U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 August 2015

BALCA Case No.: 2012-PER-00805
ETA Case No.: A-10081-91354

In the Matter of:

KAMS AUTOMOTIVE, INC.,
Employer,

on behalf of

PETRICS, SZILVIA,
Alien.

Appearance: Roya Simantob, Esquire
Law Offices of Cyrus Meshki, PC
Los Angeles, California
For the Employer

Before: Stephen R. Henley, *Acting Chief Administrative Law Judge*; Morris D. Davis, *Administrative Law Judge*; and Larry S. Merck, *Administrative Law Judge*

DECISION AND ORDER DENYING CERTIFICATION

PER CURIAM. This matter arises under the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the implementing regulations at 20 C.F.R. Part 656.

BACKGROUND

On March 22, 2010, the Employer filed a labor certification application sponsoring the Alien for a position as a Bookkeeper. (AF 14-23).[1] On the Form 9089 application, the Employer reported that the prevailing wage determination date was 04/15/2009 and the prevailing wage determination expiration date was 07/01/2010. (AF 15). On August 20, 2010, the Certifying Officer ("CO") denied certification because "[t]he prevailing wage validity period,

[1] Citations to the appeal file are shown as "AF" followed by the page number.

as listed on the ETA Form 9089, exceeds the one year maximum permitted by the regulations." The CO cited 20 C.F.R. § 656.40(c) as the regulatory authority for the denial. That provision requires, in pertinent part, that "the validity period of the prevailing wage … in no event may be less than 90 days or more than 1 year from the determination date." (AF 12-13).

The Employer requested reconsideration, stating that, due to oversight, the determination date for the prevailing wage determination ("PWD") was stated on the Form 9089 as 04/15/2009. (AF 3). The Employer presented of a copy of the prevailing wage determination issued by the State Workforce Agency to show that the determination date was actually December 15, 2009. (AF 5). The Employer also presented emails to show that its attorney had reported to the Atlanta National Processing Center on March 22, 2010 that he had attempted unsuccessfully to obtain a copy of the electronically filed ETA 9089, and asked how he could receive or retrieve a copy. (AF 8). In its motion for reconsideration, the Employer argued that this inability to retrieve a copy of the filed Form 9089 prevented it from having the opportunity to rectify the typo. (AF 3).

The CO reconsidered, but found that the ground for denial was valid. (AF 1). The CO stated: "[T]he information on the ETA Form 9089 attested to by the employer renders the application deniable on its face because the PWD validity period is not less than one year from the determination date as required by the Department's regulations at 20 CFR § 656.40(c). In addition, the Department's regulations at 20 CFR § 656.11 (b) provide that requests for modifications to an application will not be accepted for applications received after July 16, 2007. Since the application was filed March 22, 2010, it cannot be modified."

On appeal, the Employer submitted a Statement of Position that reiterated the arguments made in its motion for reconsideration. The Employer did not address the applicability of 20 C.F.R. § 656.11(b) to its appeal. The CO did not file an appellate brief.

DISCUSSION

The panel in *Rutgers, The State University of New Jersey*, 2012-PER-327 (May 21, 2014), considered an appeal similar to the instant case. In that appeal, the Employer misreported the PWD expiration date on the Form 9089, and presented proof on reconsideration that the actual expiration date was compliant with the regulations. The panel, however, affirmed the denial of certification. The panel noted that the regulation at 20 C.F.R. § 656.11(b) provides that "requests for modifications to an application will not be accepted for applications submitted after July 16, 2007." The panel noted that this regulation was added to the PERM regulation in response to the Board's decision in *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), in which the Board held that the CO abused his discretion by refusing to reconsider a denial where the Employer presented documentation that conclusively established that it had published two Sunday newspaper advertisements in compliance with the regulations, and that its only error had been in making a typographical error when reporting the date of the second Sunday advertisement on the Form 9809. The panel then stated:

> In *Sushi Shogun*, 2011-PER-2677 (May 29, 2013), the employer made a slight typographical error in listing the prevailing wage on the Form 9089. In affirming the CO's denial of certification, the panel stated:

> Were we considering this case prior to the promulgation of 20 C.F.R. § 656.11(b), we would follow the reasoning of *HealthAmerica.* Specifically, we would find that "[t]he CO"s denial of the application based on the typographical error[s] in the Form 9089 elevates form over substance," *HealthAmerica*, slip op. at 19, and would reverse the denial of certification.
>
> Unfortunately for the Employer, however, *HealthAmerica* has effectively been overruled by the promulgation of 20 C.F.R. § 656.11(b). In short, correcting the typographical errors in the Form 9089 would constitute a modification to the application, and the regulation clearly states that "[r]equests for modifications to an application will not be accepted for applications submitted after July 16, 2007." Accordingly, the plain text of 20 C.F.R. § 656.11(b) dictates the outcome of this matter.

> The same is true in the present case. The Employer made an obvious typographical error in reporting the expiration date of the PWD it obtained in support of the application. It was able to present documentation with a motion for reconsideration proving that it had a valid PWD. Were it not for the regulation at 20 C.F.R. § 656.11(b) we would not hesitate to vacate the denial. But, ETA made the clear choice in rulemaking not to permit employers to correct even small, non-substantive errors on Form 9089 PERM applications. Thus, we are compelled to affirm the denial of certification.

Rutgers, *supra* at 2-3 (footnote omitted).

We are in accord with the panels in *Rutgers* and *Sushi Shogun*. Had the Employment and Training Administration not amended the PERM regulations to include the bar on modifications to applications once filed, we would not hesitate to vacate the denial of certification in this case. However, we are bound to apply the regulation at Section 656.11(b) which clearly was added to the PERM regulations to bar employers from modifying the Form 9089 (and therefore preventing them from correcting typographical errors) once filed.

Although the Employer in this case argued that it had difficulty obtaining a copy of the Form 9089 as filed electronically, it did not explain how, even if that was true, it would have been able to fix the typographical error in view of Section 656.11(b), which essentially requires an employer to file a letter-perfect application.

ORDER

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

Entered at the direction of the panel by:

Digitally signed by TODD R. SMYTH
DN: CN=TODD R. SMYTH, OU=LEGAL COUNSEL, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

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 five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.