



Issue Date: 28 October 2016

BALCA Case No.: 2012-PER-02697

ETA Case No.: A-11153-82626

In the Matter of:

LOS ANGELES ORT TECHNICAL INSTITUTE,

Employer,

on behalf of

TARASEK, WIOLETTA,

Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Christopher E. Kurczaba, Esquire
Kurczaba Law Offices, P.C.
Chicago, Illinois
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza,
and Marc R. Hillson¹, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT 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 656.²

¹ Appointed under the U.S. Office of Personnel Management Senior Administrative Law Judge Program. *See* 5 C.F.R. § 930.209.

² “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 Skokie, Illinois. The occupational title listed in Form 9089, Section F-3, was ESL (English as a second language) teacher, listed under “English Language and Literature Teachers, Postsecondary,” Standard Occupational Classification Code 25-1123.00. (AF 83).³ Among the requirements for the position was a Master’s degree in English and two years’ teaching experience. (AF 83-84). The Employer also attested that its application was for a college or university teacher and therefore subject to the requirements set forth in 20 C.F.R. § 656.18. (AF 85). Although the position description included, “Provide group orientations to Polish speaking students. Provide individual counseling sessions to Polish speaking community,” there was no foreign language requirement specified in the Form 9089. (AF 92, Section H-11, H-13).

The Certifying Officer (“CO”) audited the application and directed the Employer to submit, *inter alia*, “[a] written statement attesting to the degree of the foreign worker’s educational or professional qualifications and academic achievements.” (AF 79). Included in the Employer’s audit response was a signed recruitment report, which stated in pertinent part:

The [A]lien’s educational and professional qualifications are set forth in the curriculum vitae attached hereto and incorporated into this statement. I attest to these qualifications. Specifically, [the Alien] has a Master’s Degree in English and over two years of experience as English Teacher. She is also fluent in Polish, which deems her more qualified than [sic] other applicants.

(AF 60). The Alien’s curriculum vitae was not attached to the recruitment report, nor was it included elsewhere in the audit response. The Employer also submitted documentation from the Illinois Board of Higher Education that stated the Employer was authorized to “Operate and Grant the Associate of Applied Science in Accounting in the North Suburban Region.” (AF 57).

The CO thereafter denied the application on two grounds. First, the CO found that the Employer was “not an institution of higher education as defined in accordance with the Department’s regulations at 20 CFR § 656.40(c)(1)(i) [sic]⁴, and therefore is not eligible to submit PERM applications using the optional special recruitment and documentation procedures (‘competitive recruitment’) for college and university teachers provided under § 656.18.” (AF 36). Second, the CO found that the Employer had substantially failed to respond to the audit request in violation of 20 CFR § 656.20(b) because the Employer’s audit response indicated that the Alien’s curriculum vitae was attached but it was not. (AF 37).

The Employer asked the CO to reconsider (AF 3-34). The Employer contended that it was in fact an institution of higher education under the regulations, and enclosed supporting documents. The Employer also submitted a copy of the alien’s curriculum vitae, which it

³ Citations to the Appeal File are abbreviated as “AF” followed by the page number.

⁴ The regulation at 20 CFR § 656.40(c) does not contain any subsections. It is likely the CO intended to cite 20 C.F.R. § 656.40(e)(1)(i), which defines the term “institutions of higher education” as it is used in § 656.40(e).

contended it had submitted with the audit response. (AF 3-6). The Employer also argued that, in any event, it met the audit request that the Employer attest to the qualifications of the Alien. (AF 3-6).

The CO reconsidered, but found that the grounds for denial were valid. (AF 1-2). The CO found, with respect to whether the Employer was an institution of higher education, that “there is no indication in the audit documentation provided by the employer, or in materials found on its websites, that its degrees or diplomas can be used as full credit toward a Bachelor’s degree,” (AF 1) and that while it was certified to grant an associate’s degree in accounting it did not give a degree in the subject the alien was to teach—English as a Second Language. With respect to the issue of lack of documentation of the alien’s qualifications, the CO pointed out that the curriculum vitae should have been submitted in response to the audit request and that the regulations barred him from accepting the document during the reconsideration process.⁵ The CO did not address the issue of whether the other submitted documents regarding the alien’s qualifications were sufficient to comply with the audit request.

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

DISCUSSION

Whether the Employer is a College or University for the purposes of § 656.18

The Labor Certification Process as outlined in Subpart C of the regulations includes special recruitment and documentation procedures for college and university teachers. 20 C.F.R. § 656.18. Subpart C does not contain any definitions or guidance indicating what constitutes a “college” or “university.” Subpart D of the regulations, which deals with Determination of Prevailing Wage, contains a fairly detailed definition of “institution of higher education,” which the CO heavily relied on in this case. 20 C.F.R. § 656.40(e)(1). However, the plain language of that regulation indicates that the definition of “institution of higher education” applies only to the term as it is used in § 656.40(e):

(1) The organizations **listed in this paragraph (e)** are defined as follows:

(i) Institution of higher education means an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965. Section 101(a) of that Act, 20 U.S.C. 1001(a)(2000), provides an institution of higher education is an educational institution in any state that:

20 C.F.R. § 656.40(e)(1) (emphasis added). The regulatory history of this provision also suggests that an “institution of higher education” is not synonymous with the “colleges” and “universities” referenced in § 656.18. The Department of Labor promulgated § 656.40(e) to enact provisions of the American Competitiveness and Workforce Improvement Act of 1998

⁵ The CO gave as part of his rationale for denial the failure of the Employer to include copies of mandatory print advertisements, but that was never raised as an issue and we assume it was cited in error.

(“ACWIA”), Pub. L. 105-277.⁶ *Labor Certification for the Permanent Employment of Aliens in the United States*, 69 Fed. Reg. 77326, 77371 (Dec. 27, 2004). This statute addressed issues idiosyncratic to the determination of prevailing wages. See *University of Michigan*, 2015-PWD-00006 (Nov. 18, 2015) (noting that “Congress passed Section 415 of ACWIA in response to [a Board decision] so that certain entities could calculate prevailing wages without sampling across an industry as a whole”). When addressing the special procedures outlined in § 656.18, the preamble to the final PERM rule discussed a series of Board and federal district court decisions interpreting a separate statutory provision. 69 Fed. Reg. at 77357. It therefore does not follow that the definition listed in § 656.40(e) applies within the context of § 656.18. Finally, the CO cites no authority for his decision to apply this Subpart D definition to a Subpart C procedure. On the record we have before us, we find that the CO lacked authority to deny the Employer’s application under the provisions cited in the denial letter.

Whether the Employer Substantially Failed to Respond to the CO’s Audit Request

In the event of an audit, the CO’s audit letter is required to specify the documentation an Employer must submit. 20 C.F.R. § 656.20(a)(1). A substantial failure by the employer to provide documentation will result in the denial of the application. 20 C.F.R. § 656.20(b). If the CO requests documentation that an employer is required by regulation to maintain in its audit file, the employer’s failure to submit such documentation is presumptively a substantial failure to respond. *SAP America, Inc.*, 2010-PER-01250 (Apr. 18, 2013) (*en banc*).

In this case, the CO directed the Employer to produce “[a] written statement attesting to the degree of the foreign worker’s educational or professional qualifications and academic achievements.” (AF 79). The regulation at § 656.18(b)(5) provides that the Employer was required to maintain this documentation in its audit file. Therefore, if the Employer had failed to provide a statement to the CO, its omission would presumptively constitute a substantial failure to respond in violation of § 656.20(b). However, the Employer attested to the Alien’s qualifications in the recruitment report. (AF 60). The CO nevertheless found that the Employer substantially failed to respond because the recruitment report indicated that a CV would be attached, but the Employer’s response omitted the CV. However, the audit request did not direct the Employer to submit a CV and the regulations at § 656.18 did not require the Employer to submit the Alien’s CV. We find that the Employer’s failure to submit documentation that was neither requested nor required does not constitute a substantial failure to respond. Thus, we hold that the decision of the CO should be reversed.

⁶ The relevant section of this statute is codified at 8 U.S.C. § 1182(p)(1).

ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2).

Entered at the direction of the panel by:

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
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 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.