U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 31 March 2009

BALCA No.: **2008-PER-00184**
ETA No.: A-05203-16383

In the Matter of:

SOULE, BLAKE & WECHSLER, INC.,
Employer,

on behalf of

DA MING DONG,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Fengling Liu, Esquire
New York, New York
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 Officer (CO) denied certification, the Statement of Position filed by Employer on October 21, 2008 and the Brief of the CO filed on November 4, 2008. 29 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On August 9, 2005, the Employer filed an application for permanent alien labor certification (ETA Form 9089) for the position of Purchasing Manager. (AF 43-53). The position required two years of experience in the job offered and a Bachelor's degree in International Business, Marketing. The Employer listed an alternate education requirement of a Bachelor's degree in Public Relations, English, or any other Business Administration Major.

On December 14, 2006, following an audit, the CO denied certification because the Notice of Filing had not been posted between 30 and 180 days before the Employer filed the ETA Form 9089, violating of 20 C.F.R. § 656.10(d)(3)(iv). (AF 21-23). The CO also found that the ETA Form 9089 indicated that the Alien was currently employed by the Employer and qualified for the position by virtue of the Employer's alternative

[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).

experience requirements, yet the Employer had not indicated on the application that any suitable combination of education, training or experience was acceptable, as required.[2]

The Employer's attorney requested reconsideration on December 20, 2006. (AF 3). According to the Employer, the date listed on the ETA Form 9089 as the date the Notice of Filing was posted was a mistake. The Notice of Filing was actually posted from May 11, 2005 to July 25, 2005. As for the alternative experience requirements, the Employer stated that the Alien had a Bachelor's degree in English and more than 24 months of related work experience, as was required.

By letter dated September 9, 2008, the CO denied certification. (AF 1). While counsel for the Employer indicated that the July 11, 2005 date was an error and that the date should have been listed as May 11, 2005, the CO noted that "documentation fabrication created after the fact to address a deficiency may be discounted," and continued to find the reason for denial to be valid.[3] Furthermore, while the Alien met the primary experience requirement of two years in the job offered, he did not meet the primary education requirements. Thus, in such a case, where the alien beneficiary only potentially qualified by virtue of the alternate requirements, those requirements will be considered unlawfully tailored to the alien unless the employer indicated that U.S. applicants with suitable combinations of education, training or experience were acceptable. The Employer had failed to so indicate.

[2] The CO also stated that the Employer listed his willingness to accept 36 months experience as a Financial/Research Analyst. Employer correctly noted in its response that this was not correct. (AF 3, 23).

[3] The CO's reference to "documentation fabrication" should not be read as an accusation of document falsification. Rather, the CO was referring to a ruling in *Healthamerica*, 2006-PER-1, slip op. at 21 (July 18, 2006)(en banc), to the effect that a motion for reconsideration under PERM must be supported by a document that was already in existence at the time the application was filed.

The case was forwarded to the Board of Alien Labor Certification Appeals (BALCA) on September 9, 2008. (AF 1). On September 18, 2008, BALCA issued a notice of docketing.

The Employer submitted a letter brief on October 13, 2008, arguing that there was no document fabrication when the ETA Form 9089 was filed and that the criteria set forth in *Healthamerica*, 2006-PER-1 (July 18, 2006)(en banc) applied, inasmuch as the Employer kept the document as it was and submitted it to the CO when the ETA Form 9098 was filed. According to the Employer, it clarified the correct Notice of Filing date in its request for reconsideration and stated that there was no motive to deceive.

The Employer concedes that the ETA Form 9089 did not include language that "applicants with any suitable combination of education, training or experience" would be acceptable, however, it argues that the job opening was always listed as requiring a Bachelor's degree with at least two years of related experience, and thus, while the language did not appear in the application form, the criterion was, in fact, applied in the recruitment.

The CO filed a letter brief received by the Board on November 4, 2008. Therein, the CO argued that the application was filed on August 9, 2005, while the Notice of Filing of the application was posted from July 11, 2005 to July 25, 2005. It was not completed at least 30 days before the application was filed. The CO notes that while counsel for the Employer indicated in the request for reconsideration that the notice was posted on May 11, 2005 and not July 25, 2005, the Employer's president had initially listed the dates of posting in handwriting, and it did not appear that the attorney had any first-hand knowledge of the circumstances surrounding the posting. The CO argues that the holding in *Healthamerica* is inapplicable, since there was no abuse of discretion by the CO in this case.

With regard to the alternative experience issue, the CO reiterates the argument that the Alien did not meet the Employer's primary education requirement, but met the alternate educational requirement of a Bachelor's degree in English. Therefore, Section 656.17(h)(4)(ii) applies, and the Employer was required to state in its application that it was willing to accept any suitable combination of education, training or experience.

DISCUSSION

With regard to the Notice of Filing and the alleged clerical error, this case differs from that of *Healthamerica*,[4] in that the Employer did not adequately document that the error was merely clerical in nature. The Notice of Posting, signed by Employer's president, has handwritten on it the dates of posting as being July 11, 2005 to July 25, 2005. (AF 65). A mere statement from the Employer's counsel that this was an error is not sufficient to establish that the date handwritten by the Employer was a clerical or typographical error. There was no abuse of discretion, therefore, in the CO's determination. The Employer did not comply with 20 C.F.R. §656.10(d)(iv), which requires that an employer post a notice of filing between 30 and 180 days before filing the application.

Because we affirm the CO's denial on the Notice of Filing issue, we do not reach the alternative job requirements issue.

[4] In *Healthamerica*, the Employer made a typographical error, indicating that the second advertisement had been placed on a Monday rather than a Sunday. The CO denied certification, and with its request for reconsideration, Employer included newspaper tear sheets substantiating that the advertisement was run on a Sunday and that Employer was in compliance with the two-Sunday publication requirement of section 656.17(e). After the CO denied the motion for reconsideration, the Board determined that the CO had abused his discretion in denying reconsideration.

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:

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
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

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.