



Issue Date: 23 June 2009

BALCA Case No.: 2009-PER-00105
ETA Case No.: A-06244-55509

In the Matter of:

THE GOOD SHEPHERD OF THE LITTLE ONES,
Employer,

on behalf of

ADELIA MATIAS,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: James V. Scarlata, Esquire
Newark, New Jersey
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.

STATEMENT OF THE CASE

On August 18, 2006, The Good Shepherd of the Little Ones ("Employer") filed an Application for Permanent Employment Certification on behalf of the Alien for an "Assistant Director" position. (AF 8-17). The SOC/O*NET code provided was 11-903, which corresponds to the occupational title "Education Administrators, Preschool, & Child Care Centers." The Employer indicated that it had based its recruitment on the requirements for a non-professional position. (AF 11).

On November 1, 2008, the CO denied certification on the ground that the Employer had improperly treated the occupation as a nonprofessional occupation for the purposes of recruitment. The CO explained that the occupation is found on the list of professional occupations from Appendix A of the Preamble to 20 C.F.R. Part 656.

The Employer filed a Motion to Reconsider on November 15, 2006. (AF 2-3). Therein, the Employer's attorney argued that the CO's "allegation" was made in error. (AF 2). The Employer's attorney asserted that the Employer did not indicate the position was a professional position, nor did the Employer require the worker to have attained a bachelor's degree or its equivalent. *Id.*

On November 19, 2008, the CO responded, reiterating that the occupations listed in Appendix A are those for which a bachelor's degree or higher is the usual requirement, and that whether the Employer actually requires a bachelor's degree or not is irrelevant. (AF 1). The CO stated that the primary purpose of Appendix A is to inform employers of those occupations for which they must conduct the recruitment effort required for professional occupations. *Id.* Since the additional recruitment was not done, the CO denied the labor certification.

The matter was forwarded to BALCA on November 19, 2008 and a Notice of Docketing was issued on December 12, 2008. The Employer notified BALCA on December 17, 2008, that it would like to proceed with the appeal. On January 13, 2009, the Employer filed a brief, reiterating its position that because the Employer did not require a bachelor's degree for the position, it was not a professional position. Additionally, the Employer argued that the State of New Jersey did not require a bachelor's degree for this position, and therefore the Employer should not be required to have a bachelor's degree qualification for the position.

On January 12, the CO filed a brief urging that the denial be affirmed because the occupation is listed on Appendix A, and therefore recruitment in a manner prescribed for a professional position is required pursuant to the regulation at 20 C.F.R. § 656.17(e)(1).

DISCUSSION

Where an application for permanent labor certification involves a professional occupation, the sponsoring employer is required to attest to having placed a job order with the State Workforce Agency and to having recruited for the position under the regulatory criteria for professional occupations found at 20 C.F.R. §656.17(e)(1)(i). Professional recruitment requires a few additional steps not required for nonprofessional positions.

Appendix A of the Preamble to 20 C.F.R. Part 656¹ provides an extensive list of professional occupations, which are defined as “occupations for which the attainment of a bachelor's or higher degree is a usual educational requirement.” 20 C.F.R. § 656.3 (emphasis added). A bachelor's or higher degree, however, is not determinative of whether an Appendix A occupation is considered a professional position. Under the regulatory scheme, Appendix A is made up of jobs customarily associated with the

¹ Appendix A was not published in the Code of Federal Regulations, but is found in the Federal Register at 69 Fed. Reg. at 77377-77384 (Dec. 27, 2004).

attainment of a bachelor's or higher degree; but that educational level is not mandatory for a job to be considered a professional occupation. *See EPI Limited Partnership*, 2008-PER-4 (Apr. 28, 2008). Thus, if an occupation is found on Appendix A, the employer must recruit the position under the criteria for professional occupations, even if the employer does not consider the position to be a professional one and does not require the attainment of a bachelor's degree. *A One Auto Center*, 2008-PER-43 (June 17, 2009).

In the instant case, the Employer does not dispute that the SOC/O*NET code it entered on the ETA Form 9089 is found in Appendix A, nor does the Employer dispute that the SOC/O*NET code for "Education Administrators, Preschool, & Child Care Centers" was the closest match to the title for the job offered. The employer alleges that the position could be filled by a person who does not have a bachelor's degree and that such a degree is not required. Since the occupational code 11-903, for "Education Administrators, Preschool, & Child Care Centers," is found on Appendix A to the Preamble to the PERM regulations, 69 Fed. Reg. at 77383, whether or not the Employer requires a bachelor's degree is not relevant. Whether or not the State of New Jersey requires a bachelor's degree for the position is also irrelevant for the same reason.

The question before the Board is not whether the Employer considers the position to be a professional one, but what the regulations require in regard to the scope of recruitment. Thus, despite the fact that the Employer did not require a bachelor's degree, because it presented an occupation listed in Appendix A, it was required to conduct the additional steps required for professional recruitment. Since the Employer did not conduct those additional steps, we affirm the CO's denial of 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.