



Issue Date: 05 January 2009

BALCA Case No.: 2008-PER-00216

ETA Case No.: A-06188-36327

In the Matter of

REDHEADS BISTRO & BAR,

Employer,

on behalf of

NERVIN RAMIREZ MARTINEZ,

Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Andrew A. Dellomo, Agent
A & A Consultants
Ocean, New Jersey
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.

The Employer is sponsoring the Alien for a position as a “Cook.” (AF 9). The CO denied the application on March 21, 2008 on the ground that the Employer had not filed its application or begun recruitment within the validity period of the prevailing wage determination. (AF 5-7). The Employer filed a Motion for Reconsideration stating that the failure to place its newspaper advertisements during the prevailing wage period was an unintentional oversight, and that its “efforts at recruitment had met the spirit if not the substance of the recruitment requirements....” Attached to the motion is an affidavit from the Employer’s owner reciting his difficulty in recruiting cooks for his restaurant. He noted that he placed a job order with the State Workforce Agency (“SWA”) and placed newspaper advertisements, but was not successful in filling the position. He stated that he is willing to pay whatever the prevailing wage is at the time of certification.

On September 22, 2008, the CO issued a letter denying reconsideration. (AF 1).

The Board issued a Notice of Docketing on September 24, 2008. The Employer filed a Statement of Intent to Proceed but did not file an appellate brief. The CO filed an appellate brief urging that the denial of certification be affirmed. The CO noted that in *Luyon Corp.*, 2007-PER-27 (June 12, 2007), the panel rejected a claim of clerical error as a grounds for reversal where the employer had committed a substantive violation of the regulations.

DISCUSSION

The PERM regulations require that a petitioning employer obtain a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended

employment. 20 C.F.R. § 656.40(a). The SWA is required to specify the validity period of the prevailing wage. 20 C.F.R. § 656.40(c). To use that SWA prevailing wage determination in support of a labor certification application, petitioning employers “must file their applications or begin the recruitment required by [the applicable regulation] within the validity period specified by the SWA.”

In the instant case, the Employer’s prevailing wage determination had an expiration date of December 31, 2005. (AF 9, ETA 9089, Section F-8). The Employer ran its SWA job order from March 23, 2006 through April 23, 2006. (AF 11, ETA 9089, Section I-c-6 and 7). It ran its first newspaper advertisement on February 12, 2006, and its second advertisement on February 19, 2006. (AF 11-12, ETA 9089, Section I-c-11 and 12). The CO accepted the Employer’s labor certification application for processing on June 8, 2006. (AF 1). Thus, the Employer’s application was clearly not in conformity with the regulatory requirement to conduct the recruitment or file the application within the validity period of the SWA prevailing wage determination.

Indeed, the Employer conceded that it unintentionally violated this requirement, but asks for relief based on its overall recruitment efforts. Even if the Employer’s error was unintentional, however, its application included a substantive violation of the regulation. Moreover, the prevailing wage determination had expired months before the Employer began its recruitment in support of the PERM application or filed the application. Under such circumstances, we find that the CO properly denied certification and that equitable relief from the error is not warranted.

ORDER

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.