

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 24 January 2012

BALCA No.: 2011-PER-00076
ETA No.: A-08077-33839

In the Matter of:

O’CONNOR HOSPITAL,
Employer

On behalf of

JOSEPHINE L. ALMARIO,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Wilfrido Panotes, Esq.
Jersey City, NJ
For the Employer

Gary M. Buff, Associate Solicitor
Matthew Bernt, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: Sarno, Bergstrom, Malamphy
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 March 19, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Medical and Clinical Laboratory Technologist.” (AF 65-74).¹ On May 15, 2008, the CO sent Employer and Audit Notification Letter requesting that Employer provide documentation regarding Alien’s qualifying experience. (AF 61-64). On June 12, 2008, the Employer responded to the Audit Notification, attaching, among other documents, certification of Alien’s Prior experience through a previous employer. (AF 36-37).

On August 5, 2010, the CO denied the Application for Permanent Employment Certification. (AF 19-21). The CO gave as his reason for denial that the foreign worker’s qualifications as listed on the application did not meet the minimum job requirements according to the employer, thus the minimum requirements asserted were not the actual minimum requirements as required by 20 C.F.R. 656.17(i)(1). (AF 20).

On August 31, 2010, the Employer submitted a request for reconsideration and review. (AF 3-4). The Employer argued that the Alien did have the requisite two years of prior experience at the time of hire, and that Employer had not hired anyone into this job category with less than two years experience since the current corporation’s inception in 1998. (AF 3). The Employer explained that the Alien’s previous experience prior to the Employer was not listed on the ETA Form 9089 as the instructions indicated “list all jobs the alien has held during the past 3 years.” Employer also referenced the certification of prior employment attached to the June 12, 2008 audit response.

On October 22, 2010, the CO issued a decision on reconsideration finding that denial of certification was valid as the Employer failed to include the Alien’s qualifying experience on the ETA Form 9089. (AF 1). The CO forwarded the case to BALCA on October 22, 2010, and BALCA issued a Notice of Docketing on January 24, 2011. The Employer filed a Statement of Intent to Proceed on February 11, 2011. The Employer did not file an appellate brief. The CO did not file a Statement of Position, but on March 14, 2011 requested the denial be affirmed for reasons set forth in the decisions on October 22, 2010 and August 5, 2010.

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

DISCUSSION

In this case it appears the CO based the denial of reconsideration solely on the information contained in Section K of the Form 9089. The initial denial letter does not acknowledge the documentation submitted by the Employer with its audit response, claiming “there is no other documentation that clarifies that the foreign worker met the employer’s requirements prior to working for the employer.” (AF 20). The reconsideration letter acknowledges the certification sent with the request for reconsideration, but not the certification sent with the audit response, and thus references the CO’s inability to consider evidence submitted with a request for reconsideration.

We find that the documentation contained in the audit response evidences that the Alien had experience in the job offered before beginning work for the Employer. The certification was prepared by the previous employer, is on the previous employer’s letterhead, and is signed by the Medical Director and a Pathologist. The certification clearly states the dates of employment consisting of over five years, lists the Alien’s position as “Medical Technologist,” and was prepared in 2003, about five years before the PERM application was filed.

It appears that the CO found that the Employer’s failure to list that prior experience on the Form 9089 was fatal to the application. The ETA Form 9089 states at the beginning of Section K., where the Employer is required to list the Alien’s work experience:

List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification.

(AF 70) (emphasis as in original). The instructions to Form 9089 state:

List all jobs held by the alien in the past three years whether or not the job is related to the job opportunity for which the employer is seeking certification. Also list all other experiences that qualify the alien for the job opportunity. If you need more space to complete this section, you may use additional pages as attachments for mailed applications, but you must list the primary jobs and

experiences in these spaces. For electronic applications, the system will allow employers to enter additional jobs.

(www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf). Thus, the Form 9089 and accompanying instructions clearly advise petitioners to list all experience that qualifies the alien for the job opportunity.

The burden is on the Employer to ensure a complete application. *Alpine Store Inc.*, 2007-PER-00040 (June 27, 2007). Normally, the failure to report information essential to the review of the case, such as previous employment, constitutes cause for denial. *Geoffrey Allen Corporation*, 2008-PER-00234, (May 7, 2009). However, 20 C.F.R. § 656.24(g)(2)(i) allows a CO to consider documentation “received from the employer in response to a request from the Certifying Officer to the Employer” when making a decision or reconsideration. Furthermore, when the PERM recordkeeping file evidences that the Alien had the required job experience prior to hire, the recordkeeping file was made in the course of an audit, and the documentation is referenced in the Employer’s request for reconsideration, the CO should have taken that documentation into consideration when ruling on the motion for reconsideration despite the incomplete ETA Form 9089. *Pa’lante, LLC*, 2008-PER-00209 (May 7, 2009).

The Employer has admitted to the deficiency in filling out the Form 9089. (AF 3). However, in the Employer’s audit response, the Employer specifies that the Alien had prior experience exceeding the minimum requirement prior to hire and includes documentation of that prior experience. (AF 13, 36-37). This documentation was “received from the employer in response to a request from the Certifying Officer to the employer” as provided by 20 C.F.R. § 656.24(g)(2)(i). The CO, however, failed to consider this properly submitted evidence before denying the application because “there is no other documentation that clarifies” the Alien’s previous work experience. (AF 20) In the Employer’s request for reconsideration, the Employer again references the certification of prior employment and the audit response containing the certification of prior employment. (AF 3). In the CO’s response to the Reconsideration the CO indicates the Employer submitted additional documentation regarding Alien’s previous work experience in their request for reconsideration, but again appears to ignore the Employer’s submission of this documentation to the CO in their audit response. (AF 1)

By including the Alien's prior employment history on the Form 9089 as instructed, the Employer "could have avoided the long appeal process." *Pa'lante, LLC*. However, the documentation of the Alien's prior employment, sent with the Employer's audit response, should have been taken into consideration by the CO when making a decision. As the record suggests the CO failed to consider this properly submitted documentation before reaching his decision we return the matter to the CO for further processing after considering the documentation of previous employment submitted in the Employer's audit response.

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:

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DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR./AMJ/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.