U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 June 2016

BALCA Case No.: 2012-PER-01179
ETA Case No.: A-10204-10096

In the Matter of:

CISCO SYSTEMS, INC.,
Employer,

on behalf of

RAGHUNANDA, PREETHAM,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Andrea Rush, Esquire
Fragomen, Del Rey, Bernsen & Loewy, LLP
Santa Clara, California
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and Larry S. Merck, *Administrative Law Judge*s

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]

[1] "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 for the position of "Software Engineer." (AF 98-113).[2] The Employer attested on the Form 9089 that the position required twenty-four months of experience as a "Software Engineer, Software Development Engineer, or related occupation." (AF 100). Nevertheless, the Employer's description of the Alien's work history indicated the Alien did not possess twenty-four months of relevant experience at the time he was hired to work for the Employer as a Software Engineer. (AF 103-104, 109-110). On the basis of the Employer's attestations, the Alien only met the experience requirement if his work history with the Employer as a Software Engineer was considered. The Certifying Officer ("CO") denied certification pursuant to 20 C.F.R. § 656.17(i)(1), finding that the Employer did not state the position's actual minimum requirements on the application. (AF 96).

The Employer submitted a request for reconsideration and stated that a typographical error caused the Alien's experience to be misrepresented on the Form 9089. (AF 3). The Employer provided a correction to the application as well as letters of experience to demonstrate that the Alien possessed the requisite twenty-four months of experience at the time of hire. *Id.* The Employer also argued that "the foreign worker's credentials are an issue which falls under the USCIS jurisdiction and not the Department of Labor … The DOL decides the test of the labor market and the USCIS decides if the alien has the credentials for the positions." (AF 3-4) (citing *Hoosier Care v. Chertoff*, 482 F.3d 987 (7th Cir. 2007)). Citing *HealthAmerica*, 2006-PER-1 (July 18, 2006) (*en banc*), the Employer further argued that the CO's actions were not consistent with procedural due process and notions of fundamental fairness because no audit was conducted on the application. (AF 4). The CO affirmed the denial of certification on reconsideration, finding that 20 C.F.R. § 656.11(b) prohibited the Employer from making post-filing modifications to its application. (AF 1).

The Employer appealed the CO's decision to the Board of Alien Labor Certification Appeals ("BALCA"). The Employer advanced several arguments in its brief on appeal. First, the Employer argued the CO's failure to issue an audit request prior to denying the application was inconsistent with procedural due process because "where evidence suggests an unaccounted for gap in the foreign national's background," due process compels a CO "to provide the sponsoring U.S. employer with adequate notice of what additional information or evidence is required by the agency to cure the deficiency before denying the labor certification application." Employer's Brief at 2-3 (citing *Moreta & Associates, INT.*, 2009-PER-8 (Aug. 6, 2009); *Tarmac Roadstone (USA), Inc.*, 1987-INA-701 (Jan. 4, 1989) (pre-PERM decision); *Shaw's Crab House*, 1987-INA-714 (Sept. 30, 1988) (pre-PERM decision)). Second, the Employer argued mere typographical errors on a Form 9089 may be corrected in accordance with notions of fundamental fairness. *Id.* (citing *Subhashini Software Solutions*, 2007-PER-43/44/46 (Dec. 18, 2007); *HealthAmerica*). Third, the Employer argued it was in actual compliance with § 656.17(i)(1) because it "clearly and correctly stated the minimum requirements for the position and did not hire any worker with less than the minimum requirements." *Id.* at 4. Fourth, the

[2] Citations to the Appeal File are abbreviated as "AF" followed by the page number.

Employer reiterated its argument that the Department of Labor lacked jurisdiction to review the Alien's qualifications. *Id.* at 5 (citing *Hoosier Care v. Chertoff*). Finally, the Employer argued the CO should have considered the letters of experience submitted on reconsideration because, "'where the PERM recordkeeping file clearly established that the Alien possessed the required qualifications for the job prior to hire, and that recordkeeping file was before the CO in the course of an audit of the PERM application and referenced in the motion for reconsideration, the CO should have taken that documentation into consideration when ruling on the motion for reconsideration.'" *Id.* at 6 (quoting *Pa'Lante*, 2008-PER-209 (May 7, 2009); *O'Connor Hospital*, 2011-PER-76 (Jan. 24, 2012)). The CO did not file a brief on appeal.

DISCUSSION

Actual Minimum Requirements

The permanent labor certification process is the first step an employer must complete in order to sponsor certain foreign workers for lawful permanent resident status.[3] 8 U.S.C. § 1182(a). Oftentimes, the sponsored alien will already work for the employer at the time of sponsorship through temporary immigration status. The labor certification represents the Secretary of Labor's certification that there are no able, willing, qualified, and available U.S. workers for the position the alien seeks to perform on a permanent basis.[4] 8 U.S.C. § 1182(a)(5)(A)(i)(I). At the heart of the labor certification process is a test of the labor market whereby an employer advertises the position. *See, e.g.,* 20 C.F.R. § 656.17(e). If the employer's recruitment efforts do not yield any able, willing, qualified, and available U.S. workers, the employer may file an application on Form 9089. *See, e.g.,* 20 C.F.R. § 656.17(a).

The PERM regulations establish an attestation based program designed to limit discourse between employers and COs; the program is "generally intended to streamline the application process and allow the CO to grant or deny [certification] **based solely on the application**." *Michigan Technological University*, 2011-PER-790, slip op. at 6 (May 21, 2012) (internal citations omitted) (emphasis added). Furthermore, "because PERM is an attestation based program, the PERM program can only function if the CO is able to rely on the information contained in an employer's application." *University of Nebraska-Lincoln*, 2012-PER-408, slip op. at 4 (Jan. 14, 2015).

The regulation at 20 C.F.R. § 656.17(i)(1) provides that "[t]he job requirements, as described [on the Form 9089], must represent the employer's actual minimum requirements for the job opportunity." The regulation at 20 C.F.R. § 656.17(i)(3) further provides:

> If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL

[3] Lawful permanent resident status is commonly referred to as having a green card. Among the benefits afforded to lawful permanent residents is the opportunity to apply for naturalization. 8 U.S.C. § 1427(a).

[4] The labor certification also represents the Secretary of Labor's certification that the permanent employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. § 1182(a)(5)(A)(i)(II).

> will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer. The Employer cannot require [U.S. workers] to possess … experience **beyond what the alien possessed at the time of hire** unless … [t]he alien gained the gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or the employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(emphasis added). The purpose of these regulations "is to address the situation of an employer requiring more strigent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker." *Your Employment Service Inc.*, 2009-PER-151 (Oct. 30, 2009) (internal citations omitted).

In this case, the Employer attested on the Form 9089 that the position of Software Engineer required twenty-four months of experience. The Employer's attestations regarding the Alien's qualifying experience indicated that the Alien did not possess twenty-four months of relevant experience at the time of hire. On the basis of the Employer's attestations, the CO determined that the Alien was treated more favorably than the U.S. workers who sought to qualify for the position. While the Employer's application indicated that the Alien met the experience requirement if his work history with the Employer was considered, the Employer failed to demonstrate that the Alien gained this experience through a job that was not substantially comparable to a Software Engineer or that it was no longer feasible to train a U.S. worker to qualify for the position. Because the Employer attested that it was willing to hire a foreign worker who did not possess twenty-four months of experience and because the Employer failed to attest that an exception applied, the CO properly determined that twenty-four months of experience was not the Employer's actual minimum requirement.[5]

While the Employer argues the Department of Labor lacks jurisdiction to evaluate the Alien's credentials, "the Department of Labor's authority to evaluate an alien's qualification has been recognized by the United States Court of Appeals for the District of Columbia … [t]he training and experience possessed by the alien-beneficiary at the time of hire by the sponsoring employer is relevant to the CO's determination whether a training or experience requirement represents the employer's actual minimum requirements for the job." *Muse Design Inc.*, 2012-PER-1088 (Jan. 15, 2016) (citing *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983)). Furthermore, the case cited by the Employer to support its argument actually stands for the proposition that the Department of Labor may deny certification when an employer fails to adequately state a position's duties and requirements. *Hoosier Care, Inc. v. Chertoff*, at 991 ("…whether the qualifications set by the employer are proper … is the responsibility of the Labor Department").

[5] We also note that the instructions to the Form 9089 placed the Employer on notice that it was required to list all of the alien's qualifying experience. *See Bencor Corporation of America Foundation Specialists*, 2012-PER-192 (Apr. 21, 2014).

Accordingly, we find that the CO properly determined, on the basis of the Employer's attestations on the Form 9089, that twenty-four months of experience was not the position's actual minimum requirement.

Due Process and Fundamental Fairness

The Employer argues a typographical error caused some of the Alien's relevant pre-hire experience to be omitted from the Form 9089. According to the Employer, the omitted experience demonstrates that the Alien actually met the experience requirement at the time of hire and establishes that the Employer stated the position's actual minimum requirement on the application. The Employer argues the CO's refusal to allow modifications to the application violates due process and fundamental fairness because the proposed modifications are supported by evidence that demonstrate the Employer was in actual compliance with regulations. However, PERM is an exacting process, designed to eliminate back-and-forth between applicants and the government and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *HealthAmerica* at 8-9. While PERM safeguards the due process rights of applicants, the Employer in this case mischaracterizes the rights afforded to it under the regulations.

Consistent with notions of due process, "an employer must be provided with adequate notice of the regulatory violations found." *Medical Care Professionals, Inc.*, 2008-PER-247, slip op. at 6 (July 17, 2009) (citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) (pre-PERM decision)).[6] Additionally, an employer must have an "opportunity to be heard on meritorious arguments regarding its de facto compliance with the regulations." *Denzil Gunnels*, 2010-PER-628, slip op. at 11 (Nov. 16, 2010). The Board has also recognized that due process requires that an employer have an opportunity to submit documentation bearing on its application. *HealthAmerica* at 21; *Denzil Gunnels* at 16.

Each of these requirements is reflected in the PERM regulations. Upon denying an application, the CO must state the reasons for denial. 20 C.F.R. § 656.24(e)(1). An employer may then request that the CO reconsider the determination. 20 C.F.R. § 656.24(g). On reconsideration, an employer may submit any documentation that existed at the time the application was filed, but that the employer did not have a previous opportunity to submit. 20 C.F.R. § 656.24(g)(2)(ii).

When the CO deviates from these regulations or misconstrues them in a way that causes harm or prejudice to the employer, the Board has been willing to find that due process has not been satisfied. *See MMB Stucco LLC*, 2011-PER-715 (May 7, 2012) (holding that a CO may not introduce a new denial ground in a determination on reconsideration because the employer has no further opportunity to contest the denial with the CO); *Denzil Gunnels* (finding that procedural due process prohibits the CO from using his discretion in such a way that denies an employer from being heard on reconsideration).

[6] A CO must not only identify the "the section or subsection allegedly violated," but also "the nature of the violation." *Kay Mays*, 2008-PER-11 (Aug. 27, 2008).

If, however, the CO's failure to abide by the regulations does not result in harm or prejudice to the employer, the Board has been less willing to find that a due process violation exists. *See New York City Department of Education*, 2012-PER-2381, slip op. at 9 (Apr. 24, 2015) (finding that "there can be no due process violation without some sort of resulting harm or prejudice to the Employer") (citing *Matthews v. Eldridge*, 424 U.S. 319 (1976) ("due process generally requires consideration of three distinct factors [including] the risk of an erroneous deprivation of [a private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards . . . .")); *Kay Mays* at 5-6 (Aug. 27, 2008) (finding there was no deprivation of a substantive right when the CO failed to describe the nature of the employer's violation because there was no way for the employer to overcome the deficiency).

The Board has held that the regulations themselves satisfy due process. *See Tibco Software Inc.*, 2011-PER-1207 (July 13, 2012) (rejecting an argument that §§ 656.11(b) 656.24(g) violated due process of law); *Fins Fish House & Raw Bar*, 2009-PER-318 (Apr. 14, 2010) (holding that the reconsideration procedures protect an employer's due process rights). Therefore, an employer is not harmed or prejudiced merely because the CO enforced a valid regulation. *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007) (finding that "enforcement [of § 656.10(d) does not] offend fundamental fairness or procedural due process").

In this case, we find that the Employer's application was processed in accordance with the regulations and thus the Employer was afforded due process. The CO notified the Employer of the denial ground by citing to the applicable regulation and by describing the nature of the violation. (AF 96). The Employer had an opportunity to contest the CO's determination through a request for reconsideration. (AF 52-94). Because the application was denied without an audit, the Employer was able to have its documentation admitted to the record on reconsideration. (AF 52-94). At no point did the CO misconstrue the regulations or otherwise harm or prejudice the Employer.

The Employer nevertheless argues that due process requires that an "agency must provide the sponsoring U.S. employer with adequate notice of what additional information or evidence is required by the agency to cure the deficiency before denying [certification] and must provide U.S. employers with sufficient opportunity to rebut the findings [of the CO]." Employer's Brief at 2. The process described by the Employer is similar to the notice/rebuttal procedures in effect prior to PERM. Indeed, the Employer quotes at length from the pre-PERM decisions *Tarmac Roadstone (USA), Inc.* and *Shaw's Crab House* to describe the "specific parameters" that "DOL must follow … when adjudicating labor certification applications." Employer's Brief at 2-3. Under the pre-PERM regulations, the CO was required to notify an employer of all deficiencies prior to issuing a final determination so that the employer could correct the defects. *See Kay Mays*. This administratively burdensome procedure was eliminated by PERM in favor of a process that "was not designed to create discourse between the [CO] and employers." *Michigan Technological University* at 5. The Employer's assertion that the CO must follow a process similar to the pre-PERM notice/rebuttal procedure is incorrect. *See Kay Mays* at 5 ("BALCA cannot rewrite the PERM regulations to restore a [notice]/rebuttal procedure").

The Employer also argues that *HealthAmerica* stands for the proposition that typographical errors on a Form 9089 may be corrected in the interest of fundamental fairness and

due process. This argument mischaracterizes *HealthAmerica* and does not take into consideration current regulations and caselaw.

In *HealthAmerica*, a typographical error on the Form 9089 led the CO to determine that the employer published a newspaper advertisement on a Monday rather than on a Sunday as required by the regulations. The CO denied certification without an audit. On reconsideration, the Employer requested an opportunity to modify its application to correct the error. The Employer also provided the CO with tear-sheets that established the advertisement was actually published on a Sunday. As originally drafted, the PERM regulation at § 656.24(g) limited the evidence an employer could provide on reconsideration to documentation that had been previously submitted to the CO. The CO refused to consider the employer's tear-sheets in accordance with this provision. The CO also insisted that the regulations in effect at the time prohibited post-filing modifications to the Form 9089.

The Board held that the version of § 656.24(g) in effect at that time was not consistent with due process of law to the extent it prohibited an employer whose application was denied without an audit from submitting documentation bearing on its application. To remedy the violation, the Board held that audit files were constructively submitted to the CO upon the filing of an application, such that they could be admitted on reconsideration if the CO denied certification without first auditing the application. *HealthAmerica* at 21.

The Board further held that the PERM regulations in effect at the time did not prohibit employers from making post-filing modifications to their applications. The Board noted, however, that "an agency may write strict procedural rules in order to deal with the administrative demands of processing large numbers of applications within a tight budget" if the agency gives explicit notice of the precise regulatory requirements. *Id.* at 17.

In response to *HealthAmerica*, the Employment and Training Administration ("ETA") amended the regulations to prohibit employers from making post-filing modifications to the Form 9089. 20 C.F.R. § 656.11(b); ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives for Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27916 (May 17, 2007) ("To the extent the BALCA favored allowing the employer in *HealthAmerica* to present evidence that effectively changed the response to a question on the application, the BALCA's approach is inconsistent with the Department's objective and the NPRM proposal that applications cannot be changed or modified after submission."). Additionally, ETA rejected the argument that typographical errors were immaterial, noting that "typographical or similar errors are not immaterial if they cause an application to be denied based on regulatory requirements." 72 Fed. Reg. at 27917.

ETA also amended § 656.24(g) in response to the due process concerns articulated by the Board in *HealthAmerica*. For applications submitted after July 16, 2007, a request for reconsideration submitted on behalf of an application may only include: (1) documentation the CO actually received from the employer in response to a request from the CO; or (2) documentation the employer did not have an opportunity to present to the CO, but which existed at the time the application was filed. 20 C.F.R. § 656.24(g)(2)(i)-(ii). Under the current

regulations, an employer who receives a denial without an audit request is not prohibited from submitting documentation to the CO on reconsideration. Indeed, this provision worked as intended in the current case.

The Board has repeatedly affirmed that these rules, while strict, are binding on employers. *See, e.g.*, *Denzil Gunnels* at 7-8; *TechDemocracy*, 2009-PER-459, slip op. at 4-5 (Nov. 16, 2010). Thus, the Employer's reliance on *HealthAmerica* is misplaced.[7]

The Employer's due process and fundamental fairness arguments also rely on several panel decisions that were issued after the 2007 regulatory amendments went into effect. These decisions, which the Employer asserts stand for the proposition than it may make post-filing modifications to its application, are inapposite for reasons we will briefly explain. First, the panels in *Pa'Lante* and *Moreta & Associates, INT.*, followed *HealthAmerica* because the underlying applications were filed prior to the effective date of the 2007 amendments. Second, while the panel in *O'Connor Hospital* initially followed *HealthAmerica* even though the employer's application was filed after the 2007 amendments went into effect, the panel subsequently reversed its decision and found that § 656.11(b) prohibited post-filing modifications to the Form 9089. *O'Connor Hospital*, 2011-PER-76 (Mar. 5, 2012). Finally, at issue in *Subhashini Software Solutions* was whether an employer could file a Form 9089 that lacked the Department of Labor's logo, not whether an employer could make post-filing modifications to its responses.

It is well settled that an employer may not modify its application post-filing. Accordingly, we find that the CO's processing of the application did not violate due process of law.

ORDER

Based on the foregoing, **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

[7] Furthermore, even if *HealthAmerica* controlled, we question whether the Employer's error should be categorized as a typographical error rather than a fatal omission. *See Yasmeena Corporation*, 2008-PER-73 (Nov. 14, 2008).

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.