U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 August 2016

BALCA Case No.: 2013-PER-01963
ETA Case No.: A-12156-68492

In the Matter of:

INSTITUTE FOR ENVIRONMENTAL HEALTH, INC.,
Employer,

on behalf of

CHHETRI, RAKSHA,
Alien.

Certifying Officer: William Carlson, Ph.D.
National Certifying Officer

Appearance: Leslie A. Karam, Esquire
Karam Law
Bloomington, Minnesota
For the Employer

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

DECISION AND ORDER DIRECTING GRANT 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 Fairfield, Ohio. The occupational title listed on the Form 9089, Section F.3, was "Biological Technicians,"

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

Standard Occupational Classification Code 19-4021.00. (AF 187-199).[2] The Employer attested on the Form 9089 that the prevailing wage was $25,022.40 and the offered wage was $25,023 for the job opportunity. (AF 188).

On September 6, 2012, the Certifying Officer ("CO") issued an audit notification to the Employer requesting, among other items, notice of filing ("NOF") documentation as outlined in 20 C.F.R. § 656.10(d). (AF 183-186). On October 3, 2012, the Employer submitted its audit response including its NOF, which listed the wage offered as "$25,023-$34,837." (AF 160-161). After reviewing the Employer's audit response, the CO denied certification because the NOF listed the offered wage as a range, but the Form 9089 listed the offered wage only as $25,023. (AF 20-22). The CO concluded that U.S. workers were not sufficiently on notice of the actual terms and conditions of the job opportunity, so the NOF violated 20 C.F.R. § 656.17(f)(3). *Id.*

On April 30, 2013, the Employer submitted a request for reconsideration, arguing

> (1) [T]he preamble to the final rule implementing the PERM regulations supports using a wage range on the Notice of Filing; (2) [the Board of Alien Labor Certification Appeals ("BALCA")] has historically interpreted the preamble as allowing the use of a wage range on the Notice of Filing; and (3) the Certifying Officer's contention that failure to use a wage range on both the ETA Form 9089 and the Notice of Filing does not adequately apprise U.S. workers of the job opportunity listed on the ETA Form 9089 is both misguided and illogical.

(AF 9-18). In support of its arguments, the Employer cited several cases including *The Wash. Post*, 2011-PER-02694 (Oct. 17, 2012), *Red Apple Child Dev. Ctr.*, 2009-PER-00472 (June 29, 2010), *Phx. Life Ins. Co.*, 2010-PER-00058 (Mar. 3, 2010), and *Thomas L. Brown Assocs., P.C.*, 2009-PER-00347 (Sept. 1, 2009). The Employer also cited the preamble to the PERM regulations, stating in relevant part that "Employers can use a wage range in the required notice. It is longstanding DOL policy that the employer may offer a wage range as long as the bottom of the range is no less than the prevailing [wage] rates…." 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004).

The CO reconsidered, but found that the ground for denial was valid because the wage range listed on the NOF was higher than the offered wage listed on the application. (AF 1-2). The CO also noted that BALCA decisions are decided on an independent basis and are not "unilaterally applied to other foreign labor certification applications." *Id.* The CO further wrote

> The inaccurate wage listed on the NOF could cause documentary evidence involving the wage to be questioned or could become the basis for denial of a U.S. worker. An applicant requesting an annual salary more than the base salary of $25,023 per year listed on the ETA Form 9089 could presumably be rejected by the employer as the applicant requested a wage higher than the offered wage of $25,023 per year entered on the employer's PERM application. Since the NOF lists a wage that is higher than the offered wage listed on the employer's

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

application…this reason for denial [is] valid in accordance with…20 C.F.R. § 656.17(f)(3).

On appeal, the Employer filed a statement confirming its intention to proceed with the appeal as well as a brief incorporating its arguments included in its request for reconsideration. The CO did not file a statement of position or an appellate brief.

DISCUSSION

When an employer files an application for permanent labor certification under the basic process at 20 C.F.R. § 656.17, it must have already notified its employees of the application by posting a NOF at the facility or location of employment.[3] 20 C.F.R. § 656.10(d)(1)(ii). The NOF must "contain the information required for advertisements by § 656.17(f) [and] state the rate of pay (which must equal or exceed the prevailing wage…)." 20 C.F.R. § 656.10(d)(4); *see also Wipro Ltd.*, 2011-PER-01825 (Apr. 30, 2014). According to 20 C.F.R. § 656.17(f)(3), the NOF "must provide a description of the vacancy specific enough to apprise workers of the job opportunity for which certification is sought."

The NOF is not a mere technicality, but is an implementation of a statutory notice requirement designed to assist interested persons in providing relevant information to the CO about an employer's labor certification application. *Voodoo Contracting Corp*., 2007-PER-00001 (May 21, 2007). Failure to comply with the requirements of the NOF regulations cannot be lightly dismissed under a harmless error finding. *Haw. Pac. Univ.*, 2009-PER-00127 (Mar. 2, 2010) (*en banc*).

In this case, the CO denied certification because the Employer included a wage range on the NOF. The wage range on the NOF was "$25,023-$34,837." Notably, the bottom of the range was neither below the prevailing wage ($25,022.40) or the wage offered to the Alien ($25,023). The CO's reasoning for finding a violation of § 656.17(f)(3) was twofold. First, he stated that "[t]he inaccurate wage listed on the NOF could cause documentary evidence involving the wage to be questioned…." The CO did not elaborate, and this statement is too ambiguous to support a denial under § 656.17(f)(3).[4]

Second, the CO stated that the "inaccurate wage listed on the NOF … could become the basis for a denial of a U.S. worker." The CO explained that if an applicant asked for a salary higher than the base salary listed on the Form 9089, the employer "presumably" could reject that applicant. We are not persuaded that such potential circumstance constitutes a violation of § 656.17(f)(3).

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[3] If the employees in the occupational classification have a bargaining representative, the notice is provided by sending the representative a letter and a copy of the PERM application. 20 C.F.R. § 656.10(d)(1)(ii).

[4] Possibly, the CO was referring to documentary evidence bearing on the application relating to wage and working conditions that the CO is required to have a process for receiving pursuant to Section 122(b) of the Immigration Act of 1990 ("IMMACT90"), Public Law 101-649, 104 Stat. 4978 (Nov. 29, 1990, eff. Oct. 1, 1991).

The Employer argues that the preamble to the PERM regulations permits an employer to state a wage range on the NOF. We agree. In the preamble to the final rule implementing the PERM regulations, the Employment and Training Administration ("ETA") wrote:

> Employers can use a wage range in the required notice. It is longstanding DOL policy that the employer may offer a wage range as long as the bottom of the range is no less than the prevailing rate. See page 114 of *Technical Assistance Guide No. 656 Labor Certifications* (TAG). However, the prevailing wage, which provides the floor for the wage range, must be the prevailing wage at the time the recruitment was conducted for the application for which the employer is seeking certification, not the prevailing wage when the alien beneficiary was initially hired.
>
> The advertising requirements at § 656.17(f) of this final rule no longer include wage or salary information; however, the wage offered must be included in the notice. The regulations implement the statute, which provides "no certification may be made unless the applicant for certification has at the time of filing the application, provided notice of the filing." Because the ETA Form 9089 includes the offered wage, the employer must include in the notice the wage offered to the alien beneficiary at the time the application is filed. *Alternatively, the employer may include a salary range in the notice, as long as the bottom of the range is no less than the prevailing wage rate.* The wage paid to the alien when initially hired is irrelevant.

(Emphasis added). ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States, Implementation of New System*, 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004).

We find that this section of the preamble is clear and unambiguous as to the question of whether an employer may lawfully include a wage range on the NOF.[5] In response to a comment to the Final Rule, the ETA directly advised that an employer may include a wage range in the NOF. The ETA went further to characterize the use of a wage range in the NOF as being a "longstanding" policy and cited to the relevant guidance. Furthermore, the ETA was explicit that § 656.17(f) no longer mandated wage or salary information, and implied that a wage range could be listed on the NOF regardless of whether the Employer listed the wage offered to the foreign worker on the Form 9089 as a single wage rate or a wage range.[6]

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[5] We are not bound by the preamble to the regulations, but we find the passage persuasive, and it has been relied on by several BALCA panels. *See The Wash. Post*, 2011-PER-02694, slip op. at 5 (Oct. 17, 2012); *O'Brien v. Van Stiphout LLC*, 2010-PER-00035 (Jan. 3, 2011); *S. Chae Holdings*, 2009-PER-00135 (Mar. 31, 2009) (finding that the preamble to the regulations may be entitled to deference as persuasive authority).

[6] We note that the opposite, i.e., listing a wage range on the Form 9089 but listing a single rate of pay on the NOF, may not be acceptable if doing so causes the NOF to contain terms and conditions of employment that are less favorable to U.S. workers than those offered to the alien. *See PT Thomas, Inc.*, 2012-PER-00897 (Jan. 12, 2016).

Moreover, several BALCA panels have found that listing a wage range on the NOF is an acceptable practice as long as the bottom of the range does not fall below the prevailing wage or the wage offered to the alien. *See generally Red Apple Child Dev. Ctr.*, 2009-PER-00472, slip op. at 4 (June 29, 2010); *Charles E. Churchwell*, 2012-PER-01662 (Mar. 2, 2016); *Lakeview Farms*, 2011-PER-01679 (Sept. 4, 2014).

We find that the Employer's NOF sufficiently apprised U.S. workers of the available job opportunity, and that its use of wage range in the NOF did not violate the regulation at § 656.17(f)(3).

ORDER

IT IS ORDERED that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2).

For the panel:

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 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.