



Issue Date: 06 October 2016

BALCA Case No.: 2012-PER-03624
ETA Case No.: A-11306-15667

In the Matter of:

TOWN AND COUNTRY CHILDREN'S MONTESSORI, INC.,
Employer,

on behalf of

WEERASOORIYA, DAYA,
Alien.

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

Appearance: Gordon J. Quan, Esquire
Foster Quan, LLP
Houston, Texas
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and
Morris D. Davis, *Administrative Law Judges*

DECISION AND ORDER
REVERSING 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 Austin, Texas.

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

The occupational title listed in Form 9089, Section F-3 was “Elementary School Teachers, Except Special Education,” Standard Occupational Classification Code 25-2021.00. (AF 24).²

The Certifying Officer (“CO”) denied the application on November 29, 2011, because the job order was placed more than 180 days from the date the application was filed in violation of 20 C.F.R. § 656.17(e)(1)(i), which requires an employer to place the job order at least 30 days, but no more than 180 days, from the date the application was filed. (AF 11-12). On December 22, 2011, the Employer filed a motion for reconsideration/request for review. (AF 3-5). The Employer explained that it sent the application on Thursday, October 13, 2011, via overnight mail with FedEx. (AF 4). The application was scheduled for delivery on Friday, October 14, 2011, but was not delivered until the following Monday, October 17, 2011. (AF 4-5). The end of the 180 day time period fell on Saturday, October 15, 2011. (AF 5). The Employer contended that this delivery delay was a harmless error caused by the courier service. (AF 5). In support, the Employer submitted a shipment receipt from FedEx, showing that the application was sent on October 13, 2011 via priority overnight mail. (AF 7).

The CO reconsidered, but found that the ground for denial was valid. (AF 1-2). The CO noted that an employer bears the burden to ensure that all application materials are submitted timely. (AF 1). It also pointed out that the last listed date of recruitment was August 17, 2011, and the application could have been submitted any time after September 16, 2011. The Employer chose to mail in the Form 9089, rather than submit it online, and chose to delay submission until a few days before the deadline. The CO also stated that the Employer’s untimely submission of the application was not harmless error because it caused the application to be denied. (AF 1). Thus, the CO determined that denial of certification was valid under 20 CFR § 656.17(e)(1)(i). (AF 1).

The file was forwarded to BALCA for an appeal. The CO did not file an appellate brief. The Employer filed an appellate brief, arguing that its application was, in fact, timely filed. First, the Employer argued that the United States Department of Labor’s frequently asked questions (“FAQ”) instruct that weekends and federal holidays should be excluded if the place of business is not open on those days, in which case the next business day is counted. The Employer acknowledges that pursuant to case law, the “last day” in a timeline calculation will be a part of the “count” but nevertheless contends that, because the end of the 180 day time period fell on a Saturday, the next business day (in this case, Monday, October 17, 2011) should be deemed the end of the 180 day period. Second, the Employer argues that excluding weekends from deadline calculation is consistent with the policies of the United States Citizenship and Immigration Services (“CIS”) and the Office of Administrative Law Judges³ and cites to regulatory authority in support of the idea that this policy should be used by, presumably, the Office of Foreign Labor Certification (“OFLC”).

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

³ “The Board of Alien Labor Certification Appeals (“BALCA”) is housed within the Office of Administrative Law Judges (“OALJ”), United States Department of Labor. Consequently, BALCA applies OALJ’s Rules of Practice and Procedure at 29 C.F.R. Part 18 in reference to procedural matters not covered by the permanent labor certification regulations.” See *Infosys Technologies Ltd.*, 2012-PER-417 (Nov. 16, 2012), slip op. at 3 n.2.

DISCUSSION

With respect to Employer's first argument, the FAQ are only persuasive authority and are not binding on the Board. Furthermore, the Employer does not provide a citation to the specific FAQ to which it refers, but it appears the Employer refers to one that discusses a notice of filing, not recruitment or counting days in general.

With respect to the Employer's second argument, the Board finds that regulations from CIS are inapplicable to this case. However, the Employer's citation to OALJ regulations, which permit an extension to the next business day when the last day of the period falls on a Saturday, Sunday, or federal holiday, is more persuasive. The Board considered a similar argument in *Ecosecurities*, 2010-PER-00330 (June 15, 2011), a case in which the Employer filed an application the day after the prevailing wage determination ("PWD") expired. The Employer argued that, because the last day of the PWD validity period expired on a Sunday, the date of expiration should be extended to the next business day. In support, the Employer cited the Rules of Practice and Procedure for Administrative Hearings before the OALJ. The Board rejected the Employer's argument and stated that (1) the Employer chose to mail the application rather than file it with the online system that is available 24 hours a day, 7 days a week; and (2) the OALJ Rules of Practice and Procedure govern only filings before OALJ and, thus, have no bearing on the expiration date of the prevailing wage determination issued to the Employer by the New York State Workforce Agency. In a footnote, the Board further elaborated by stating that the OALJ regulations are meant to accommodate filings by mail on days that the OALJ is closed. The Board explained that OFLC's electronic filing system, which is always available, eliminates the need to extend any time period to include the next business day. In light of this precedent, the Board rejects the Employer's argument that OALJ regulations mandate an extension of the 180 day period to the next business day in this case.

In its motion for reconsideration/request for review, the Employer also argued that the application was filed on Monday, October 17, 2011 because the courier service failed to deliver it on the date promised, which would have been a timely filing. The Board notes that we have generally been hesitant to excuse courier errors in the past. In *First Truck Services*, 2007-PER-00091 (Mar. 28, 2008), the CO denied certification after the Employer failed to timely submit an application under 20 C.F.R. § 656.17(e). The Employer argued that it had, in fact, satisfied the requirements of § 656.17(e) because it submitted its application on Thursday, April 27, 2006 via FedEx express overnight shipment. Accordingly, the application was scheduled for a timely delivery on Friday, April 28, 2006, even though it ended up arriving on Monday, May 1, 2006. The Board rejected the Employer's argument, in part, because the Employer did not submit any documentary evidence to substantiate its claim that the application was sent via FedEx express overnight on April 27, 2006. The Board said, "[a] bare assertion without supporting evidence is insufficient to carry the Employer's burden of proof." (*Id.* at 4).

The Board came to the same conclusion in *Ozark Mountain Construction Co.*, 2008-PER-00039 (Aug. 25, 2009), where the Employer lacked proof of when it mailed its application. The Board said:

It is ultimately an employer's burden to prove the date of mailing. [citing *First*

Truck Services] ... It is unfortunate that the CO was unable to produce the original mailing envelope. But the Employer made no effort to provide any alternative proof of date of mailing. The Employer's lack of prudence in retaining proof of mailing simply does not provide a compelling case for reversing the CO's denial of certification.

(*Id.* at 6-7). The Board thus twice expressly contemplated that an employer's untimely filing of an application could be excused if the Employer submitted documentary evidence that the application was timely mailed in a way that should have resulted in the application being received by the deadline.

Here, the Employer did support its assertion of timely mailing with documentary evidence in the form of a FedEx shipment receipt. (AF 7). The receipt shows that the application was sent to the Atlanta National Processing Center ("ANPC") on October 13, 2011 via FedEx priority overnight and was scheduled for a timely delivery on Friday, October 14, 2011. Additionally, the Appeal File includes the FedEx standard overnight envelope Employer used to send its request for reconsideration to the ANPC. (AF 10). It shows the request for reconsideration was shipped via FedEx on December 22, 2011, and was date stamped upon arrival at ANPC the next day. (AF 3).

This supporting evidence is sufficient to carry the Employer's burden to corroborate its assertion that it filed its application in a timely manner and was not in violation of the regulations. The CO did not dispute Employer's assertion that it shipped the application by FedEx priority overnight on October 13, 2011 with a delivery date of October 14, 2011, which was prior to the expiration of the 180 day deadline. It would be inconsistent with *First Truck Services* and *Ozark Mountain* for us to now find the Employer's submission of documentary evidence unavailing.

Accordingly, we reverse the CO's denial of the application under 20 C.F.R. § 656.17(e)(1)(i).

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **REVERSED**.

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.