U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 May 2015

In the Matters of:

NEW YORK CITY DEPARTMENT OF EDUCATION,
Employer,

on behalf of

MARIA ANNA SANTA CRUZ VERZOSA	**BALCA Case No.:**	**2012-PER-02553**
	ETA Case No.:	A-1105-43792
MARILOU TENIO QUIDET	**BALCA Case No.:**	**2012-PER-02632**
	ETA Case No.:	A-11032-50971
MARSHA ANNROCHELLE PIERRE	**BALCA Case No.:**	**2012-PER-02658**
	ETA Case No.:	A-11146-81234

Aliens.

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

Appearance: Helen L. Konrad, Esq.
Richmond, Virginia
For the Employer

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

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

JONATHAN C. CALIANOS
Administrative Law Judge

DECISION AND ORDER
AFFIRMING 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 for three foreign workers on grounds that the Employer did not comply with 20 C.F.R. § 656.17(g)(1), which states that"[t]he employer must prepare a recruitment report signed by the employer or the employer's representative noted in 20 C.F.R. § 656.10(b)(2)(ii)." For the reasons set forth below, we affirm the denials of the Employer's Applications for Permanent Employment Certification.

BACKGROUND

On June 2, 2011, the Certifying Officer ("CO") accepted for processing the Employer's Application for Permanent Labor Certification for the position of "Students with Disabilities (Special Education) Teacher." (AF 943-56).[1] On August 5, 2011, the CO sent the Employer an Audit Notification Letter requesting, among other documents, the Employer's signed recruitment report pursuant to 20 C.F.R. § 656.17(g)(1). (AF 940-42).

On August 30, 2011, the Employer responded to the Audit Notification Letter. (AF 183-939). On February 9, 2012, the CO denied the Employer's application for two reasons. (AF 181-82). First, the CO stated that the recruitment report did not provide an account of the actual

[1] All three captioned appeals involve the same relevant facts, issues, and arguments presented. Thus, for the purposes of this Decision and Order, we will cite to a representative Appeal File, 2012-PER-02553, which will be referenced by the abbreviation "AF," followed by the page number.

number of applicants for the relevant position. (AF 182). Second, the CO concluded that that recruitment report was not signed in contravention of 20 C.F.R. § 656.17(g)(1). (AF 182).

On March 5, 2012, the Employer submitted a Request for Reconsideration, or, in the alternative, Request for Review. (AF 3-180). With respect to the first reason for denial, the Employer stated that the recruitment report had, in fact, accounted for all applicants for the job opportunity. (AF 3-6). Regarding the second reason for denial, the Employer explained that there was a physically-signed copy of the recruitment report in existence at the time its application was filed, which, through administrative error, was omitted in its audit materials. (AF 7). It submitted with its motion for reconsideration, a copy of the physically-signed recruitment report, and affidavits and other evidence verifying the signed report was in existence at time the application was filed. (AF 7). The Employer argued that its omission was not material and therefore fundamental fairness required reversal. (AF 8). It alternatively argued that the regulations do not require a handwritten signature and the version of the recruitment report submitted on audit with the typed name of the Employer's Deputy Executive Director, Peter Ianniello, satisfied 20 C.F.R § 656.17(g)(1). (AF 9-10).

On June 6, 2012, the CO denied the Employer's Request for Reconsideration. (AF 1-2). In the transmittal letter, the CO accepted the Employer's response regarding the number of applicants accounted for in the recruitment report. (AF 1). However, he upheld his denial because the version of the recruitment report submitted on audit did not contain a valid, "original" signature. (AF 1).

The CO transferred the Appeal File to the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"), and BALCA issued a Notice of Docketing and Order Requiring Submission of Statement to Proceed on November 19, 2012. On November 27, 2012, the

Employer filed a Statement of Intent to Proceed. On December 28, 2012, the Employer submitted its Statement of Position and Appellate Brief ("Er. Br"). The CO did not file a Statement of Position.

DISCUSSION

Recruitment report requirements are governed by 20 C.F.R. § 656.17(g)(1):

> The employer must prepare *a recruitment report signed by the employer or the employer's representative* noted in Sec. 656.10(b)(2)(ii) describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections.

(emphasis added).

The Employer contends that the typed name of the Deputy Executive Director at the bottom of the recruitment report submitted with its Audit Response constitutes a valid "typed signature" or "electronic signature" that complies with 20 C.F.R. § 656.17(g)(1) and the regulations do not indicate that a handwritten signature is required. (Er. Br. at 2). This argument is unavailing. While 20 C.F.R. § 656.17(g)(1) does not distinguish between handwritten and electronic signatures, there is no indication that the typed name on the recruitment report was intended to be a signature. The Employer admitted that there was a physically-signed copy of the report which was inadvertently omitted from the Audit Response. (Er. Br. at 3). This admission, together with the fact that the name of the Executive Deputy Director was not preceded by the customary "/s/" for electronic signatures, suggests that the Director did not execute or adopt the typed word with the intent to authenticate the document. (AF 951). Because such intent is generally required in order for a typed name to constitute a legal electronic signature, *see, e.g.*, 17 C.F.R. § 1.3; 21 C.F.R. § 11.3; 12 C.F.R. § 202, we find that Mr. Ianniello's typed name on the report does not constitute a valid signature.

The Employer additionally argues that by stating in his transmittal letter that "original signatures" are required on the recruitment report, (AF 1), the CO both improperly mentions reasons not stated in the initial Denial Letter and imposes novel requirements not found in the PERM regulations. (Er. Br. at 4-5). There is indeed no indication in 20 C.F.R. § 656.17(g)(1) that recruitment reports, even those delivered by mail, require original signatures. Nevertheless, as stated earlier, the typed name of the Executive Deputy Director does not constitute a valid signature, and that is the end of the inquiry. There is no signature of any kind—original or otherwise—on the recruitment report.

Lastly, the Employer argues that fundamental fairness requires reversal, stating that it was only through administrative error that a physically-signed copy of the recruitment report was omitted from its Audit Response. (Er. Br. at 2-4). It also notes that the physically-signed copy was included with the Employer's Request for Reconsideration. (AF 7). The Employer cannot, however, cure its failure to comply with the Audit Notification by submitting a different recruitment report with its Request for Reconsideration. *See Spotsylvania County Schools*, 2011-PER-00562 (Dec. 14, 2011). The regulations state that an employer may only submit new evidence with its motion for reconsideration if it did not have a prior opportunity to submit the evidence before the denial. § 565.24(g)(2)(i)-(ii); *see Denzil Gunnels d/b/a Gunnels Arabians*, 2010-PER-628, PDF at 15 (Nov. 16, 2010). Because it is undisputed that the Employer had the opportunity to submit the signed copy of the recruitment report with its audit response, the CO properly chose not to consider the evidence, and we cannot consider it on appeal. *See* 20 C.F.R. § 656.27(c).

The Employer also argues that because "each statement in the recruitment report was verified by other documentation submitted with Employer's audit response," the omission of the physically signed copy was immaterial. (Er. Br. at 4). PERM is, however, an exacting process, one in which employers bear the burden of proof. 20 C.F.R. §§ 656.26(a)(4)(i), 656.27(c); s*ee also All Ohio Air Filter Sales & Service Co.*, 2009-PER-205, slip op. 4 (Apr. 7, 2010) ("[t]he CO is under no obligation to gather the information needed to perfect the application"). Furthermore, in the regulatory history to the 2007 amendment to the PERM regulations, ETA explicitly noted that "typographical or similar errors are not immaterial if they cause an application to be denied based on regulatory requirements." *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27917 (May 17, 2007). A signature on the recruitment report is a regulatory requirement contained in 20 C.F.R. § 656.17(g)(1). The Employer's failure to supply a signed copy of the recruitment report in response to an audit notification is not immaterial, and accordingly, we affirm the CO's denials of certification.[2]

[2] Regarding the Employer's application on behalf of Ms. Pierre (AF 2012-PER-02658), the CO also denied certification because he concluded that the Employer had improperly rejected U.S. applicants. (AF 1). Because we affirm the CO's decision on other grounds, we do not address this reason for denial.

ORDER

IT IS ORDERED that the denials of labor certification in these matters are hereby **AFFIRMED.**

For the Panel:

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, Massachusetts

NOTICE OF OPPORTUNITY TO PETITION FOR EN BANC 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 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.