



Issue Date: 05 January 2009

BALCA Case No.: 2008-PER-00135

ETA Case No.: A-06034-82995

In the Matter of

DUNKIN DONUTS,

Employer,

on behalf of

ANIL KUMAR SHARMA,

Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Munawar H. Sandhu, Esquire
Brooklyn, 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, DC
For the Certifying Officer

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

DECISION AND ORDER

PER CURIAM. 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 CO accepted the Employer's labor certification application for processing on February 3, 2006. (AF 1). The Employer is sponsoring the Alien for a position as a "Baker." (AF 10). On May 12, 2006, the CO issued an Audit Notification letter. (AF 19-21). Among other documentation, the CO directed the Employer to submit its Notice of Filing, and its recruitment documentation.

The Employer responded to the Audit Notification. Among other responsive materials, the Employer submitted a copy of an "Employment Notice" (AF 32) and copies of its newspaper classified advertisements for the job opportunity. (AF 36-37).

On October 5, 2006, the CO issued a denial letter. (AF 6-8). The CO found that the newspaper advertisements were deficient because they did not include the Employer's name as required by 20 C.F.R. § 656.17(f)(1), because the Notice of Filing did not include the address of the appropriate CO at the National Processing Center with jurisdiction over the application as required by 20 C.F.R. § 656.10(d)(3)(iii), and because the Notice of Filing did not list the wage offered as required by 20 C.F.R. § 656.10(d)(4).

The Employer thereafter filed a motion for review arguing that the advertisement was adequate because it included the Employer's personal office fax number and therefore faxes would not be misplaced. The Employer also argued that a copy of the Notice of Filing was included in the audit response showing the case number and jurisdiction of the CO. The Employer did not address the CO's concern that the Notice of Filing did not show the wage offer, but only attached a copy of the State Workforce Agency ("SWA") wage determination. (AF 3-5).

The CO issued a letter of reconsideration on August 18, 2008. (AF 1-2). The CO withdrew the citation concerning whether the Notice of Filing included the appropriate CO's address, but found that the absence of the Employer's name in the newspaper advertisement and the absence of the wage offer in the Notice of Filing remained valid grounds for denial of certification.

The Board docketed an appeal on August 19, 2008. In its appellate brief, the Employer argued that the fax number included in the newspaper advertisement satisfied regulatory requirements. In addition, the Employer argued that its wage offer was clearly stated in the Form 9089, and was equivalent to or more than the SWA prevailing wage determination.

The CO filed an appellate brief urging that the two grounds for denial of certification be affirmed.

DISCUSSION

The regulation at 20 C.F.R. 656.17(f)(1) requires that the newspaper advertisement supporting a labor certification application identify the employer. In preamble to the final rule implementing the PERM regulations, the CO responded to commenters who objected to this requirement:

Despite the objections of some commenters, the employer's name must appear in the advertisement. Review of employment advertisements clearly indicates the vast majority of these advertisements include the employer's name. The employer's name allows potential applicants to identify the employer, and applicants will be able to better determine if they wish to apply for the advertised position. Applicants also may be unwilling to submit resumes to a blind advertisement, as they can not tell who will receive their resume. Requiring the employer's name in the advertisement also allows us to match the employer's advertisement to the sponsored job opportunity in the event of an audit. We have concluded these benefits outweigh confidentiality concerns of employers. In addition, we note employers are required by statute to provide notice that the employer is seeking a labor certification for the job opportunity, making it

unlikely any of the job information is in fact confidential in nature. See 8 U.S.C. 1182 note.

ETA, Final Rule, *Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 69 Fed. Reg. 77326, 77348 (Dec. 27, 2004). Thus, the Employer's argument that applications would not be misplaced because the fax number provided in its newspaper advertisements ensured the receipt of applications directly by the Employer's owner did not address the reason for inclusion of the Employer's name in the advertisement – to let applicants know what company is offering the job. We therefore affirm the CO's denial of certification on this ground.

Likewise, we affirm the CO's denial of certification on the ground that the Notice of Filing did not include the rate of pay as required by 20 C.F.R. § 656.10(d)(4).

The regulation at 20 C.F.R. § 656.10(d) requires an employer to post a Notice of the Filing of the permanent labor certification application. The purpose of this regulation is to implement the statutory requirement provided by Section 122(b) of Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649, 104 Stat. 4978, effective October 1, 1991, that provided that "any person may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions with respect to the employment of alien workers and co-workers)." Under the regulations, the Notice of Filing must "must state the rate of pay (which must equal or exceed the prevailing wage entered by the SWA on the prevailing wage request form)." 20 C.F.R. § 656.10(d)(4). The Employer's inclusion of the rate of pay in the Form 9089 filed with the CO does not cure the failure to include the rate of pay on the Notice of Filing. The Employer's Notice of Filing did not state the rate of pay (AF 32) and the CO therefore correctly denied certification on this ground.

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.