

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 December 2007

BALCA Case No.: 2007-PER-00077
ETA Case No.: A-06044-85978

In the Matter of:

CONSTRUCTION PROS CORP.,
Employer,

on behalf of

CZESLAW PODBIELSKI,
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Mayra A. Velez, Esquire
Maspeth, New York
For the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20,

Part 656 of the Code of Federal Regulations.¹ In this case, the Employer filed an application for permanent alien labor certification for the position of Stone Mason. (AF 18-38). The Certifying Officer (CO) accepted the application for processing on January 27, 2006. (AF 1). The ETA Form 9089 indicated at Items I.c.6. and I.c.7. that a State Workforce Agency (SWA) job order was started on December 16, 2005 and ended on January 20, 2006. (AF 21, 31).

On April 24, 2006, the CO issued a letter denying the application because it was filed less than 30 days after the end of the job order placed with the SWA in violation of 20 C.F.R. § 656.17(e). (AF 15-17).²

By letter dated May 9, 2006, the Employer requested review. (AF 3). The letter stated in regard to the citation for filing the application less than 30 days after the closing of the SWA job order: “It has now been over 30 days and would like you to advise us as to whether this would necessitate that we resubmit.” (AF 3).

The CO denied reconsideration in a letter dated July 13, 2007, and forwarded the matter to BALCA as an appeal. (AF 1-2). BALCA docketed the appeal on July 16, 2007, and issued a notice of docketing on August 10, 2007. The Employer submitted an appellate brief, which was received by the Board on August 24, 2007. The Employer argued that its application contained “inadvertent typographical errors” that had been corrected, and that the application should not have been denied because of those minor errors, citing *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc). The CO submitted a letter brief, which was received by the Board on September 8, 2007. The CO argued that the Board should affirm the denial of certification because “[i]t is patent that the employer’s application did not comply with § 656.17(e)(1)(i).”

¹ The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

² In this letter, the CO identified two other deficiencies with the application. However, they are not at issue in this appeal because the CO dropped these citations upon reconsideration. (AF 1-2).

DISCUSSION

The regulation at 20 C.F.R. § 656.17(e) provides, in pertinent part:

(e) *Required pre-filing recruitment.* [With certain exceptions, a]n employer must attest to having conducted the following recruitment prior to filing the application:

* * *

(2) *Nonprofessional occupations.* If the application is for a nonprofessional occupation, the employer must at a minimum, place a job order and two newspaper advertisements within 6 months of filing the application. The steps must be conducted at least 30 days but no more than 180 days before the filing of the application.

(i) *Job order.* Placing a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application serve as documentation of this step.

* * *

Thus, the placement of a job order with a SWA is mandatory; it must have been completed at least 30 days, but no more than 180 days before the filing of the application; and it must have been at least 30 days in duration. The start and end dates of the job order must be entered on the ETA Form 9089 to document the timing of the SWA job order.

The Employer's application showed an end date for the SWA job order that was only seven days prior to the date it filed the Form 9089. The Employer clearly was in violation of the regulatory requirement and does not deny the violation in its request for review. Rather, it argues that it merely made clerical errors which, once corrected, should not result in denial of the application. This panel, however, rejected the same argument made by the employer in *Luyon Corp.*, 2007-PER-27 (June 12, 2007).

In *Luyon*, the employer argued that it had made a harmless clerical error when it submitted the application only three days after the end date for the SWA job order. The panel, however, held that filing an application prior to 30 days after the end of the SWA job order was not a mere clerical error, but a substantive violation of the regulation at 20 C.F.R. § 656.17(e)(1)(i). Moreover, in *Luyon* the panel specifically found that because the employer had violated a substantive requirement of the regulations, the case was distinguishable from *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), in which the CO was found to have abused his discretion in refusing to permit an employer to correct a typographical error where the employer was in actual compliance with the regulation at issue. In *HealthAmerica*, the Board observed that "a CO will not be found to have abused his or her discretion in denying a motion for reconsideration of a denial ... if the [Employer's] pre-existing documentation does not establish conclusively that the error was merely on the face of the Form 9089, and that there was actual compliance with the applicable substantive requirement." Slip op. at 21.

The Employer clearly violated 20 C.F.R. § 656.17(e)(1)(i) by submitting the application too early. This was not a mere clerical error. Thus, we affirm the CO's denial of labor certification.

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:

A

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 review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board 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 full Board 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.