

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue Date: 06 October 2015

BALCA Case No.: 2012-PER-00429
ETA Case No.: C-07324-97427

In the Matter of:

G.O.T. SUPPLY, INC.,
Employer

on behalf of

FERNANDEZ, FERNANDO,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Genaro Salazar, Esq.
Law Offices of Manuel Solis, PC.
Houston, TX
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: **ROMERO, KENNINGTON and ROSENOW**
Administrative Law Judges

Patrick M. Rosenow
Administrative Law Judge

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 (“C.F.R.”).

BACKGROUND

On December 27, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Welder-Fitter” (AF 121-130).¹ The CO audited the application on January 28, 2008 and subsequently denied the application on February 14, 2008. (AF 115-20). The CO denied the application because the Notice of Filing of the ETA Form 9089 did not contain the name of the employer, pursuant to 20 C.F.R. § 656.10(d)(4) and § 656.17(f)(1). (AF 115-117).

The Employer requested a status inquiry on June 30, 2011, where it argued it made a timely appeal of the CO’s denial. (AF 54-114). On October 4, 2011, the CO requested additional information from Employer including documentation of a Request for Reconsideration by Employer after the denial and information responding to the audit request. (AF 53). On October 13, 2011, Employer responded to the CO’s information request. (AF 2-52). In its request for reconsideration, Employer argues that listing the President’s name on the Notice of Filing (NOF) is sufficient notice of who the Employer is and that anyone reading the NOF, which was posted on Employer’s premises, would know that the Notice pertained to Employer. (AF 2-52). Alternatively, Employer argues that omission of Employer’s name on the NOF is harmless error. (AF 2-52).

The CO denied the request for reconsideration and forwarded the case to BALCA on November 14, 2011. In its denial of reconsideration, the CO noted that Employer omitted the name of the employer on the NOF, required by 20 C.F.R. § 656.10(d)(4) and § 656.17(f). The CO noted that in order for the Department to match documentary evidence bearing on an application, the employer’s name must be on the NOF and must match the name provided on the ETA Form 9089. (AF 1).

BALCA issued a Notice of Docketing on February 23, 2012. The Employer filed a Statement of Intent to Proceed on February 29, 2012. Employer did not file an appellate brief and the CO did not file a Statement of Position.

DISCUSSION

PERM is an exacting process, designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *HealthAmerica*, 2006-PER-1, slip op. at 19 (July 18, 2006) (en banc). An employer bears the burden of proof to establish eligibility for labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b).

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

The regulations require that an employer that files an application for permanent labor certification must provide notice to the employer's employees at the facility or location of employment. 20 C.F.R. § 656.10(d)(ii).

The Notice of Filing must contain the information required for advertisements in newspapers of general circulation or in professional journals by § 656.17(f). 20 C.F.R. § 656.10(d)(4). The applicable regulation requires that advertisement must:

- (1) Name the employer;²
- (2) Direct applications to report or send resumes, as appropriate for the occupation, to the employer;
- (3) Provide a description of the vacancy specific enough to apprise the U.S. worker of the job opportunity for which certification is sought;
- (4) Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity;
- (5) Not contain a wage rate lower than the prevailing wage rate;
- (6) Not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089; and
- (7) Not contain wages or terms and conditions of employment that are less favorable than those offered to the alien.

20 C.F.R. § 656.17(f). The Notice of Filing is not a mere technicality, but is an implementation of a statutory notice requirement designed to assist interested persons in providing relevant information to the CO about an employer's certification application. It is not a regulation to be lightly dismissed under a harmless error finding. *See Riya Chutney Manor, LLC*, 2010-PER-177 and 191 (Apr. 7, 2010); *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007).

Employer did not file an appellate brief and thus, the only argument presented is in the Employer's Request for Reconsideration where it argued that the Section in the regulations requiring it to list the "name of employer" on the NOF is ambiguous because it does not specify that only the company name is acceptable. Employer does not argue that it included the name of employer on its NOF. Instead, its argument in essence is that the inclusion of the Employer's president's name and phone number was the functional equivalent of the name of the company given that the NOF was posted at the workplace, and because the President is the individual who would be employing the new hire.

The NOF has two purposes: to provide an opportunity for the Employer's workers to apply for the position, and to permit interested persons to contact the CO directly about the application. *Brodie's Pub*, 2008-PER-150, slip op. at 5-6 (Aug. 6, 2009). Without the name of

² Failure to include the business name on the Notice of Filing is fatal to the application. *Robert Venuti Landscaping*, 2009-PER-453 (Oct. 27, 2010). In *Robert Venuti Landscaping*, the Board held that the hypothetical suggestion in *Stone Tech*, 2008-PER-187 (Jan. 5, 2008) that there are exceptions to the Notice of Filing requirements is no longer viable.

the employer in the NOF, a person attempting to provide information to the CO might not be able to inform the CO of the name of the Employer as it appeared on the application. *Id.* at 6.

The regulatory requirement of including the employer's name in the NOF is not an obscure requirement, nor a difficult one to implement. The Employer clearly failed to comply with that requirement in its NOF and thus, the CO's above reason for denial is valid and supported by the record.

Accordingly, **IT IS ORDERED** that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel

PATRICK M. ROSENOW
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.