



Issue Date: 05 January 2009

BALCA Case No.: 2008-PER-00109
ETA Case No.: C-07038-08173

In the Matter of

BRITISH EUROPEAN
formerly
ENCINO MOTOR WORKS,
Employer,

on behalf of

GABRIEL RIOS,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Monzo Yontov, Esquire
Legal Solution Group
Van Nuys, California
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, Senior Trial 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 involves an appeal of the denial by an Employment and Training Administration, Office of Foreign Labor Certification, Certifying Officer (“CO”) of permanent alien labor certification 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 CO accepted the Employer’s labor certification application for processing on January 30, 2007. (AF 1). The Employer is sponsoring the Alien for a position as an “Automobile Mechanic” (AF 11). The Employer indicated in the ETA Form 9089, Section I-a-1, that this was a nonprofessional position. (AF 13). The Employer answered Section I-c-6 and Section I-c-7, by stating that the State Workforce Agency (“SWA”) job order started on December 15, 2006, and ended on January 17, 2007. (AF 13).

On February 7, 2007, the CO issued a denial letter. (AF 7). Although the Appeal File is missing the last two pages of this letter, other parts of the file make it clear that the CO based the denial in part on the SWA job order not being in compliance with the regulatory time parameters.

On March 12, 2007, the CO received a request for review from the Employer’s owner. (AF 5-6). The Employer argued that the SWA job order was completed at least 30 days prior to submission of the application. The owner wrote: “The 30 days were up on January 17, 2007. The application was mailed on the 22nd of January 2007.” (AF 5).

On July 16, 2008, the CO issued a letter of reconsideration. (AF 1-2). The CO found that the Employer misunderstood the regulatory requirement, which mandates that the job order end at least 30 days prior to the ETA Form 9089 filing date. The CO found that the application must be denied because the end date of the job order on January 17, 2007, was less than 30 days prior to January 30, 2007, the ETA Form 9089 filing date.

The Board issued a Notice of Docketing on July 23, 2008. The Employer filed a Statement of Intent to proceed with the appeal but did not file an appellate brief. The CO filed an appellate brief urging that denial of certification be affirmed.

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.

We agree with the CO that the Employer misinterpreted the regulatory requirement. Under the regulations, it is not sufficient that the 30 day duration of the SWA job order ended prior to filing the application. Rather, the SWA job order must have ended at least 30 days prior to the filing of the ETA Form 9089. *Luyon Corp.*, 2007-PER-27 (June 12, 2007); *Construction Pros Corp.*, 2007-PER-77 (Dec. 18, 2007).

In the instant case, the Employer clearly violated the regulation by filing its application less than 30 days after the SWA job order ended.

This regulatory requirement is designed to ensure that the employer has sufficient time to receive resumes, make contact with any applicants, conduct interviews, and make decisions regarding any U.S. applicants who may have applied for the job opportunity in response to the recruitment effort. *Golden Bridge Restaurant LLC*, 2007-PER-00099 (Dec. 18, 2007). Filing before the end of the 30 day period reflects an employer's indifference to whether U.S. applicants are given adequate consideration for the job opportunity. *Id.*

Accordingly, we find that the CO properly denied 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.