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: 07 November 2013

BALCA No.: **2010-PER-01466**
ETA No.: A-08031-19187

In the Matter of:

SIEMENS ENERGY & AUTOMATION,
Employer,

on behalf of

GAN DONG,
Alien.

Certifying Officer: William Carlson

Appearances: Maryann Palazzolo, Esq.
Fragomen, Del Rey, Bernsen & Loewy, LLP
Matawan, New Jersey
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: **Almanza, Johnson, and Reilly**
Administrative Law Judges

PAUL R. ALMANZA
Administrative Law Judge

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 governing alien labor certification found at

Title 20, Part 656 of the Code of Federal Regulations. For the reasons set forth below, we affirm the Certifying Officer's denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On January 31, 2008, the Employer filed an Application for Permanent Employment Certification for the position of "Senior Commissioning Engineer." AF 113-126.[1] The Certifying Officer (CO) issued an Audit Notification letter on March 28, 2008. This letter directed the Employer to submit, among other documentation, a copy of the prevailing wage determination it received from the State Workforce Agency (SWA), and if not included in the determination, a copy of the request for the determination as originally submitted to the SWA. AF 108-112. The Employer responded to the Audit Notification on April 24, 2008. AF 33-107. The Employer's response did not include a copy of the prevailing wage determination that it received from the State Workforce Agency (SWA).

On March 8, 2010, the CO denied the application on the following ground:

> The employer failed to provide documentation as requested in the Audit Notification letter. Specifically, the employer failed to provide a copy of the prevailing wage determination it received from the State Workforce Agency (SWA) along with a copy of the request for the determination.

AF 31. As authority for the denial, the CO cited 20 C.F.R. § 656.20(b). *Id*. The Employer submitted a request for reconsideration on March 31, 2010. AF 3-29. The Employer reported that it had obtained a prevailing wage determination from the State Wage Agency in Georgia, but that this document had been inadvertently omitted in the audit response mailed to the CO. The Employer included a photocopy of the prevailing wage determination it received from the Georgia SWA and a copy of the request for the determination that it originally sent to the Georgia SWA. AF 18-22.

The CO forwarded the case to BALCA on August 16, 2010. AF 1. In the transmittal letter, the CO argued that the documentation provided by the Employer with its request for reconsideration was barred by § 656.24(g)(2), because it constitutes evidence not in the record on which the denial was based. AF 1. BALCA issued a Notice of Docketing on October 14, 2010. The Employer filed a Statement of Intent to Proceed on October 27, 2010; the Employer did not file a brief. On December 7, 2010, counsel for the CO requested the denial be affirmed based on the record.

[1] References to the 126 page Appeal File are abbreviated as "AF."

DISCUSSION

Pursuant to 20 C.F.R. § 656.20(b) a "substantial failure by the employer to provide required documentation will result in that application being denied . . ." The Board has consistently affirmed denials under Section 656.20(b) when the "required documentation" an employer fails to produce is specifically identified in the regulations as evidence that an employer must retain. *See SAP America Inc*., 2010-PER-1250 (April 18, 2013), *citing* Yakima Steel Fabricators, 2011-PER-1289 (July 5, 2012) (failure to provide proof of print advertisements, as required by Section 656.17(e)(1)); Gotham Distribution, 2011-PER-1352 (Aug. 2, 2012) (failure to provide a Notice of Filing, as required by Section 656.10(d)); Marlenny's Haircutters, 2009-PER-13 (Jan. 29, 2009) (failure to produce a recruitment report, as required by Section 656.17(g)).

The CO's Audit Notification Letter directed the Employer to submit, *inter alia*, "[a] copy of the Prevailing Wage Determination received from the State Workforce Agency (SWA) and if not included in the Prevailing Wage Determination, a copy of the request for the [prevailing wage] determination as originally submitted to the SWA." (AF 13). The CO correctly stated that Employer's response to the Audit Notification Letter did not contain this requested documentation. (AF 1).[2] At the time the Employer filed its application, the regulation governing prevailing wage determinations, 20 C.F.R. § 656.40(a), explicitly required employers to maintain a copy of the determination issued by the SWA and to produce this document if requested in the course of an audit.[3] Despite this regulatory notice, the Employer failed to timely produce a copy of the prevailing wage determination it obtained from the Georgia SWA.

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[2] Although the Employer provided this documentation in its request for review, we cannot consider it at this time. *See* 20 C.F.R. § 656.26(a)(4)(i).

[3] Specifically, 20 C.F.R. § 656.40(a) (2008), provided:

> The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

As of January 1, 2010, the Department of Labor assumed responsibility for the issuance of prevailing wage determinations for use in the PERM program. Employers are now directed to submit a standard Prevailing Wage Determination Request form to ETA's National Processing Center. *See* 69 Fed. Reg. 77386 (Dec. 27, 2004), as amended at 73 Fed. Reg. 78020, 78068 (Dec. 19, 2008).

In sum, the Employer failed to produce "required documentation" that was specifically identified in the regulations as evidence that the Employer was required to retain. Accordingly, we affirm the CO's denial of labor certification under Section 655.20(b).[4]

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED.**

For the Panel:

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

PAUL R. ALMANZA
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.

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[4] This decision is based solely on the Employer's failure to produce a copy of the prevailing wage determination issued by the SWA. It does not address whether the Employer's failure to produce a copy of the request for the determination would support a denial of certification.