U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 June 2010

BALCA Case No.: 2010-PER-00056
ETA Case No.: A-07199-57553

In the Matter of:

SOON PAL KWON,
Employer,

on behalf of

KYUNG HWAN KIM,
Alien.

Certifying Officer: William L. Carlson
Atlanta Processing Center

Appearances: Young K. Park, Esquire
Philadelphia, Pennsylvania
For the Employer

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

Before: **Colwell, Johnson and Wood**
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.

STATEMENT OF THE CASE

On August 15, 2007, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification on behalf of the Alien for an "Alteration Tailor" position. (AF 88-97).[1]

On September 26, 2007, the CO issued an Audit Notification, directing the Employer to provide evidence of recruitment. (AF 86-87). In response to the audit, on October 24, 2007, the Employer submitted: a copy of the ETA Form 9089; a copy of the prevailing wage determination; a recruitment report; a copy of the Notice of Filing; copies of newspaper advertisements; a copy of the job order; and a copy of the website advertisement on monster.com. (AF 20-80).

On February 13, 2008, the CO denied certification because the Notice of Filing ("NOF") did not contain the address of the appropriate Certifying Officer, as required by 20 C.F.R. § 656.10(d)(3)(iii).[2] (AF 17-19). Specifically, the CO stated that the Notice of Filing contains several addresses, only one of which is the appropriate address for the Certifying Officer.[3] Although the address for the Atlanta National Processing Center

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

[2] The CO also indicated a second reason for denial. However, since we are affirming the denial on the aforementioned ground, we will not discuss the other reason here.

[3] In fact, the NOF only contains two addresses, not several. However, as the attorney for the CO pointed out in his appellate brief, this error does not change the basic rationale for the denial and does not change the CO's decision.

("ANPC") is listed on the NOF, the Employer also lists an additional address which does not have jurisdiction over the application and would neither have awareness nor the information necessary to forward any documentation received in connection with the application to the ANPC. (AF 19).

The Employer submitted a request for review on March 13, 2008. (AF 1-16). In this request, the Employer asserted that, "[t]he inclusion of the additional address is not a critical defect that should result in denial of the Form." (AF 8). The Employer also contended that there was no response to the NOF, thus there was no harm caused by its error.

BALCA issued a Notice of Docketing on November 6, 2009. The Employer filed a Statement of Intent to Proceed with the appeal on November 20, 2009, but did not file an appellate brief. The CO filed an appellate brief on December 24, 2009, asserting that non-compliance with 20 C.F.R. § 656.10(d)(3)(iii) is a valid reason for denial.

DISCUSSION

The regulation at 20 C.F.R. § 656.10(d)(3) provides:

> (3) The notice of the filing of an Application for Permanent Employment Certification must:
>
> (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
> (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
> (iii) Provide the address of the appropriate Certifying Officer; and
> (iv) Be provided between 30 and 180 days before filing the application.

In the instant case, the Employer listed two addresses for the CO. One address was the appropriate CO address at the Atlanta National Processing Center, however, the

other address was for the Harrisburg Processing Unit, in Harrisburg, Pennsylvania. Interested persons were instructed to send comments to "either (or both) offices." As the CO stated in his denial, the Harrisburg office does not have jurisdiction over the application and would neither have awareness nor the information necessary to forward any documentation received in connection with the application to the ANPC. (AF 19). The Employer argued that the inclusion of the additional address is not a critical defect and that since there was no response to the NOF, there was no harm caused by its error. Had the Employer either omitted the Harrisburg office from the Notice of Filing or instructed interested parties to send their submissions to both addresses, rather than "either" address, the result may have been different.

Although the Board has recognized that notions of fundamental fairness and procedural due process are applicable in PERM processing,[4] the Notice of Filing requirement is an implementation of IMMACT's notice/posting requirement that cannot be lightly dismissed under a harmless error finding. The enforcement of the regulatory requirements implementing this statutory purpose does not in itself offend fundamental fairness or procedural due process. In the instant case, it is not possible to know whether the Employer's listing an additional address on the NOF actually was harmless. Moreover, as the Board stated in *Hawai'i Pacific University*, 2009-PER-00127 (Mar. 2, 2010)(en banc), "it is simply unreasonable for petitioning employers to put the burden on [a state processing unit] to redirect communications about labor certification applications from workers or members of the public when the regulations direct employers to put the proper address on the Notice of Filing in the first instance." Slip op. 14.

Thus, in this case the circumstances do not support a finding either that the Employer's error in listing an additional and incorrect address on the NOF was excusable, or that the statutory and regulatory purpose of the Notice of Filing had been served despite the error in the listing of the CO's address.

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[4] *See Voodoo Contracting*, slip op. at 9-10, citing *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc). See also *Aramark Corp.*, 2008-PER-181 (Jan. 8, 2009), where the panel rejected an argument that only an infinitesimal number of contacts are directed to the CO as the result of Notices of Filings, and therefore the absence of the CO's address could have had no significant impact on the integrity of the employer's application.

ORDER

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

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

Administrative Law Judge Pamela Lakes Wood, dissenting.

I respectfully dissent. As the Employer technically complied with the requirement of the regulation that it post the address of the appropriate Certifying Officer on the Notice of Filing, the petition cannot be denied based on noncompliance with 20 C.F.R. § 656.10(d)(3)(iii). The Employer's inclusion of another address, that of the former Harrisburg office does not negate the fact that the correct address was also provided. Accordingly, I would reverse the denial of certification.

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.