

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 12 November 2008**

**BALCA Case No.: 2008-PER-00080**  
ETA Case No.: A-06157-24679

*In the Matter of:*

**BRUCE N. LEVINE,**  
*Employer,*

*on behalf of*

**ALTAGRACIA RODRIGUEZ,**  
*Alien.*

Certifying Officer: Melanie Shay  
Atlanta National Processing Center

Appearances: John J. Montes, Esquire  
Bronx, 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, Vittone and Wood**  
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.

## **BACKGROUND**

The Employer, Bruce N. Levine, filed a labor certification application for the position of Horse Trainer at Belmont Race Track. (AF 49-68). The application was filed by mail. In Section I.c.8 through 11 of the ETA Form 9089, the Employer indicated that the job was first advertised in the New York Post, “NOVEMBER 11, 2005 (THREE DAYS, FRIDAY, SATURDAY, SUNDAY).” (AF 62). In Section I.c.12, the Employer indicated that the second advertisement was run “DECEMBER 17, 2005 (THREE DAYS SATURDAY, SUNDAY, MONDAY).” The CO apparently had the mailed in application re-keyboarded. The re-keyboarded version only states “11/11/2005” in Section I.c.10, and “12/17/2005” in Section I.c.12. (AF 52-53).

On November 2, 2006, the CO issued a denial letter. (AF 46-48). One ground for denial related to the dates of the placement of a SWA job order. The other ground related to whether the position was advertised in a Sunday edition of a newspaper of general circulation.

The Employer filed for reconsideration. (AF 32-45). In regard to the newspaper advertisement issue, the Employer enclosed tear sheets establishing that a Sunday advertisement was run in the New York Post on November 13, 2005 and on December 18, 2005. (AF 44-45).

On June 30, 2008 the CO denied reconsideration. (AF 1-2). In regard to the Sunday newspaper advertisement issue, the CO found that the tear sheets revealed that when the Employer ran the advertisements, it did not name the Employer, did not indicate the geographic area of employment, and did not contain a wage rate at least equal to the prevailing wage rate. Thus, the CO found that denial was valid “because the employer has not provided evidence that it placed an advertisement meeting regulatory requirements on a Sunday.”

The CO then forwarded an Appeal File to BALCA. The Employer’s attorney

filed a Statement of Intent to Proceed, which included several attachments relating to the date when the SWA job order was placed. The Employer, however, did not file an appellate brief or otherwise address the problems the CO identified with the newspaper advertising. The CO filed an appellate brief received by the Board on August 20, 2008. In regard to the newspaper advertising issue, the CO noted that the Employer's advertisements violated the regulatory requirements at 20 C.F.R. §§ 656.17(f)(1), (f)(4) and (f)(5). Thus, under the circumstances the CO could not grant certification.

## **DISCUSSION**

The advertisements submitted by the Employer to support its motion for reconsideration very clearly did not comply with the PERM regulations. As the CO noted, the advertisement did not identify the Employer as required by 20 C.F.R. 656.17(f)(1), did not identify the geographic area of employment as required by 20 C.F.R. § 656.17(f)(4), and stated a wage lower (in fact substantially lower) than the prevailing wage in violation of 20 C.F.R. 656.17(f)(5).<sup>1</sup>

In *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), the Board held that a CO will not be found to have abused his or her discretion in denying a motion for reconsideration of a denial of labor certification where the documentation used to support the motion does not establish conclusively that there was actual compliance with the applicable substantive requirement. In the instant case, although the tear sheets established that the Employer ran advertisements on two Sundays, they also revealed fundamental lack of compliance with the regulatory requirements for newspaper advertisements. In other words, as the CO stated in the letter denying reconsideration, the motion for reconsideration was not supported by evidence that the Employer placed an advertisement meeting regulatory requirements on a Sunday. Although this was a slightly different issue than one raised in the November 2, 2006 denial letter, the Employer was provided an opportunity to brief the CO's grounds for denying

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<sup>1</sup> The prevailing wage determination was \$23.33 an hour. (AF 60). The advertisements stated a salary of \$10 to \$16 per hour. (AF 44, 45).

reconsideration before this Board, but did not avail itself of that opportunity.<sup>2</sup> Accordingly we affirm the CO's denial of certification.<sup>3</sup>

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **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.

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<sup>2</sup> It may be noted that if the CO's office had not omitted the part of the Employer's answers to Sections I.c.10 and I.c.12 in the mailed-in ETA 9089 stating that the advertisements had been run for three days including a Sunday, the problems with the Employer's advertisements may never have been revealed.

<sup>3</sup> Because we affirm the CO on the newspaper advertising issue, we do not reach the issue regarding the dates of the placement of a SWA job order.