. at 14 (Nov. 16, 2010). In this case, Employer did not unambiguously request BALCA review, in fact it addressed its request to the CO, and not to BALCA.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **VACATED**, and we **REMAND** this matter for reconsideration by the CO.

For the Panel:

A

KENNETH A. KRANTZ
Administrative Law Judge

KAK/lec/mrc

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.