



Issue Date: 12 September 2008

BALCA Case No.: 2008-INA-00095
ETA Case No.: D-05220-90545

In the Matter of:

THE NEW AAA APARTMENT PLUMBERS, INC.,
Employer,

on behalf of

ROGELIO RODRIGUEZ,
Alien.

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center¹

Appearances: Mark A. Park
Pro se for the Employer

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

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification.

¹ The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about these applications should be directed to the Chicago Processing Center.

Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).²

STATEMENT OF THE CASE

The Employer – a plumbing services company– filed its application for labor certification on April 30, 2001 to enable the Alien to fill the position of Plumber Helper. (AF 59). The application got caught up in the large backlog of pre-PERM applications, and the Employer did not receive a Recruitment Instructions letter until February 9, 2007. (AF 28-30). That letter directed the Employer to advertise the position for three consecutive days in a newspaper of general circulation in the area of intended employment. (AF 29).

The Employer placed its advertisement in the Greensheet. (AF 23-25). Specifically, the advertisement was run in the print edition for the Houston Northwest Greensheet the week of Friday, March 23, 2007, and online from March 23 to March 29, 2007.

The Certifying Officer issued a Notice of Findings on August 15, 2007 proposing to deny certification. (AF 9-12). In pertinent part the CO wrote:

A review of the case file reveals the absence of valid advertisement for the job opportunity. Therefore, it has been determined that a valid test of the labor market has not occurred. Consequently, the employer must submit proof of valid advertisement for the job opportunity in a newspaper of

² This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 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, 2004), unless otherwise noted.

general circulation or in a professional, trade, or ethnic publication appropriate to the occupation. This office will accept tear sheets (or copies of such) as “proof of publication”. A notarized affidavit from the publisher is also acceptable, so long as it contains a copy of the actual advertisement on the affidavit. Such documentation must clearly indicate the name of the publication and date(s) advertised.

(AF 11).

By letter dated September 5, 2007, the Employer submitted a notarized “Proof/Receipt” from the Greensheet showing that the advertisement had been run in the Houston Northwest edition on March 22, 2007. (AF 6-7).³

The CO issued a Final Determination denying certification on October 4, 2007. (AF 3-5). The CO acknowledged that the advertisement had been run in the Greensheet, but held that “the *Greensheet* does not meet the definition of a newspaper of general circulation. Unlike a major metropolitan newspaper, such as *The Houston Chronicle*, the *Greensheet* would not be the most likely to draw applicants and would not qualify as [a] valid test of the labor market.” (AF 5).

The Employer requested BALCA review in a letter dated October 29, 2007. (AF 1). The Employer stated that it had used the Greensheet in the past for labor certifications and that the forms were never returned. The Employer stated:

We chose to run the ad in the *Greensheet* because it is free and does not require potential applicants to purchase anything. In contrast to what the denial letter claims, the *Greensheet* is in general circulation and is commonly sought after by job seekers because of the very large “Employment” section.

³ The Proof/Receipt indicates a start date of March 22, 2007 and stop date also of March 22, 2007. It indicates a publication for 1 week. It appears that the Greensheet is a weekly that is published on a single day and distributed for one week until replaced by a new weekly.

(AF 1). The Employer asked to be permitted to re-advertise if the *Greensheet* was determined to be an inadequate place to recruit for the job.

The Board issued a Notice of Docketing on January 9, 2008. Neither the Employer nor the CO filed an appellate brief.

DISCUSSION

Fundamental to the recruitment effort under the labor certification regulations is advertisement in a newspaper of general circulation or a professional, trade or ethnic publication, whichever is appropriate to the occupation and is most likely to attract responses from able, willing, qualified and available U.S. workers. 20 C.F.R. §§ 656.21(g)(1)-(9), 656.21(h)-(j). The issue, as framed in the Final Determination in this case was whether advertisement in the Greensheet was advertisement in a newspaper of general circulation most likely to attract responses from U.S. workers.

Upon close review of the Appeal File in the instant case, we find that the issue of whether a weekly circular was an adequate place to advertise the position offered was not clearly identified until the Final Determination. Thus, the Employer was denied an adequate opportunity to timely submit evidence on this issue.

It is the CO's obligation to state the specific bases upon which the decision to issue the Notice of Findings was made. 20 C.F.R. §656.25(c)(2). If the reasons for the denial are not made clear to the Employer, it cannot rebut with specificity nor can it attempt to cure any deficiency. *The Standard Oil Co.*, 1988-INA-77 (Sept. 14, 1988) (en banc). We have carefully reviewed the NOF and find that it strongly suggested that the Employer only needed to provide proof of publication to rebut. Indeed, the rebuttal submission provided the notarized proof of publication as suggested in the NOF. It was

only the Final Determination that the CO specifically identified her conclusion that the Greensheet did not meet the definition of a newspaper of general circulation as required by the regulations. By that time it was too late for the Employer to submit evidence to rebut that conclusion.

Based on the foregoing, we find that the Employer rebutted the NOF, and that certification should be granted.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby **REVERSED** and labor certification is hereby **GRANTED**

For the panel:

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JOHN M. VITTON
Chief Administrative Law Judge

Linda S. Chapman, Administrative Law Judge, dissenting.

I concur with the majority that the Certifying Officer first raised the issue of whether the Greensheet met the regulatory definition of a newspaper of general circulation in the Final Determination. Thus, procedurally the Final Determination cannot be affirmed. It appears, however, that the Greensheet is a weekly, and it is unclear whether it is a newspaper of general circulation appropriate to the occupation and most likely to attract responses from able, willing, qualified and available U.S. workers, as required by 20 C.F.R. §§ 656.21(g)(1)-(9), 656.21(h)-(j). Thus, rather than reverse and

grant certification, I would remand to permit the Employer to document its assertion that the Greensheet met the regulatory requirements for an appropriate place to advertise the job.

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.