



Issue Date: 12 October 2016

BALCA Case No.: 2012-PER-02129
ETA Case No.: A-10105-94752

In the Matter of:

JAMSHID EHSANI,
Employer,

on behalf of

AZUCENA ROMERO,
Alien.

Certifying Officer: William Carlson, Ph.D.
National Certifying Officer
Atlanta National Processing Center

Appearance: Robert J. Shannon, Esquire
Roura Melamed and Shannon, LLP
New York, New York
For the Employer

Before: Colleen A. Geraghty, *District Chief Administrative Law Judge* and
Jonathan C. Calianos and Daniel F. Sutton, *Administrative Law Judges*

Opinion for the Board filed by CALIANOS, *Administrative Law Judge* with whom GERAGHTY, *District Chief Administrative Law Judge* and SUTTON, *Administrative Law Judge*, join:

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter which arises under Section 212(a)(5)(A) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1182(a)(5)(A) and the “PERM” labor certification regulations at 20 C.F.R. Part 656¹ is before the Board of Alien Labor Certification Appeals (“the Board”) on the Employer’s request for review pursuant to 20 C.F.R. § 656.26 of the administrative denial of its application for a Permanent Employment Certification. The Board’s consideration of the request

¹ “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005. 69 Fed. Reg. 77326 (Dec. 27, 2004).

for review is based on a review of the record upon which the denial of certification was made, the request for review, and any statement of position or legal brief. 20 C.F.R. § 656.27(c). For the reasons set forth below, we affirm the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On March 12, 2010, the Certifying Officer ("CO") accepted for filing the Employer's *Application for Permanent Employment Certification* ("Form 9089") sponsoring the Alien for permanent employment in the United States as a "Nanny" in Greenwich, Connecticut. (AF 82-103).² The occupational title listed on the Employer's Form 9089, Section F-3 was "Child Care Worker," Standard Occupational Classification Code 39-9011.01. (AF 83). The Employer attested that the job of Nanny is a non-professional position, that there is no minimum education requirement and that 24 months of job experience are required. (AF 83-85).

Upon initial review of the Form 9089, the CO requested additional documentation which the Employer provided on July 7, 2010. (AF 70-81). On July 26, 2010, the CO issued a determination letter in which he stated that certification was denied because multiple attempts to contact the employer's listed contact person by telephone had been unsuccessful. (AF 68-69). The Employer requested reconsideration in a letter dated August 11, 2010, asserting that it had returned all of the CO's telephone calls and left messages which the CO did not return. (AF 56-67). By letter dated December 15, 2011, the CO advised the Employer that it had received the request for reconsideration but could not process the application until the Employer provided the following information: "a signed statement written on the employer's letterhead, indicating that the employer was aware that the ETA Form 9089 had been submitted to the National Processing Center, that the job opportunity listed in Section H of the ETA Form 9089 is available, and that the employer is sponsoring the alien listed in Section J of the ETA Form 9089." (AF 54-55). The Employer submitted the requested statement on January 9, 2012. (AF 49-53).

The CO then issued an *Audit Notification* on February 26, 2012, directing the Employer to submit documentation supporting the attestations made in the Form 9089 including recruitment documentation as described in 20 C.F.R. § 656.17. (AF 44-48). The Employer provided the requested audit documentation on February 28, 2012. (AF 20-43). As pertinent to this appeal, the documentation submitted by the Employer in response to the *Audit Notification* included a Prevailing Wage Request form that the Employer filed with the Alien Labor Certification Unit of the State of Connecticut's Employment Security Division. (AF 38).³ The PWD request form that the Employer completed and filed contains a section 9 which reads as follows: "State, IN DETAIL, the MINIMUM Education (specify the degree and Major Field of

² Citations to the Appeal File are abbreviated as "AF" followed by the page number.

³ Prior to January 1, 2010, prevailing wage determinations were made by the SWAs. 20 C.F.R. § 656.3 (2009). This PWD process was nationalized for requests made beginning on January 1, 2010, partially because state practices varied widely and complicated compliance with the PERM regulations. 74 Fed. Reg. 63531, 63796-97 (Dec. 4, 2009).

Study). Training, Experience and Other Special Requirements for the job.” (AF 38). This section is blank. (AF 38),

By letter dated March 21, 2012, the CO notified the Employer that certification of its application for permanent labor certification was denied for two reasons: (1) the prevailing wage determination (“PWD”) submitted by the Employer did not match the Form 9089 because it did not list a two-year experience requirement and thereby violated 20 C.F.R. § 656.10(c)(1) which requires the PWD be determined in accordance with 20 C.F.R. § 656.40; and (2) the Employer committed a substantial failure to submit audit documentation in violation of 20 C.F.R. § 656.20(b) by failing to provide a copy of the job order placed with the state workforce agency (“SWA”). (AF 17-18).

The Employer again requested reconsideration of the denial by the CO. (AF 3-16). Regarding the PWD, the Employer’s attorney stated,

I have attached my letter of 10/11/09 to D.O.L as Exh. 1 which was sent via mail along with a copy of blank prevailing [wage] form. On 10/6/09 the Department faxed a prevailing wage based on my faxed request after no response was received to my letter of 10/01/09. The letter clearly indicates, job title and duties, and the amount of experience to be required, the hours and the location. Further the Department assigned the job duties to the O'Net code of 39-9011(01) which is for child care workers and Nannies. I have attached a copy of O'Net online as Ex.2. Based on the assignment of this code the position of a nanny is in the SVP range of 6.0 but less than 7.0. This clearly encompasses the requirement of 2 years experience. Thus the prevailing wage assigned by the Department of Labor is the correct wage for this position.

(AF 3). Exhibit 1 to the Employer’s request for reconsideration is a copy of an October 1, 2009 cover letter from Employer’s Attorney to the state Alien Labor Certification Unit which filed the PWD request form. (AF 6). While the PWD form, as discussed above lists no experience requirement for the job, the cover letter lists “Exp.: 2yrs” in the information provided for the requested PWD. (AF 6). The Employer also submitted proof that the SWA job order was placed from 11/11/09 to 12/11/09. (AF 3, 14-15).

In a letter dated April 27, 2012, the CO notified the Employer that he had reconsidered the denial concerning the job order but that reconsideration did not cure the deficiency noted with respect to the PWD:

In its request for reconsideration, the employer states the letter the employer sent to the Department requesting the PWD included its two year experience requirement. The employer also states the assigned Standard Occupation Classification (SOC) code on the PWD correlates to a position requiring up to two years experience, thus the prevailing wage was correctly determined by the Department. When assigning a prevailing wage, the National Processing Center or the State Workforce Agency utilizes specific elements, including but not limited to, the education, training and experience required by the employer to identify a

wage level to determine the appropriate prevailing wage for the job opportunity. Here, there is no indication on the PWD that the Department considered the employer's two year experience requirement when determining the prevailing wage. Thus it is unclear whether the prevailing wage issued was appropriate for the instant job opportunity. Further, when the PWD is in need of review, it is the employer's responsibility to request a review within 30 days of the issuance of the PWD. Since the PWD submitted by the employer does not reflect the experience requirement listed on the ETA Form 9089, the Office of Foreign Labor Certification Certifying Officer has determined this reason for denial is valid in accordance with Departmental regulations at 20 CFR §§ 656.40 and 656.41.

(AF 1).

After confirming denial of the Employer's application on reconsideration, the CO forwarded the case to the Board. In response to the Board's notice of docketing, the Employer filed a statement confirming its intention to proceed with the appeal. On August 4, 2016, the Board issued an *Order Requiring Certification on Mootness*. The Employer's attorney responded by letter dated August 15, 2016 that the job is still open and available and that the Alien is still ready, willing, and able to fill the position. Neither the Employer nor the CO has filed an appellate brief with the Board.

STANDARD OF REVIEW

The Board's review of the CO's legal and factual determinations when denying an application for permanent alien labor certification is *de novo*, limited in scope by 20 C.F.R. § 656.27(c). *Albert Einstein Medical Center*, 2009-PER-00379 (Nov. 21, 2011) (*en banc*), slip op. at 32. Thus, the Board engages in *de novo* review of the record upon which the CO denied permanent alien labor certification, together with the request for review, and any statements of position or legal briefs. *Id.* at 25. The Board may not consider evidence first presented in an appellate brief. *Id.* at 7. The Board permits general legal argument in briefs, but will not consider wholly new arguments not made before the CO. *Id.* at 8. The Board will not decide an appeal on grounds for denial not raised while the case was before the CO. *Loews Anatole Hotel*, 1989-INA-00230 (Apr. 26, 1991) (*en banc*); *Mandy Donuts Corp.*, 2009-PER-00481 (Jan. 7, 2011).

DISCUSSION

The permanent labor certification process is the first step an employer must complete in order to sponsor certain foreign workers for lawful permanent resident status.⁴ 8 U.S.C. § 1182(a). The labor certification represents the Secretary of Labor's determination that there are no able, willing, qualified, and available U.S. workers for the position the alien seeks to perform

⁴ Lawful permanent resident status is commonly referred to as having a green card. Among the benefits afforded to lawful permanent residents is the opportunity to apply for naturalization. 8 U.S.C. § 1427(a).

on a permanent basis.⁵ 8 U.S.C. § 1182(a)(5)(A)(i)(I). PERM is an attestation-based program. 20 C.F.R. § 656.10(c). Among other things, an employer must attest that the wage offered to the alien equals or exceeds the prevailing wage determined pursuant to Sections 656.40 and 656.41, and that the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment. 20 C.F.R. §§ 656.40, 656.41, 656.10(c)(1). An employer sponsoring a foreign worker for permanent labor certification bears the burden of proving that all regulatory requirements have been satisfied before the CO can grant certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b).

In this case, the Employer submitted a PWD request form to the SWA that did not contain the 24-month job experience requirement that the Employer listed as a minimum requirement on the Form 9089. Consequently, the PWD issued by the SWA in response to the Employer's request did not list any experience requirement. (AF 38).⁶ While the Employer provided the CO with a copy of its October 1, 2009 cover letter to the SWA which contained the "Exp.: 2yrs" reference, the CO rejected the Employer's apparent attempt to blame the SWA for any discrepancy between the PWD and the job requirements listed in the Form 9089, noting that it is the Employer's responsibility to ensure that a PWD is accurate. We agree.

PERM is also 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-00001, slip op. at 19 (July 18, 2006) (*en banc*). The burden is on the employer to ensure that it is submitting a complete and compliant application to the CO. 20 C.F.R. § 656.2(b); *All Ohio Air Filter Sales & Service Co.*, 2009-PER-00205 (April 7, 2010); *Alpine Store Inc.*, 2007-PER-00040 (June 27, 2007). Consistent with these principles, other Board panels have affirmed denial of certification where an Employer omits job requirements listed in the Form 9089 from a PWD. *See St. Jude Children's Research Hospital*, 2011-PER-00567 (Apr. 19, 2012); *Florida Restaurant Group, LLC*, 2009-PER-00014 (Aug. 25, 2009). Since the Employer obtained a PWD which omitted an experience requirement listed in its Form 9089 that could have affected the accuracy of the PWD, we conclude that the CO did not err in denying certification pursuant to 20 C.F.R. § 656.10(c)(1).

⁵ The labor certification also represents the Secretary of Labor's certification that the permanent employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. § 1182(a)(5)(A)(i)(II).

⁶ The record shows that a SWA official reviewed the PWD request form that the Employer had completed and submitted and entered a prevailing wage of \$8.92 per hour on the bottom of the form. (AF 38).

ORDER

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

SO ORDERED.

For the panel:

JONATHAN C. CALIANOS
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 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 the Board's 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 400N
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 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.