U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 August 2008

BALCA Case No.: 2008-PER-00065
ETA Case No.: A-06020-77102

In the Matter of:

WANGS MING GARDEN, INC.
d/b/a
MING GARDEN CHINESE RESTAURANT,
Employer,

on behalf of

SHI QU LI,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Kwok S. Ling, Esquire
Philadelphia, Pennsylvania
For the Employer

Gary M. Buff, Associate Solicitor
Frank P. Buckley, 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.[1]

In this case, the Employer filed an ETA Form 9089 application for permanent alien labor certification for the position of Chinese Specialty Cook. (AF 12-21). The Alien signed the application on November 19, 2005. (AF 19). The Employer's attorney signed the application on December 13, 2005. (AF 19). The Employer's president signed the application on December 13, 2005. (AF 20). The filing date of the application was January 3, 2006. (AF 20). The Employer indicated on the application that the job was advertised in the Courier-Post newspaper on May 7, 2006 and May 14, 2006. (AF 15-16).

On December 4, 2007, the CO issued a letter denying certification because the advertisements used for the recruitment effort did not occur at least 30 days, but no more than 180 days, prior to the date the application was filed. (AF 9-11).

On December 27, 2007, the CO received a request for reconsideration from the Employer's attorney. (AF 2-8). The attorney stated that the Employer had advertised the job in the New Jersey Courier-Post on Wednesday, June 15, 2005, Thursday, June 16, 2005, and Friday, June 17, 2005, and in the World Journal, a Chinese newspaper, on the same dates. The attorney stated that "[t]he original ETA 750 Part A and ETA 750 Part B were mistakenly filed with NJ Labor Department on July 26, 2005, the same were returned and later filed with Labor Department at Atlanta, GA…" (AF 2). In support of the motion, the Employer attached a copy of the letter sent to the New Jersey Department of Labor. (AF 4). The letter was stamped as received by the New Jersey office on August 1, 2005, and referenced the filing of an ETA Form 750. The Employer's attorney confessed error in the timing of the advertisements, but contended that the Employer had,

[1] The Final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 77386, and are applicable to permanent labor certification applications filed on or after March 28, 2005. The regulations were amended on June 21, 2006, 71 Fed. Reg. 35522, and May 17, 2007, 72 Fed. Reg. 28903.

in fact, advertised, and did not get any responses to those advertisements, and that its error was procedural.

The CO issued a letter denying reconsideration on June 13, 2008. (AF 1). BALCA docketed the case on June 16, 2008, and issued a notice of docketing on June 17, 2008. The Employer filed a Statement of Intent to Proceed, as required by the Board's notice of docketing, but did not file an appellate brief. The CO filed a letter brief received by the Board on August 5, 2008, urging that the denial of certification be affirmed.

DISCUSSION

In December 2004, the Employment and Training Administration published in the Federal Register a Final Rule changing the labor certification regulations to streamline processing and ensure the most expeditious processing of cases using the resources available. The new rule deleted the prior rule at 20 CFR Part 656, and replaced it in its entirety. The new regulatory text applied to all applications filed on or after March 28, 2005. 69 Fed. Reg. 77326 (Dec. 27, 2004). These new rules are popularly known as the "PERM" rules. Among the changes to the program under PERM were the use of a new ETA Form 9089 rather than the old Form 750, and the requirement that applications be filed directly with the federal Certifying Officer rather than a State Workforce Agency.

In the instant case, the Employer was applying for certification for a non-professional position. Under the PERM regulations, 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. 20 C.F.R. § 656.17(e)(2).

In the instant case, the Employer evidently attempted to file an application under the pre-PERM regulations in July 2005. The SWA returned the application. The Employer re-filed under the PERM regulations. The re-filed application in January 2006

showed the date of the advertisements to be in May of 2006. The advertisement date for months after the application was filed may have been a typographic error. But the Employer's motion for reconsideration does not remedy the timing problem with the advertisements.

The motion indicates that advertisements were run in June 2005. Regardless of whether the Employer's advertisements were run in May 2005, June 2005, or would be run in the future in May 2006, none of those dates fit the time window permitted in support of a labor certification application filed under PERM.

Implicit in the Employer's motion for reconsideration is a request for equitable relief from its error in filing a pre-PERM application with the New Jersey Department of Labor, rather than a PERM application with the Atlanta CO's office. Mistakenly filing the application with the wrong office under defunct regulations, however, does not present a compelling case for the application of equitable relief.[2] Moreover, the case for invocation of equitable principles is not helped by the fact the dates of the newspaper advertising used on the PERM and pre-PERM applications do not match, and that both applications were filed with the assistance of an attorney. We decline to apply equitable relief under the circumstances presented.

Accordingly, we affirm the CO's denial of labor certification.

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[2] *See Park Woodworking, Inc*., 1990-INA-93 (Jan. 29, 1992) (en banc) (pre-PERM decision holding that an untimely rebuttal would be excused only if to failure to do so would result in manifest injustice); *Torres Discount Radiator*, 1988-INA-324 (Feb. 7, 1990) (pre-PERM decision holding that the employer's rebuttal was untimely where it was sent to the state job service rather than to the CO).

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.