U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue Date: 03 January 2011

BALCA No.: **2010-PER-00035**
ETA No.: A-07189-54074

In the Matter of:

O BRIEN & VAN STIPHOUT LLC
formerly known as
KRUPIN O'BRIEN, LLC,
Employer,

on behalf of

ABDUL RAHMAN SHEIKH,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Monique A. van Stiphout, Esquire
Washington, D.C.
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: **Colwell, Johnson and Rae**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

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 ("C.F.R.").

BACKGROUND

On August 22, 2007, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Senior Immigration Paralegal." (AF 131-146).[1] The Employer indicated that the position required a bachelor's degree and 60 months of related experience. (AF 132-133). Additionally, the Employer listed the offered wage as $70,000 per year and the prevailing wage as $41,413 per year. (AF 132).

On October 5, 2007, the CO issued an Audit Notification, explaining that the Employer's stated minimum requirements exceeded those normally required for the job opportunity as defined by O*Net. (AF 127-130). Specifically, the CO stated that the total lapsed time for the education, training, and experience entered on the Form ETA 9089 equals 84 months, while the SVP level assigned to the occupation permits a maximum total lapsed time of preparation of 2 years. The CO required the Employer to provide documentation justifying business necessity for this requirement by showing that the requirement bears a reasonable relationship to the occupation in the context of the employer's business and that the requirement is essential to perform the job in a reasonable manner. (AF 130). Additionally, the CO required the Employer to submit, including other documentation, a copy of its Notice of Filing. (AF 127).

The Employer filed its audit response materials on November 5, 2007 and included a statement justifying the business necessity for the stated minimum job requirements. (AF 34-126). The Employer's Notice of Filing ("NOF") listed the salary

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

for the position as $50,000-$65,000 per year. (AF 93). Additionally, the Employer submitted a copy of its prevailing wage determination ("PWD") of $41,413 per year. (AF 102).

On January 9, 2009, the CO denied certification. (AF 32-33). The CO denied certification because the Employer's NOF lists a wage that is less than the prevailing wage shown on the prevailing wage determination form in violation of 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(5). (AF 33). Additionally, the CO denied certification because the Notice of Filing contains a wage that is lower than the offered wage of $70,000 in violation of 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(7). (AF 33).

The Employer filed a request for expedited review on February 6, 2009. (AF 1-31). In its brief, the Employer argues that the Notice of Filing did not list a wage that is less than the prevailing wage. (AF 1-2). In addition, the Employer states that at the time it posted the Notice of Filing, it was paying the Alien $60,000, but before it filed its application, it raised the Alien's salary to $70,000 per year. (AF 2). Therefore, the Employer argues that it did not violate 20 C.F.R. § 656.17(f)(7) by listing a wage that was less favorable than that offered to the alien. (AF 2). In addition, the Employer submitted additional documentation with its request for review to show that the Alien received a $60,000 annual salary at the time the Employer posted its Notice of Filing. (AF 12-28).

The CO forwarded this case to BALCA, and BALCA issued a Notice of Docketing on October 12, 2009. The Employer filed a Statement of Intent to Proceed, but did not file an appellate brief. The CO filed a Statement of Position on December 9, 2009, arguing that the Employer failed to comply with §§ 656.10(d)(4) and 656.17(f)(7) by listing a wage in the NOF that was less than the offered wage of $70,000 per year.

DISCUSSION

The regulations require an employer that files an application for permanent labor certification to provide notice to the employer's employees at the facility or location of employment. 20 C.F.R. § 656.10(d)(ii). The Notice of Filing must contain the

information required for advertisements in newspapers of general circulation or in professional journals under § 656.17(f). 20 C.F.R. § 656.10(d)(4). The applicable regulation requires that the advertisement must not contain wages or terms and conditions of employment that are less favorable than those offered to the alien. 20 C.F.R. § 656.17(f)(7).

BALCA has repeatedly stressed the importance of the NOF to the PERM program. We have stated that the NOF is not a mere technicality, but 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. *See Riya Chutney Manor, LLC*, 2010-PER-177 and 191 (Apr. 7, 2010); *Voodoo Contracting Corp*., 2007-PER-1 (May 21, 2007). Further, BALCA has held that 20 C.F.R. § 656.17(f)(7) requires that when the offered wage is more than the PWD, the wage listed on the NOF must not be less than the wage offered to the alien. *Thomas L. Brown Associates*, P.C., 2009-PER-347 (Sept. 1, 2009).

Here, the Employer's NOF listed a wage range of $50,000-$65,000 per year, less than the offered wage of $70,000 per year to the Alien. We are not persuaded by the Employer's argument that it did not violate the 20 C.F.R. § 656.17(f)(7) because it was paying the Alien a wage that fell within the NOF wage range at the time of posting. The wage that the Employer was paying the Alien at the time it posted the NOF is not the "offered wage;" the "offered wage" is the wage offered to the alien beneficiary at the time the application is filed, as provided by the Employer on the ETA Form 9089. *See* Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004) ("the employer must include in the notice the wage offered to the alien beneficiary at the time the application is filed"). Therefore, the Employer explicitly violated the requirements

under 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(7) by listing a wage in its NOF that was less than the wage offered to the Alien.[2]

Based on the foregoing, we affirm the CO's denial of labor certification.

ORDER

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

[2] We acknowledge that this seems like an unjust result because the regulation does not accommodate changes in the Alien's salary between recruitment and filing of the Form 9089. Nevertheless, the Board is not at liberty to ignore plain regulatory language.