



Issue Date: 28 October 2016

**BALCA Case No.:** 2012-PER-02661  
**ETA Case No.:** A-10348-38825

*In the Matter of:*

**AUTOMATIC DATA PROCESSING, INC.,**  
*Employer,*

*on behalf of*

**PADMANABHUNI, BHANU PRATAP,**  
*Alien.*

**Certifying Officer:** William Carlson, Ph.D.  
National Certifying Officer

**Appearance:** Steven L. Weinberg, Esquire  
Wildes & Weinberg, P.C.  
New York, New York  
*For the Employer*

**Before:** Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and  
William T. Barto, *Administrative Law Judges*

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

**PER CURIAM.** This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the “PERM” labor certification regulations at 20 C.F.R. Part 656.<sup>1</sup>

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<sup>1</sup> “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

## **BACKGROUND**

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States in Salem, New Hampshire. The occupational title listed on the Form 9089, Section F.3, was “Computer Software Engineers, Applications,” Standard Occupational Classification Code 15-1031.00. (AF 80-96).<sup>2</sup> On August 10, 2011, the CO issued an audit notification to the Employer, and on September 9, 2011, the Employer submitted its audit response. (AF 76-79, 17-75).

On January 26, 2012, upon review of the Employer’s audit response, the CO notified the Employer its application had been selected for supervised recruitment pursuant to 20 C.F.R. § 656.21. (AF 13-16). The notice provided the supervised recruitment process, requiring the Employer to submit a draft advertisement “within 30 calendar days from the date of [the] notification letter **OR** submit a timely request to the [CO] for one extension of the 30-day timeframe.” (Emphasis as in original) *Id.* The notice also stated:

[T]he [CO] in his or her discretion **may** provide one extension to any request for documentation or information. Requests for extensions must be made timely (within the original response time frame). Additionally your request must include specific justification for the extension. You may mail your request... or via electronic mail.... The [CO] will determine the length of the extension based upon your reason(s) for requesting the extension.

(AF 16).

On February 23, 2012, the Employer sent an email to the CO requesting an extension. (AF 12). Specifically, the email stated, “As per your letter, we are kindly requesting an additional 15 days to submit the documentation (draft advertisement and suggested publications) in this matter.” *Id.* No reason for the request was included. On March 2, 2012, the CO sent a letter to the Employer denying its request for an extension because the CO “did not consider the employer’s reason to be sufficient for the request.” (AF 11). The CO also noted that because the request for an extension was denied, the Employer’s documentation was due on February 27, 2012, and a failure to comply would result in the application being denied. *Id.*

On March 15, 2012, the CO denied certification because the Employer failed to submit its draft advertisement within 30 calendar days of the supervised recruitment notification, in violation of 20 C.F.R. § 656.21(f). (AF 9-10). The CO also explained that the Employer’s extension request had been denied because “the reason for the request was insufficient.”<sup>3</sup> *Id.* The Employer submitted a request for reconsideration, arguing that the CO “arbitrarily denied the extension of time requested by the employer in order to complete all newspaper advertising and recruitment....” (AF 4). The Employer also cited 20 C.F.R. § 656.21(g). *Id.*

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<sup>2</sup> Citations to the Appeal File are abbreviated as “AF” followed by the page number.

<sup>3</sup> The CO also wrote that in addition to the letter mailed to the Employer denying its request for an extension, the CO also emailed the Employer on February 27, 2012 with the denial. (AF 11). There is no documentation of this email correspondence from the CO to the Employer in the Appeal File.

The CO reconsidered, but found that the ground for denial was valid because the Employer did not submit its draft advertisement within the 30 day timeframe. (AF 1). In response to the Employer's argument, the CO noted that the supervised recruitment notification did not request that the Employer complete all of its recruitment.<sup>4</sup> *Id.*

On appeal, the Employer filed a statement confirming its intention to proceed with the appeal. Neither the Employer nor the CO, however, filed appellate briefs.

## DISCUSSION

Before making a final determination as to whether to grant or deny labor certification, a CO may "require the employer to conduct supervised recruitment under § 656.21." 20 C.F.R. § 656.20(d)(2). The supervised recruitment process requires an employer to submit a draft advertisement to the CO for review within 30 days of being notified that supervised recruitment is required. 20 C.F.R. § 656.21(b)(1). If an employer fails to submit required documentation to the CO within 30 days of the date of a request, "the CO shall deny the application." 20 C.F.R. § 656.21(f). Section 656.21(g) provides, however, that the CO "in his or her discretion, for good cause shown, may provide one extension to any request for documentation or information."

In this case, the CO issued a notice of supervised recruitment dated January 26, 2011, and required the Employer to submit its draft advertisement by February 27, 2011. On February 23, 2011, the Employer requested a 15 day extension from the CO, which was denied because the Employer did not include a reason for its request. The application was denied on March 15, 2011 because the draft advertisement was not submitted to the CO within 30 days of his request.<sup>5</sup> The Employer argues that the CO's denial of its extension request was arbitrary and cites § 656.21(g) as support.

An abuse of discretion standard applies when reviewing a CO's decision not to reconsider a denial based on an untimely filing. *Albert Einstein Med. Ctr.*, 2009-PER-00379, slip op. at 30-31, n. 29 (Nov. 21, 2011) (*en banc*) (citing *Harry Tancredi*, 1988-INA-00441 (Dec. 1, 1988) (*en banc*) (pre-PERM)). In *El Rancho Grande Mexican Rest.*, 2011-PER-02165 (Apr. 30, 2014), the panel considered whether a CO abused his discretion in denying an extension of time for an employer to file its audit response.<sup>6</sup> The panel found that the CO had not abused his discretion because the employer "had provided no explanation for why an extension of time was needed." *Id.*

Likewise, we hold that the CO in this case did not abuse his discretion by denying the

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<sup>4</sup> The supervised recruitment notification stated, "Under no circumstances may [the Employer] initiate recruitment for U.S. workers until the Certifying Officer has approved [the Employer's] draft advertisement." (AF 14).

<sup>5</sup> It appears from the Appeal File that a draft advertisement also was not received between the original due date on February 27, 2011 and the denial of certification on March 15, 2011.

<sup>6</sup> The employer did not request an extension, but rather, filed its audit response late. However, the panel considered the outcome of construing the late submission as a request for an extension of time. *El Rancho Grande Mexican Rest.*, at 3.

Employer's extension request. While we recognize the abuse of discretion standard has been consistently applied to a CO's reconsideration of late audit response filings,<sup>7</sup> we find that the standard also applies to untimely filings of supervised recruitment documentation. Section 656.21(g) requires "good cause shown" for an employer's extension to be granted. Here, the Employer's request did not contain a reason additional time was needed. By failing to provide a reason or an explanation with its request, the Employer failed to show good cause. Further, the instructions in the supervised recruitment notification required "specific justification" for an extension request. The notification also stated that "the length of the extension [would be] based upon [the Employer's] reasons for requesting the extension." Without justification for the request, the CO was unable to determine a length of time, so he did not abuse his discretion in denying the request for an extension.

The CO did not abuse his discretion in denying the Employer's request for an extension, and the Employer did not submit its draft advertisement within 30 days of the CO's request. Accordingly, we find that the denial of certification must be affirmed according to 20 C.F.R. § 656.21(f).

### **ORDER**

**IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

For the panel:

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

**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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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

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<sup>7</sup> See 20 C.F.R. § 656.20(c).

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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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.