

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: 29 March 2011

BALCA No.: 2010-PER-00437
ETA No.: A-09153-48234

In the Matter of:

SHASTRIJI PENNSYLVANIA DONUTS CORP.,
Employer,

on behalf of

KAMIESH PATEL,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Michael S. Henry, Esq.
Philadelphia, PA
For the Employer

Before: Malamphy, Bergstrom, Sarno
Administrative Law Judges

DECISION AND ORDER
VACATING 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 May 8, 2009, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Baker.” (AF 20-29).¹

The CO denied certification on February 5, 2010, stating that the ETA Form 9089 was incomplete. (AF 17-19). The CO explained specifically that Section F-4, the skill level, and Section M-3, preparer’s title, were left blank. (AF 19).

On February 17, 2010, the Employer submitted a request for review. (AF 1-15). The Employer argued that “the omitted information is so minor that it is hardly (*sic*) reasonable for any common sense adjudicator to consider the form ‘incomplete’ and outright deny it.” The Employer further stated that it has routinely left blank fields on forms and has never been denied before without being afforded a chance to correct the form. The Employer also attached a corrected form with the additions initialed.

The CO forwarded the case to BALCA on March 15, 2010, and BALCA issued a Notice of Docketing on April 14, 2010. The Employer filed a Statement of Intent to Proceed and Statement of Position on April 23, 2010. The CO did not file a Statement of Position.

DISCUSSION

The regulation at 20 C.F.R. §656.17(a) requires that an employer who desires to apply for a labor certification on behalf of an alien file a complete Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089). 20 C.F.R. §656.17(a). The regulations go on to say that “incomplete applications will be denied.” 20 C.F.R. § 656.17(a).

The Employer argued in its Statement of Position:

Employer avers that the omissions are so insignificant that they should not have impacted the CO’s decision making process. The title of the preparer who is Employer’s attorney is completely immaterial. The attorney’s contact information is provided fully in Section E. The skill level is also a minor and immaterial omission.

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

The US DOL² had previously issued a prevailing wage determination for this Employer, for the same job and same Beneficiary, for the skill level 2. A copy of the determination is attached hereto. Form ETA 9089 referred to this determination in section F-1 and the information was easily verifiable. The employer could not have filed ETA 9089 for any other skill level but the one the US DOL determined appropriate in this particular case.

BALCA, while emphasizing that the regulations clearly require that petitioning employers submit complete applications, has nonetheless recognized that some omissions may not be material to the review of the substance of an application. *Yasmeena Corp.*, 2008-PER-3 (Nov. 14, 2008). Thus, in certain circumstances where the CO has failed to explain why an omission is material, we may find that a denial of reconsideration was arbitrary and capricious.

In the instant case, the Employer has made a reasonable argument that the omission of the preparer's title is not material given that the preparer's complete information is provided elsewhere on the form. Specifically, Section M lists the preparer's name as "Michael S. Henry" and his email address as "mshenry@mshenrylaw.com." It does not list anything in the blank for "title." However, Section E, Agent or Attorney Information, also lists "Michael S. Henry" along with the same email address from Section M. It further lists the firm name as "Law Office of Michael S. Henry." Thus, it is clear that the preparer, Mr. Henry, is the Employer's attorney, despite his title not being listed as such in Section M-3.

The second omission cited by the CO is the lack of skill level in Section F-4. We note that this is the only blank in the section of the form regarding the prevailing wage information. The tracking number, SOC/O*Net code, occupation title, prevailing wage, prevailing wage source, and determination and expiration dates are all completed.

The CO has proffered no explanation for why either of the omissions prevented a complete review of the application. Thus, under the circumstances of this particular case, we decline to affirm the CO's denial of certification. We expressly reserve judgment on whether the omissions were, in fact, material to the CO's review of the application, but only find that such materiality is not apparent on the record before us.

² The Employer appears to be mistaken as to this fact. The attached prevailing wage determination was properly issued by the Pennsylvania Department of Labor and Industry.

Notwithstanding our decision, we wish to emphasize that failure to file a complete application is itself a ground for denial of the application and an employer who fails to fully answer all of the questions on the Form 9089 runs the risk of having its application denied. PERM is an attestation based program, and as such, it can only be maintained by strictly following the letter of the law. The PERM regulations very purposefully were designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *HealthAmerica*, 2006-PER-1, slip op. at 19 (July 18, 2006) (en banc). The CO is under no obligation to gather the information needed to perfect an application. *Alpine Store, Inc.*, 2007-PER-40 (June 27, 2007).

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **VACATED** and that this matter is returned to the CO for completion of processing.

For the panel:

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/AMC/jcb
Newport News, Virginia

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.