

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 31 March 2009

BALCA No.: 2008-PER-00203
ETA No.: A-05210-18222

In the Matter of:

A FRESH PERSPECTIVE, INC.,
Employer,

on behalf of

LAURA MORELOS,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Malathi Benjamin, Esquire
Pasadena, California
For the Employer

Gary M. Buff, Associate Solicitor
Frank P. Buckley, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case 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.¹ The following decision is based on the record upon which the Certifying Office (CO) denied certification, the Appeal Brief filed by Employer on November 5, 2008 and the Brief of the CO, which was filed on November 7, 2008. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On August 30, 2005, A Fresh Perspective, Inc. filed an application for permanent alien labor certification (ETA Form 9089) on behalf of the Alien for a Marketing Consultant position. (AF 31-41). The job opportunity was listed as being located in Warren, Rhode Island. On September 16, 2006, an Audit Notification was issued directing the Employer to submit certain documents, including the Prevailing Wage Determination (PWD). (AF 26). The Employer responded to the Audit Notification, submitting as part of its documentation, its PWD. The Prevailing Wage Request form was from the State of California, Arnold Schwarzenegger being listed as the Governor, the website for information being that of “calmis.ca.gov,” and the telephone number being a California number. (AF 45). Portions of the California information were crossed out, with Rhode Island being inserted. On that part of the form which was completed by Employer, the “Job Site Address” was noted as being 47 Warren Road, Warren, Rhode Island and/or Stockton, California. The “County of Job Site” was listed as Bristol and/or San Joaquin. That portion of the form which was to be completed by the State Workforce Agency (SWA) was neither signed nor dated. Specifically, the portions of the form which were to be completed by the SWA -- the Survey Data, Survey Area, Research Analyst, Phone and Date -- were all blank.

¹ The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

On February 28, 2008, the CO denied certification, finding that the PWD provided by the Employer was issued by the California SWA and not the Rhode Island SWA, the latter having jurisdiction over the area of intended employment. (AF 8-10). The Employer responded by requesting reconsideration/review. (AF 5). The Employer contended that the PWD was in fact issued by the Rhode Island SWA; however, at the time the request was made, the Rhode Island SWA did not have its own prevailing wage request forms, and counsel for the Employer was advised by the Rhode Island SWA that the Employer could use the California form and amend it to reflect the Rhode Island SWA information. According to the Employer, its attorney faxed a California form to the Rhode Island SWA office, amending it first to reflect Rhode Island SWA information. It was that form which was utilized in this application.

By letter dated September 18, 2008, the CO reviewed and rejected the Employer's argument, finding that the Employer had failed to submit a wage determination which complied with the regulations. (AF 1). The CO pointed out that 20 C.F.R. §656.40 requires that the SWA enter its wage determination on the form it uses and return the form with its endorsement to the employer. The PWD submitted by the Employer was not endorsed by the Rhode Island SWA as required, and therefore, it could not be considered valid for the job location of the position offered. The matter was then forwarded to the Board of Alien Labor Certification Appeals (BALCA) on September 18, 2008, and a Notice of Docketing was issued on September 22, 2008.

In its Appeal Brief, the Employer argues that the failure of the Rhode Island SWA to endorse the PWD was harmless error, arguing that the intent of the endorsement is to ensure the credibility of the determination and to verify that same was issued by the appropriate SWA. According to the Employer, it provided sufficient evidence to establish that the PWD was in fact issued by the Rhode Island SWA. Furthermore, had the CO raised the issue of the lack of endorsement in the initial reasons for denial, it

would have addressed that issue in its request for reconsideration. The Employer was not afforded the opportunity of doing so at that stage of the process. The Employer included with its Appeal Brief a memo from a Prevailing Wage Specialist from the Rhode Island SWA, stating that “[t]his memo is to certify that the prevailing wage issued” was appropriate. The memo is not signed but it bears the facsimile line for the “RI DEPT OF LABOR & TR,” as does the attached form. The Employer contends that in light of that evidence, the failure on the part of the Rhode Island SWA to endorse the PWD was harmless with no material bearing on the PERM process or the substantive issues in this case.

By letter brief dated November 6, 2008, the CO contends that the PWD form, as submitted, lacks the indicia to demonstrate that it was issued by the Rhode Island SWA. Thus, some of the boxes on the form marked “for SWA use only” have not been completed, and it is that information which is lacking, such as “Survey Area,” name of the Research Analyst, and the Phone number, which would have provided evidence as to whether the Rhode Island SWA or the California SWA provided the purported prevailing wage. Additionally, according to the CO, the information provided by Employer in the form, including the listing of the job site address and county of job site on the PWD form, which included Rhode Island and California, did not advance the Employer’s argument that the PWD form was issued by the Rhode Island SWA. In sum, the CO argued that the Employer failed to provide the documentation requested to demonstrate that the SWA in the area of intended employment issued the PWD in question.

DISCUSSION

Section 656.40 of the regulations requires that an employer request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. It further provides that the SWA “must enter its wage determination on the form it uses and return the form with its endorsement to the employer.” While Employer

claims to have a valid reason for the failure to comply with this regulation, it failed to provide the CO with any documentation to support its argument. We cannot consider the Memorandum and attachment submitted with the Employer's Appeal Brief.² Additionally, the Employer's argument that it was impeded by the fact that the CO did not mention the lack of the local SWA's endorsement until the denial of reconsideration is without merit, given the CO's initial finding that the local SWA had not provided the PWD. Thus, 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 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 of Alien Labor Certification Appeals. 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals

² Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. §656.27(c). *See also* 20 C.F.R. §656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*).

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Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.