U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 December 2013

BALCA Case No.: 2011-PER-02630
ETA Case No.: A-08161-59728

In the Matter of:

HESO ELECTRICAL, INC.,
Employer

on behalf of

PANIAGUA GERMOSEN, GILBERT MANUEL,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Howard L. Baker, Esquire
Wilens & Baker, P.C.
New York, New York
For the Employer

Before: **Colwell, Johnson, and Reilly**
Administrative Law Judges

DECISION AND ORDER GRANTING LABOR 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 20 C.F.R. Part 656.

BACKGROUND

On December 3, 2007, the Certifying Officer ("CO") accepted for processing the Employer's Application for Permanent Labor Certification on behalf of Gilbert Manuel Paniagua

Germosen for the nonprofessional position of "Electrical Helper." (AF 83-94).[1] The Employer reported in the Form 9089 application that it ran two Sunday newspaper advertisements in the Daily News. The dates reported for the newspaper advertisements were October 14, 2007 and October 21, 2007. (AF 76-77).

On June 11, 2008, the CO denied certification, and an Appeal File was transmitted to BALCA on April 30, 2010. On April 21, 2011, a BALCA panel vacated the denial and remanded for further processing. *See Heso Electric*, 2010-PER-670 (Apr. 21, 2011).[2] On May 12, 2011, the Atlanta National Processing Center issued a letter directing the Employer to provide documentation relating to its bona fides as a business entity. (AF 54). The CO issued an Audit Notification on June 21, 2011. The Audit Notification informed the Employer that its responsive documentation must be submitted by July 21, 2011. (AF 50-53).

The Employer replied with its audit response postmarked July 19, 2011. (AF 13-49). In the cover letter to the response, the Employer's attorney wrote: "Please note that we have requested a copy of newspaper tearsheet of Oct. 21, 2007 and are expecting it to arrive soon. Please grant us an extension of 30 days to submit this tearsheet." (AF 14).[3]

The CO denied certification on July 22, 2011 because the Employer failed to provide original tear sheets, copies of tear sheets, or proof of publication and text of its October 21, 2007 Daily News advertisement. The CO cited as grounds for the denial 20 C.F.R. § 656.17(e)(1)(i)(B)(3) (requirement that employer retain documentation of newspaper advertisement) and 20 C.F.R. § 656.20(b) (substantial failure to provide required documentation in response to audit notification). The CO did not mention the Employer's request for an extension of time to submit the October 21, 2007 tearsheet. (AF 11-12). Nor does the Appeal File contain any other documentation indicating a ruling on the request for an extension of time to submit the tearsheet.

On August 4, 2011, the Employer requested reconsideration and/or review of the CO's decision. (AF 3-10). The Employer asserted that proof of the October 21, 2007 Daily News advertisement was in existence at the time the Employer filed the labor certification application. However, unforeseen circumstances prevented the Employer from submitting it because it was in the possession of the Employer's previous representative, Katherine Murphy, who had taken it with her and disappeared. The Employer further explained that to cure this problem, the Employer's new attorney, Howard L. Baker, requested a tear sheet of the October 21, 2007 advertisement from the Daily News and requested a 30-day extension of the audit response deadline. (AF 7). A copy of a proof of publication of the newspaper advertisement on October 14 and 21, 2007, from the Daily News dated was attached. The proof of publication was dated July 22, 2011. (AF 9).

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

[2] The remand related to an issue not before us on this second appeal.

[3] The audit response included a tearsheet for its October 14, 2007 newspaper advertisement. (AF 42-43).

Upon review, the CO issued a decision on reconsideration on August 25, 2011, finding that the Employer did not comply with the Department's regulation requiring the Employer to retain all supporting documentation for its application for five years from the date of filing. The CO stated that the request for an extension on submitting the audit response was denied because the request was made only two days prior to the due date. Furthermore, the CO asserted that it properly did not consider the tearsheet for the October 21, 2007 advertisement submitted with the Employer's request for reconsideration because a request for reconsideration may include only documentation received from the employer in response to a request from the CO, or documentation the employer did not have an opportunity to present to the CO, but which existed at the time the application was filed. Since the employer failed to provide proof of publication of the second newspaper advertisement with its audit response as requested in the audit notification letter, the CO determined that the denial of certification was valid.

The CO transferred the appeal file to the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). (AF 1). The Employer filed a statement confirming its intent to pursue the appeal, but neither the Employer nor the CO filed appellate briefs.[4]

DISCUSSION

The regulation governing the filing of labor certification applications instructs employers to retain all supporting documentation for its application for five years from the date of filing. 20 C.F.R. § 656.10(f). The regulation governing the mandatory newspaper advertisements for nonprofessional positions states that this recruitment step can be documented by furnishing copies of the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper. 20 C.F.R. § 656.17(e)(2)(ii)(C), incorporating by reference 20 C.F.R. § 656.17(e)(1)(i)(B)(3). The Employer here filed the labor certification application on December 3, 2007 and the CO issued an audit notification letter on June 21, 2011. Since the audit notification letter was issued within five years of the Employer's application, and the Employer should have had in its records all the documentation to support its labor certification application, including the October 21, 2007 advertisement tear sheet, the failure to produce the tear sheet constituted grounds for denial of certification.

The audit regulations, however, provide the CO with the discretion to provide one extension of time of up to 30 days to respond to the audit notification. 20 C.F.R. § 656.20(c). In the instant case, the Employer's attorney requested a 30 day extension of time to file the October 21, 2007 tear sheet. This extension request was made in the audit response near the end of the audit response period. There is no evidence in the Appeal File that the CO considered this request prior to issuing his July 22, 2011 denial determination. We note that the CO's denial was issued only one day after receipt of the Employer's audit response.

Under the pre-PERM regulations, the Board held that it is an abuse of discretion to deny an extension without regard to the facts and explanations of the parties. *Barbara Friedman*, 1989-INA-220 (Dec. 5, 1990). On the other hand, the Board also held that an employer who lets a deadline pass on the assumption that an extension will be granted does so at its own risk. *See*

[4] We note that the copy of the Board's Notice of Docketing served on the Alien was returned by the United States Postal Service as undeliverable.

West Virginia Univ., 1993-INA-198 (May 24, 1994). Moreover, panels of the Board have found that denials of an extension of time to file rebuttal made near the end of the rebuttal period were not an abuse of discretion. *See, e.g., Gianni Leatherwear*, 1994-INA-184 (May 25, 1995) (request made the night before the rebuttal was due); *Joanne Carma*, 1990-INA-462 (Aug. 19, 1992) (request made one day prior to the end of the rebuttal period, and no reason was offered in support of the extension).

In the instant case, the Employer's attorney asked for an extension of time in a letter mailed on July 19, 2011 (AF 13, 49), and received by the CO on July 20, 2011. (AF 13). The due date for the audit response was July 21, 2011. (AF 51). Thus, it was a last minute extension request. Moreover, the only reason given by the Employer's attorney for requesting an extension was that it had requested a copy of the October 21, 2007 tearsheet and expected it to arrive soon. (AF 14). Nowhere in the audit response did the Employer argue that the reason it needed more time to file the October 21, 2007 tearsheet was because it former attorney had purportedly taken it with her and then disappeared. This argument was not made until later. Thus, given an employer's obligation under the PERM regulations to retain proof of newspaper publication for five years in the event of an audit, and the last minute nature of the extension request, we would be hard pressed to find that the CO abused his discretion in denying an extension. However, in the instant case, the CO ignored or missed the Employer's request for an extension of time, and did not provide a ruling on the request until after the Employer requested reconsideration.

By the time the CO ruled on the Employer's motion for reconsideration, the Employer had provided the missing documentation with an explanation that the additional time was needed because of the prior representative's disappearance with the documentation.

Because the CO had a material, indeed crucial, motion for extension of time before him when he issued the July 22, 2011 denial letter, and the audit regulations expressly permit the filing of such motions for extension of time to file an audit response, we find that the CO had not yet effectively denied certification at the time the Employer provided the documentation of the October 21, 2007 newspaper advertisement. In other words, we find that the pending motion for an extension of time tolled the denial until the CO actually ruled on the motion. Consequently, we find that consideration of the documentation of the October 21, 2007 newspaper advertisement, and the Employer's explanation why more time was needed to obtain this documentation, was not barred by 20 C.F.R. § 656.24(g)(2), because section 656.24(g)(2) applies to motions for reconsideration filed <u>after</u> the issuance of a denial.

Given our ruling that the missing documentation and explanation were in the record for the CO's consideration at the time he actually ruled on the motion for an extension of time, we find that it was abuse of discretion for the CO to have denied the motion. The fact that Ms. Murphy was associated with the American Immigration Federation, Inc., which had been shut down by the New York State Attorney General, was known prior to the CO's audit notification.[5] The Employer's recruitment report submitted with the audit response mentioned a problem with

[5] *See* www.ag.ny.gov/sites/ default/files/press-releases/archived/American%20Immigrants%20Federation%20AOD.pdf (Assurance of discontinuation).

obtaining documentation of the SWA job order because Ms. Murphy had taken the documentation. (AF 19). Moreover, arguments about Ms. Murphy's unprofessional handling of PERM applications had been made in the original appeal of this application to BALCA. *See Heso Electric*, 2010-PER-670, *supra*, slip op. at n. 3 (AF 57). Thus, the Employer's argument that Ms. Murphy had disappeared and taken relevant documentation with her is credible. Thus, although the Employer had an obligation to retain the newspaper documentation for five years, the disappearance of its prior representative shows good cause for allowing the Employer a few extra days to obtain new documentation of the newspaper advertisement. In addition, it is clear that the Employer attempted to provide all the documentation it could at the time of the audit response and had asked for more time to provide missing documentation of a single missing item. Even though the Employer's attorney did not explicitly state that he was asking for the extension because of Ms. Murphy's taking of the documentation, given the background of the application, that the Employer was having to recreate its recruitment documentation due to Ms. Murphy's disappearance in possession of needed records would have been reasonably implicit in the extension request.

It is also noteworthy that the Daily News tearsheet/proof of publication was issued on July 21, 2011, only one day after the Employer's audit response was due, and the same day the CO issued the denial letter. Thus, it would have been clear to the CO by the time he ruled on the motion for extension that the Employer's new attorney had been, in good faith, attempting to obtain the missing documentation, and had in fact been successful in that attempt. Thus, we find that the CO abused his discretion in relying solely on the fact that the extension request had been made only two days before the audit response due date to deny the extension. By the time the CO actually ruled on the motion, it was arbitrary to ignore the additional conforming documentation and explanation, and try to set the clock back to the time to the circumstances when the motion for an extension was originally made.

Because we found above that the Daily News tearsheet/proof of publication was in the record before the CO because of the tolling of the denial date, the tearsheet proof of publication is in the record for the Board on appeal. The Daily News tearsheet/proof of publication indicates that the Employer's advertisement accurately reflected the job title, the job duties, the job requirements, the Employer's name, the address of the employment, and contact information for applicants to send their resumes. Thus, the advertisement contained the information required by the regulation at 20 C.F.R. § 656.17(f)(1) to (f)(4). The advertisement did not state a wage rate lower than the prevailing wage, and thus was not in violation of 20 C.F.R. § 656.17(f)(5). The advertisement did not contain any job requirements in excess of those reported on the Form 9089 application, and thus was not in violation of 20 C.F.R. § 656.17(f)(6). And the advertisement did not contain wages or terms and conditions of employment that were less favorable than those offered to the Alien, and thus was not in violation of 20 C.F.R. § 656.17(f)(7). Moreover, the advertisements were run on the two Sundays alleged in the Form 9089 application, which were within the 30 to 180 day window of time prior to the filing of the application required by 20 C.F.R. § 656.17(e)(2). Finally, the advertisements were run in a 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, as required by 20 C.F.R. § 656.17(e)(2)(ii)(A). Accordingly, we find that the Employer's newspaper advertisement complied with regulations.

Thus, based on the foregoing, we reverse the CO's denial of labor certification.[6]

ORDER

IT IS ORDERED that labor certification in this matter is hereby **GRANTED.**

For the panel:

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

WILLIAM S. COLWELL
Associate Chief 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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[6] *See also Madeline S. Bloom*, 1988-INA-392 (Oct. 13, 1989) (en banc) (pre-PERM decision holding that filing deadlines contained in 20 C.F.R. Part 656 cannot be ignored or disregarded, but may be waived in rare cases where failing to toll regulatory deadlines would result in manifest injustice); *Park Woodworking, Inc.*, 1990-INA-93 (Jan. 29, 1992) (en banc) (manifest injustice standard is to be strictly construed, and that equitable relief is not required where there is no specially egregious factor in the case such that certification would have been granted but for the existence of that factor).