

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 January 2009

BALCA Case No.: 2009-PER-00013

ETA Case No.: A-06242-54453

In the Matter of

MARLENNY'S HAIRCUTTERS,
Employer,

on behalf of

MARIA TERESA VALENCIA OSORIO,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Joyce Antila Phipps, Esquire
Casa de Esperanza
Bound Brook, New Jersey
For the Employer and the Alien

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

JOHN M. VITDONE
Chief Administrative Law Judge

DECISION AND ORDER

This matter involves an appeal of the denial by an Employment and Training Administration, Office of Foreign Labor Certification, Certifying Officer (“CO”) of permanent alien labor certification 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.

BACKGROUND

The Employer is sponsoring the Alien for a position as a Beautician. (AF 37). On March 7, 2008, the CO issued an Audit Notification letter. (AF 51-55). Among other items, the CO directed the Employer to submit a copy of the recruitment report required by 20 C.F.R. § 656.17(g)(1). (AF 51-52). The Employer’s response to the Audit Notification included documentation of a State Workforce Job Order, a prevailing wage determination, newspaper advertising, and a Help-Wanted posting (AF 76-88). The Appeal File, however, does not include a recruitment report describing the recruitment undertaken and the results achieved. On May 8, 2008, the CO issued a letter denying certification. (AF 23-25). One of the reasons for the denial was the failure to provide a recruitment report. (AF 25).

The Appeal File does not clearly identify what happened next in the procedural history of the case. The CO’s appellate brief, however, contained an attachment of a May 31, 2008 letter (not found in the Appeal File) in which the Employer’s attorney resubmitted several documents to the CO. Handwritten on the cover letter is “appeal? app denied.”

On October 2, 2008, the CO issued a letter of reconsideration.¹ Among other matters, the CO revisited the issue of the missing recruitment report, and found that upon

¹ The Appeal File indicates that several prior denials had been issued by the CO in 2006 (AF 5-7 and 8-10). The Employer’s then agent moved for reconsideration (AF 1), which appears to have been granted by

review of the entire case file, the recruitment report was not present. Thus, the CO found that this ground for denial of certification was valid. (AF 1-2). The CO then forwarded an Appeal File to the Board.

On October 17, 2008, the Board issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed with the appeal, but did not file a brief. The CO filed a letter brief, which was received by the Board on December 22, 2008, urging that the denial be affirmed.

By letter postmarked December 1, 2008, the CO filed a letter brief on appeal. As noted above, the CO attached to his brief a copy of the Employer's submission of May 31, 2008, and argued that this was not actually a request for review, as it merely stated that it was enclosing documents for the CO, and did not state that it was an appeal or request for review. The CO argued that if the Board found the letter adequate as a request for review, he requested that the denial be affirmed because the Employer had only supplied recruitment materials and not a recruitment report as required by 20 C.F.R. § 656.17(g). The CO argued that failure to supply documentation request by an audit is grounds for denial pursuant to 20 C.F.R. § 656.20(b).

DISCUSSION

Under 20 C.F.R. § 656.17(g), the employer is required to "prepare a recruitment report signed by the employer or the employer's representative noted ... describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections. The Certifying Officer, after reviewing the employer's recruitment report, may request the U.S. workers' resumes or applications, sorted by the reasons the workers were rejected." When an application is audited, the audit procedure

the CO in January 2008. (See AF 101). The CO's letter denying reconsideration in October 2008 revisits several of the issues raised by the earlier denials. For purposes of this appeal, however, we focus only on the missing recruitment report issue raised in the May 2008 denial determination.

specifies that “[a] substantial failure by the employer to provide required documentation will result in that application being denied. 20 C.F.R. § 656.20(b).

In the instant case, the CO’s Audit Notification specifically directed that the Employer submit the recruitment report required by section 656.17(g). The Appeal File does not contain such a report. The CO’s reconsideration letter clearly stated that the CO had not found such a report upon reviewing the entire file. On appeal, the Employer did not provide any response to the CO’s statement that he had been unable to locate a recruitment report with the audit response or anywhere else in the file. Without an explanation or proof that the report had in fact been submitted, we are compelled affirm the CO’s finding that the report was not submitted.

Without a report, the CO could not determine whether the recruitment complied with the regulations or whether U.S. workers were rejected for lawful job related reasons. Thus, the failure to provide a recruitment report requested by the CO under the audit procedures was clearly a substantial failure to provide required documentation, and we find that the CO correctly denied certification pursuant to section 656.20(b).

Because we affirm the CO on the missing recruitment report issue, we do not reach the issue of whether the Employer’s May 31, 2008 submission was sufficient to serve as a letter requesting reconsideration or BALCA review.

ORDER

IT IS ORDERED that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

For the panel:

A

JOHN M. VITDONE
Chief Administrative Law Judge

Administrative Law Judge Pamela Lakes Wood, dissenting.

I respectfully dissent. Here, the panel relies upon the absence of documentation in the file. Significantly, along with the appeal letter, the Solicitor's office forwarded a relevant document from the Employer that clearly was omitted from the appeal file. However, no explanation has been provided for the omission. Accordingly, I would obtain a complete copy of the CO's file before deciding this case.

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.