U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 May 2012

BALCA Case No.: 2011-PER-00845
ETA Case No.: A-08193-69386

In the Matter of:

IAC SEARCH & MEDIA, INC.,
Employer

on behalf of

WAHID CHRABAKH,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Clifford Chin, Esq.
Berry Appleman & Leiden, LLP
San Francisco, CA
For the Employer

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

Before: **Calianos, Geraghty, McGrath**
Administrative Law Judges

JONATHAN C. CALIANOS
Administrative Law Judge

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

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 ("C.F.R."). For the reasons set forth below, we reverse the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On July 14, 2008, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Software Engineer." (AF 121).[1] On March 10, 2009, the CO issued an Audit Notification, requiring the Employer to submit its Prevailing Wage Determination ("PWD"), among other documentation. (AF 117-19). On April 8, 2009, the Employer responded to the Audit Notification, attaching the requested documentation, which included the PWD. (AF 37-116). On July 16, 2010, the CO denied the application for two reasons: first, the prevailing wage listed on the ETA Form 9089 did not match the prevailing wage in the PWD as required by sections 656.10(c)(1), 656.40 and 656.41 of the PERM regulations, and second, the Employer's Notice of Filing did not contain the job requirements or duties listed on the ETA Form 9089 as required by sections 656.10(d)(4) and 656.17(f)(6) of the regulations. (AF 35-36).

On August 12, 2010, the Employer submitted a request for reconsideration. (AF 19-34). In relevant part, the Employer argued that the discrepancy between the prevailing wage listed on the ETA Form 9089 and the PWD was a harmless error pursuant to *HealthAmerica*, 2006-PER-1 (July 18, 2006). (AF 21-23). The Employer argued that its audit response materials established that it was in actual compliance with the prevailing wage regulations. (AF 21-22).

[1] In this decision, AF is an abbreviation for Appeal File.

On March 21, 2011, the CO forwarded the case to BALCA. (AF 1). In the transmittal letter, the CO accepted the Employer's information regarding the Notice of Filing, but found that the denial of certification remained valid on the basis that the prevailing wage of $38.69 listed on the Employer's application did not match the PWD of $44.63. (AF 1). The CO additionally explained in his transmittal letter that the lower end of the wage range in the Employer's internal website advertisement was less than the PWD, and therefore the incorrect prevailing wage listed in the Employer's application was substantive and not merely a typographical error. (AF 1).

On May 4, 2011, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on May 13, 2011, and filed an appellate brief on June 16, 2011. The CO did not file a Statement of Position in this case. On February 22, 2012, the Employer certified via email that the job identified on the PERM application is still open and available and that the alien identified in the PERM application remains ready, willing, and able to fill the position.

DISCUSSION

PERM is an attestation-based program. 20 C.F.R. § 656.10(c). When an employer files an application for permanent employment certification, it must attest to various conditions, including that "the offered wage equals or exceeds the prevailing wage determined pursuant to § 656.40 and § 656.41, and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment." § 656.10(c)(1). Section 656.40(a) provides in relevant part:

> The employer must request a PWD from the NPC . . . . Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment shall continue

> to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009.[2] On or after January 1, 2010, the NPC shall receive and process prevailing wage determination requests . . . . The NPC will provide the employer with an appropriate prevailing wage rate . . . Unless the employer chooses to appeal the center's PWD under § 656.41(a) of this part, it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

Lastly, section 656.41 of the regulations set forth the requirements for an Employer seeking review of a prevailing wage determination.

In this case, the Employer listed the prevailing wage on its ETA Form 9089 as $38.69 an hour. (AF 121). However, the PWD submitted with the Employer's audit response listed the prevailing wage as $44.63 per hour. (AF 85). In the Employer's cover letter to its audit response, it acknowledged that it mistakenly listed the wrong prevailing wage in its ETA Form 9089. (AF 31-32). The Employer stated in its cover letter that the error was unintentional and that the audit documentation demonstrated that it complied with all the recruitment and prevailing wage requirements. (AF 32).

[2] The prior regulatory provision, which applies in this case, stated:

> The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

§ 565.40(a) (2007).

In the CO's denial letter, he cited to sections 656.10(c)(1), 656.40, and 656.41 of the regulations as the authority for denying the application because the prevailing wage on the ETA Form 9089 did not match the PWD. (AF 36). However, the regulations cited by the CO do not provide proper authority for the denial because the Employer did not violate any of the requirements found in these sections. In accordance with section 656.10(c)(1), the Employer offered the alien a wage that exceeds the prevailing wage. Specifically, the wage offered to the alien is $114,000 annually, which equates to $54.81 per hour, and this amount well exceeds both the incorrect prevailing wage of $38.69 listed in ETA Form 9089 and the correct prevailing wage of $44.63 in the PWD. (AF 121, 85). The Employer also maintained the PWD in its files and submitted it to the CO upon his request in the Audit Notification, as required by section 656.40. (AF 85). Lastly, because neither the CO nor the Employer argues that the PWD itself was inaccurate, the provisions for review of the PWD in section 656.41 are inapplicable. As such, the CO's reason for denial is not supported by regulatory sections cited as authority, and the denial of labor certification was improper.[3]

In the CO's transmittal letter, he provided an entirely new reason for his denial of the Employer's application. He stated that the wage range listed on the Employer's website advertisement equated an hourly wage range of $44.23 to $54.81 an hour, and because the lower

[3] Furthermore, there is no regulation that states that an application can be denied solely because of a typographical error. The issue of denials based on typographical errors only comes into play when the typographical error has resulted in some violation of the requirements set forth in the regulations. *See* Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, 72 Fed. Reg. 27904, 27917 (May 17, 2007) ("Typographical or similar errors are not immaterial *if they cause an application to be denied based on regulatory requirements*."); § 656.24(b)("the CO determines to either grant or deny the labor certification on the basis of whether or not: (1) The employer has met the requirements of this part."). Here, because the typographical error in Section F of the ETA Form 9089 did not result in a violation of any of the regulatory requirements, the typographical error on its own does not provide a valid basis for denial.

end of the range is less than the PWD of $44.63 (by a difference of 40 cents), the error on the ETA Form 9089 was substantive and not merely a typographical error. (*See* AF 94-97). The CO stated that:

> Advertising a wage less than the PW could have a chilling effect on applicants and discourage U.S. workers who are minimally qualified for the position from applying. This chilling effect nullifies the purpose of the advertisement to adequately test the labor market and prove there are not sufficient U.S. workers who are able, willing, qualified, and available for the job opportunity. Based on the above, the Certifying Officer has determined this reason for denial as valid in accordance with . . . 20 C.F.R. 656.10(c) and 656.41.

(AF 1).

Again, the regulations cited by the CO in his transmittal letter do not support his reasoning for denial. Although the 40 cent discrepancy between the lower end of the wage in the website posting and the prevailing wage may have been a violation of section 656.17(f)(5), which requires that the wage included in an advertisement not be lower than the prevailing wage rate, the CO did not cite to this regulation in his initial denial determination, nor did he cite to it on reconsideration.

Furthermore, even if the CO had cited to the appropriate regulation in support of his additional reason for denial in his transmittal letter, we find that the Employer did not have adequate notice of the new denial reason. An employer must be provided with adequate notice of the regulatory violations found. *Medical Care Professionals, Inc.*, 2008-PER-00247, PDF at 6 (July 17, 2009). The Board has found that "an employer needs to know the basis for a denial in order to file a meaningful motion for reconsideration. Thus . . . the CO must identify the section or subsection allegedly violated and the nature of the violation, *when notifying the applicant of a denial*." *Kay Mays*, 2008-PER-00011, PDF at 5 (Aug. 27, 2008) (emphasis added).

Fundamental fairness requires that an employer has an opportunity to rebut the reasons for denial provided by the CO. *See Ornelas, Inc.*, 2009-PER-00246, PDF at 4 (June 23, 2009) ("Given the terseness of the November 8, 2007 denial, and the lack of an opportunity for the Employer to supplement the record in response to the CO's letter on reconsideration, we conclude that fundamental fairness dictates that we return this matter to the CO"); *Marathon Hosiery*, 1988-INA-00218, PDF at 2 (May 4, 1989) (en banc) ("[A] CO may not cite new evidence in a Final Determination, because the Employer must be afforded the opportunity to rebut the evidence being relied on to deny certification.") (citations omitted).

The Employer was not provided adequate notice of the CO's additional reason for denial based on the Employer's website advertisement. The initial denial letter simply stated that the PWD did not match the prevailing wage listed on the ETA Form 9089. It did not mention any possible violations of the regulations based on the Employer's internal website posting. The Employer did not have notice of this additional reason until the CO denied reconsideration in its transmittal letter, and as a result, the Employer did not have an opportunity to present evidence that would overcome the denial. We therefore find that in the interest of due process and fundamental fairness, the Employer should not be denied certification based on the new reason provided by the CO in his transmittal letter. Accordingly, we reverse the CO's denial of labor certification.

ORDER

It is **ORDERED** that the denial of labor certification in this matter is hereby **REVERSED** and we direct the Certifying Officer to **GRANT** labor certification in this case.

For the Panel:

JONATHAN C. CALIANOS
Administrative Law Judge

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.