U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 26 July 2013

In the Matters of:

SEVEN OAKS LANDSCAPES-HARDSCAPES, INC.,
Employer,

on behalf of

HECTOR Z. GUZMAN,	**BALCA Case No.:**	**2011-PER-02628**
	ETA Case No.:	A-08165-61120
ARMANDO HERNANDEZ PEREZ,	**BALCA Case No.:**	**2011-PER-02471**
	ETA Case No.:	A-08165-61128

Aliens.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Christine Lockhart Poarch, Esq.
Poarch Law
Salem, VA 24153
For the Employer

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

Before: **Calianos, Geraghty, McGrath**
Administrative Law Judges

JONATHAN C. CALIANOS
Administrative Law Judge

DECISION AND ORDER
REVERSING DENIALS OF CERTIFICATION

These matters arise 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."). The above captioned cases have been consolidated because they present the common issue of whether the Certifying Officer ("CO") of the Employment and Training Administration ("ETA"), Office of Foreign Labor Certification ("OFLC") correctly denied labor certification in two applications on grounds that the Employer had not complied with 20 C.F.R. § 656.10(d)(1)(ii) and § 656.10(d)(3)(iv), as its Notice of Filing ("NOF") failed to indicate the specific dates the NOF was posted. For the reasons set forth below, we reverse the denial of the Employer's Applications for Permanent Employment Certification.

BACKGROUND

On June 18, 2008, the CO accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Landscape Tech." (AF 81).[1] On January 23, 2009, the CO issued an Audit Notification, instructing the Employer to file, among other things, documentation of the notice of filing as outlined in 20 C.F.R. § 656.10(d). (AF 75). On February 17, 2009, the Employer responded to the Audit Notification.[2] (AF 68). On June 24, 2010 the CO denied the Employer's application on the ground that the Employer failed to "confirm the NOF was posted for ten (10) consecutive business days between 30 and 180 days before filing its ETA Form 9089." (AF 1). On July 6, 2010, the Employer requested reconsideration.[3] (AF 64).

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[1] For purposes of this Decision and Order, we are citing to a representative appeal file, 2011-PER-02628, which will be referenced to as "AF" followed by the page number.

[2] The Employer's Response to the CO's Audit Notification is not found in the Appeal File. In its place is a typewritten note indicating that the Employer's response "was received by the… [OFLC] on 02/17/2009 [but] is not available for inclusion in the administrative file." (AF 68). There is no indication as to why the response documentation is missing from the appeal file. The typewritten note includes an additional self-serving statement that the Employer's response "is not necessary to render an accurate determination on the Employer's request for reconsideration as outlined in the Transmittal Letter." (AF 68). As this appeal turns on the NOF documentation supplied by the Employer in its Response, we disagree with the CO's self-serving notation contained in the file. We further note that the Employer's Response to the Audit Notification is absent in both appeal files, and the content of the Employer's Response is only discernible by reviewing the documentation provided in the Employer's Second Request for Reconsideration. How documents the OFLC acknowledged it received go missing from the appeal file without explanation is concerning to the Panel. Attempting to minimize the inadequate preservation of records by suggesting their content is worthless to these appeals, provides no measure of comfort.

[3] Again there are problems with missing documents in these appeal files. In place of the Employer's Response to the CO's Denial Letter in the Appeal File is a typewritten note indicating that the OFLC received the Employer's Response "on 07/06/2010" but the document "is not available for inclusion in the administrative file." (AF 64). There is also the same self-serving statement that the document "is not necessary to render an accurate determination on the Employer's request for reconsideration as outlined in the Transmittal Letter." (AF 64). We note that the Employer's Response to the CO's Denial Letter is absent in both appeal files.

On May 5, 2011, the CO sent a Five Year Documentation Request, noting it had received a request for reconsideration and asked the Employer to resubmit within thirty days a complete copy of ETA Form 9089, a complete copy of the Request for Reconsideration, and a complete copy of the audit documentation previously submitted by the Employer. (AF 63). The Employer filed its response to the Documentation Request on May 20, 2011.[4] (AF 4). On July 7, 2011, the CO denied Employer's Application for failing to timely respond to the Documentation Request. (AF 60).

On July 27, 2011, the Employer filed its Second Request for Reconsideration, claiming administrative error on the part of the Department of Labor, appending a copy of the entire original filing, audit materials, and correspondence with the CO.[5] (AF 3-59). On August 24, 2011, the CO determined the Employer had not overcome all of the deficiencies stated in the determination letter because the Employer failed to disclose the posting dates of the NOF and as a result "failed to confirm the NOF was posted for ten (10) consecutive business days between 30 and 180 days before filing its ETA Form 9089." (AF 1). Furthermore, the CO acknowledged that the Employer also submitted a new affidavit with its reconsideration request, affirming the specific dates of posting, but declined to admit such evidence because a request for reconsideration may include only documentation the employer did not have an opportunity to present to the CO, but which existed at the time the application was filed. (AF 1). The CO found that the newly submitted affidavit, sworn July 1, 2010, (AF 27), was created after the Application was filed and therefore inadmissible in a request for reconsideration.[6] (AF 1).

The CO forwarded the case to BALCA on July 27, 2011, and BALCA issued a Notice of Docketing on December 13, 2011. The Employer received an oral extension of time and filed a

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[4] Although the CO alleged the Employer failed to respond to the Five Year Documentation Request, the Employer, in its Second Request for Reconsideration, provided copies of certified mail receipts indicating its Response was received by the Atlanta National Processing Center ("ANPC") on May 20, 2011. (AF 4). Again, the Employer's Response to the CO's Document request is absent from the appeal files of both cases.

[5] The administrative record in this case is almost entirely compiled of the documentation provided by the Employer in its Second Request for Reconsideration. Given the substantial shortcoming contained in the administrative record in both of these consolidated appeals as discussed *supra* in footnotes 2-4, in all instances where there is a conflict between what the Employer states it sent to the OFLC and what the CO claims it received, we resolve all such conflicts against the CO.

[6] Because we find that the Employer's original filing was sufficient, we do not address whether the Employer's new affidavit is admissible.

Statement of Intent to Proceed and Notification of Alien's Change of Address on January 4, 2012. The Employer filed its Memorandum of Law in Support of Appeal on January 27, 2012. On December 27, 2012, BALCA issued an Order Requiring Certification on Mootness, and on January 10, 2013, the Employer certified that the jobs identified in the PERM application were still open and available on the same terms as set forth in the application, and that the aliens identified in the PERM applications remain ready, willing and able to fill the positions.

DISCUSSION

Under the PERM regulations, when an employer files an application for permanent labor certification, it must provide notice of the filing of the application ("NOF") to its employees. 20 C.F.R. § 656.10(d)(1). This is done by posted notice, for at least 10 consecutive business days, at the facility or location of the employment. 20 C.F.R. § 656.10(d)(1)(ii). The regulations further state the NOF must be "provided between 30 and 180 days before filing the application." 20 C.F.R. § 656.10(d)(3)(iv). Section 10(d) contains specific requirements as to the content of the NOF, but nowhere does it specifically require the Employer to document or identify the precise dates the NOF was posted. As in the instant case where the Employer has no bargaining representative for the employees, Section 10(d) requires the notice to be posted "in conspicuous places" and must be "clearly visible and unobstructed." 20 C.F.R. §656.10(d)(ii). The regulation goes on to state that when an employer is asked to document its compliance with this section, the documentation requirement can be "satisfied by providing a copy of the posted notice and stating where it was posted…" *Id.* There is no requirement that the specific dates of posting be supplied as part of the documentation requirement.

The question of whether an employer must document the precise dates of the NOF posting has been addressed by other BALCA Panels,[7] however, we have found only one such decision in which the Panel performed any analysis of the content and construction of Section 10(d).[8] In *Sonora Desert Diary*, the Panel determined:

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[7] *See Big Dog Homes, LLC.*, 2011-PER-01421 (Dec. 27, 2012) (affirming CO's denial); *VIP Tours of California*, 2011-PER-00540 (March 19, 2012) (affirming CO's denial); *Future Quest USA, Inc.*, 2010-PER-01516 (March 6, 2012) (affirming CO's denial); *Salem Village Nursing and Rehabilitation Center, LLC.*, 2022-PER-00587 (Jan 27, 2012) (affirming CO's denial).

[8] *See Sonora Desert Diary, LLC.*, 2011-PER-00066 (April 13, 2012) (affirming CO's denial).

> [a]lthough 20 C.F.R. § 656.10(d)(1)(ii) pertaining to how the NOF may be documented does not specifically state that an Employer must give the dates the notice was posted, we agree with other BALCA panels that have found such a requirement to be implicit. If the Employer does not provide the dates, the CO cannot independently verify either that the notice was posted for ten days or was posted between 30 and 180 days before filing ETA Form 9089.

2011-PER-00066 PDF at 4-5 (citations omitted). We agree with the Panel's observation that Section 10(d) does not require employers to document the dates the NOF was posted, but respectfully disagree with the conclusion that such a requirement is implicit.

The golden rule of statutory construction provides that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). Furthermore, other canons of construction advocate caution against implying provisions not included in the regulations. The Supreme Court has specifically noted that "to supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 250 (1926). To expand the regulations to cure a presumed inadvertent omission amounts to judicial overreaching, especially when confronting a regulation crafted with such painstaking attention to detail as the PERM regulations. *See id.* Here, the clear language of the regulation creates no requirement for Employers to document the NOF's posting dates. Absent such a requirement, we would be remiss to read one into the regulations.

The PERM regulations are rife with minutia, requiring an applicant's exacting adherence the first time around. There are no second bites at the apple, and when an applicant omits information required by the regulations, denial is the certain consequence. *See* 20 C.F.R. § 565.11(b) ("requests for modifications to an application will not be accepted for applications submitted after July 16, 2007."). Here the regulations set forth a minimum standard for documenting compliance with the posting requirements, and those standards do not include specifying the precise dates the NOF was posted. It is presumed the absence of such particularity in documenting the specific dates the NOF was posted, was intentional by the drafters. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute, but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983)).

We note that Section 10(d)(1)(ii) is not rendered superfluous or ineffective by our ruling. ETA Form 9089 Section I.e.25, requires the employer to affirm whether "notice of this filing [was] posted for 10 business days in a conspicuous location at the place of employment, ending at least 30 days before but not more than 180 days before the date the application is filed." (AF 77). Therefore, although nothing in ETA Form 9089 requires the Employer to document the specific dates the NOF was posted, the Employer must still affirm, under oath, that the NOF complies with the regulations set forth in Section 10(d). Here, the Employer properly affirmed that the notice was posted for ten consecutive business days within the specified period, and therefore met its obligations under Sections 10(d)(1)(ii) and 10(d)(3)(iv).

While almost complete, we think one more point requires brief discussion. An argument can be made that section 656.10(d)(4) requires some indication within the NOF that it was posted between 30 and 180 days before the PERM application was filed. The NOFs at issue in these appeals do not contain such a notification, and presumably, if such a requirement was found to exist in the regulations, it could be met by either including a general statement within the NOF that the notice was posted between 30 and 180 days before filing the application, or include the actual posting dates within the NOF. We find no such requirement exists in the regulations.

Section (d)(4) states that: "If an application is filed under § 656.17, the notice must contain the information required for advertisements by § 656.17(f)… and must contain the information required by paragraph (d)(3) of this section." 20 C.F.R. § 656.10(d)(4). Paragraph (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.

20 C.F.R. § 656.10(d)(3). While we read paragraphs (i) – (iii) as requiring specific content within the NOF, we do not read paragraph (iv) in the same manner. Paragraphs (i) and (ii) each start with the verb "[s]tate" and clearly require specific content within the NOF. Similarly, paragraph (iii) commences with "[p]rovide" and dictates the inclusion of the address of the Certifying Officer within the NOF. Conversely, paragraph (iv) states that the notice must: "Be provided," and requires the applicant to post the NOF within the specified time periods. Had the drafters intended paragraph (iv) to include a content requirement, they would have written it similar to paragraph (ii) along the lines of "State the notice was provided between . . ." To read paragraph (iv) as containing a content requirement, necessarily ignores the specific variation in word choice selected by the drafters. Such a reading is at odds with the teachings of statutory construction and we have seen no cases where the CO has denied a PERM application solely because the applicant failed to include such information within the NOF itself. While no party has specifically invited us to traverse this path, we wanted to be sure that we considered all possibilities.

ORDER

For the foregoing reasons, it is **ORDERED** that the denials of labor certification in these consolidated appeals are hereby **REVERSED,** and we direct the Certifying Officer to **GRANT** labor certification in these cases.

For the Board:

Digitally signed by JONATHAN CALIANOS
DN: CN=JONATHAN CALIANOS, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, MA

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.