



Issue Date: 21 October 2016

BALCA Case No.: 2012-PER-03743

ETA Case No.: A-11334-20990

In the Matter of:

NORMAN W. FRIES, INC. D/B/A CLAXTON POULTRY FARMS,
Employer,

on behalf of

KIM, EUN SUK,

Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: David S. Perrie, Esquire
Perrie & Associates, LLC
Atlanta, Georgia
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; William T. Barto
and Morris D. Davis, *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 656.¹

BACKGROUND

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States in Claxton,

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

Georgia. The occupational title listed in Form 9089, Section F-3 was “Meat, Poultry and Fish Cutter and Trimmers,” Standard Occupational Classification Code 51-3022.00. (AF 605).²

The Certifying Officer (“CO”) audited the application. (AF 601-03). After reviewing the Employer’s documentation, the CO denied certification on three grounds. (AF 14-15). For the purposes of deciding this appeal, we limit our consideration to the CO’s first ground for denial—the wage listed in the state workforce agency (“SWA”) job order is less than the wage offered to the foreign worker. (AF 15). The wage listed on the SWA job order was \$8.00 an hour, totaling \$16,640 a year. (AF 41-42). However, the wage offered to the foreign worker was \$16,848 annually. (AF 605). Therefore, the CO denied certification because the lower wage offered to U.S. workers “disaffirms the employer’s attestation that the job opportunity is clearly open to any U.S. worker” under 20 C.F.R. §§ 656.10 & 656.17(f)(7). (AF 15).

The Employer requested reconsideration, explaining that all new employees receive \$8.00 an hour for the first two months and then \$8.25 for the remaining ten months of the year, totaling a true annual salary of \$17,073. (AF 4, 8). The Employer further argued that 20 C.F.R. § 656.17(f) only applies to newspapers in general circulation and professional journals, not to SWA job orders. (AF 3-4).

The CO affirmed the denial of certification because no recruitment advertisement may contain an offer less favorable than that offered to the foreign worker. (AF 1). The CO concluded that it could not consider the information regarding the raise under 20 C.F.R. § 656.24(g)(2)(i)-(ii). (AF 1-2). Because that wage information was not listed on the Form 9089, and because the offered wage exceeded the wage on the job order, the CO affirmed denial. *Id.*

On appeal, the Employer filed a statement confirming its intention to proceed with the appeal. The Employer included its request for reconsideration as its “statement of position” on appeal.³ The CO did not file an appellate brief.

DISCUSSION

The regulation at 20 C.F.R. § 656.10(c)(8) requires an employer to attest that “[t]he job opportunity has been and is clearly open to any U.S. worker.” In this case, the CO found that the job opportunity was not clearly open because the Employer’s SWA job order failed to comply with the content requirements of § 656.17(f). (AF 15). However, the Board held in *Symantec Corp.*, 2011-PER-01856 (July 30, 2014) (*en banc*), that the regulation at § 656.17(f) only applies to advertisements in newspapers or professional journals. It does not necessarily follow that § 656.10(c)(8) requires all recruitment steps to comply with § 656.17(f). *DGN Technologies Inc.*, 2012-PER-01647, slip op. at 2 (Feb. 25, 2016).

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

³ Employer requests an oral hearing on this matter pursuant to 20 C.F.R. § 656.27(c)(3). In this case, the Employer’s request is **DENIED**.

The relevant inquiry under § 656.10(c)(8) is whether the Employer's SWA job order so misinformed, or so failed to inform, potential applicants that the recruitment did not support the Employer's attestation that the job opportunity was clearly open to any U.S. worker. *SWDWII, LLC*, 2012-PER-00887 (Jan. 29, 2016); *The China Press*, 2011-PER-02924 (Aug. 20, 2015), *vacated on other grounds* (Nov. 30, 2015). Panels have generally held that a job is not clearly open when an employer's recruitment materials affirmatively mischaracterize an aspect of the position. *See, e.g., AMR Capital Trading Corp.*, 2012-PER-00609 (Jan. 19, 2016) (finding that a job was not clearly open when the advertisements under-reported the wage by \$23,000); *The China Press*, at 5 (finding that a job was not clearly open when the advertisements under-reported the wage by \$0.43 per hour).

Here, the Employer's SWA job order affirmatively mischaracterized the position by under-reporting the wage as \$8.00 an hour. Therefore, U.S. applicants were unaware of the true salary, meaning the job was not clearly open to U.S. workers.

We affirm the CO's denial of the labor certification application.⁴

ORDER

Accordingly, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in this matter is **AFFIRMED**.

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

⁴ Because we affirm denial on this ground, we do not reach the other reasons cited by the CO.

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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.