U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 January 2009

BALCA Case No.: 2008-PER-00181
ETA Case No.: A-06065-93446

In the Matter of:

ARAMARK CORPORATION,[1]
Employer,

on behalf of

ELISEO VALENZUELA,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: John Kuhn Bleimaier, Esquire
Princeton, New Jersey
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, Senior Trial 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

[1] The Form ETA 9089 lists the Employer as "Aramark Corporation c/o Westminster Choir College of Rider University." It appears, however, that Westminster Choir College is only the work location, and is not itself a petitioning employer.

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 Employer is sponsoring the Alien for a position as a "Chef." (AF 22). On May 4, 2006, the CO issued an Audit Notification letter. (AF 33-36). Among other items, the CO directed the Employer to submit the Notice of Filing required by 20 C.F.R. § 656.10(d). (AF 33). Included with the Employer's audit response were two Job Postings, one posted at "Westminster" and one posted at "Westminster Choir Colleges." (AF 50-51). The CO denied the application on December 19, 2006 on several grounds. (AF 8-10). A number of the grounds focused on deficiencies with the Notice of Filing. Specifically, the CO found that the Notice failed to (1) state that the Notice is being provided as a result of the filing of an application for permanent alien labor certification, (2) state that any person may provide documentary evidence bearing on the application to the CO, (3) provide the CO's address, and (4) list the wage offered.

By letter dated January 16, 2007, the Employer requested reconsideration and review of the denial. (AF 3-4). The Employer argued essentially that the documentation was submitted to the CO in the context of an audit, and that "only a substantial failure to provide documentation may justify denial of the application" under 20 C.F.R. § 656.20(b). (AF 3) (emphasis as in original).

The CO issued a letter of reconsideration on September 9, 2008. (AF 1-2). The CO found that the denial was proper under 20 C.F.R. § 656.10(d).

The Board issued a Notice of Docketing on September 17, 2008. The Employer filed an appellate brief arguing that the standard for consideration of whether to deny an

application is whether the Employer's filings constituted substantial compliance with the requirements of the Code of Federal Regulations. The Employer stated that it had been alleged by the CO that the notice of filing did not include the exact language suggested by the Employment and Training Administration, but that the CO had not contended that the notice did not fairly describe the opening or that it was not posted prominently at the Employer's place of business. The Employer's attorney wrote: "It is a truism that notices of the subject type result in an infinitesimal number of contacts directed to the National Processing Center. Thus the alleged absence of the National Processing Center address can have no significant impact on the integrity of processing this application."

The CO filed an appellate brief urging affirmance of the denial of certification. The CO noted that the Board had addressed the importance of the Notice of Filing requirement as one the statutory requirements of IMMACT 90 in *Voodoo Contracting Corp.* 2007-PER-1 (May 21, 2007) and *Brooklyn Amity School*, 2007-PER-64 (2007).

DISCUSSION

The regulation at 20 C.F.R. § 656.10(d) provides, in pertinent part:

> (3) The notice of the filing of an Application for Permanent Employment Certification must:
>
> (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
>
> (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
>
> (iii) Provide the address of the appropriate Certifying Officer; and
>
> (iv) Be provided between 30 and 180 days before filing the application.
>
> (4) If an application is filed under Sec. 656.17, the notice must contain the information required for advertisements by Sec. 656.17(f), must state the rate of pay (which must equal or exceed the prevailing wage entered

> by the SWA on the prevailing wage request form), and must contain the information required by paragraph (d)(3) of this section.
>
> * * *

As the CO found, the Employer's job postings did not (1) state that the Notice was being provided as a result of the filing of an application for permanent alien labor certification, (2) state that any person may provide documentary evidence bearing on the application to the CO, (3) provide the CO's address, or (4) list the wage offered. Thus, the Employer's Notice was missing four required elements. We therefore reject the Employer's argument that it was in substantial compliance with the regulations.

Moreover, we reject the Employer's argument that only an infinitesimal number of contacts are directed to the CO as the result of Notices of Filings, and therefore the absence of the CO's address could have had no significant impact on the integrity of the Employer's application. In *Voodoo Contracting Corp, supra*, we described the purpose of the Notice of Filings and the requirement that it inform interested persons of the opportunity to contact the CO as follows:

> The purpose of section 656.10(d)(3) 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).'' 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, 77337-77338 (Dec. 27, 2004). Clearly, the regulatory requirement to provide the address of the appropriate CO is a reasonable means of implementing this statutory purpose.

Slip op. at 4. Moreover, in *Voodoo Contracting Corp.*, we rejected the employer's argument that its failure to include the address of the appropriate CO in its Notice of Filing should be forgiven because the PERM regulations were then new, and that it

would be contrary to due process not to forgive the Employer's "minor and harmless" error. We wrote:

> The Board has recognized that notions of fundamental fairness and procedural due process are applicable in PERM processing. *See generally HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc). However, as noted above, the Notice of Filing requirement is an implementation of a statutory notice requirement designed to assist interested persons in providing relevant information to the CO about an employer's certification application. It is not a regulation to be lightly dismissed under a harmless error finding. Nor does its enforcement offend fundamental fairness or procedural due process.

Slip op. at 9-10 (footnote omitted).

Finally, assuming arguendo that the Employer's application was otherwise in substantial compliance with the regulations,[2] we reject the Employer's argument that an application that is in substantial compliance with the regulations cannot be denied pursuant to 20 C.F.R. § 656.20(b). Section 656.20 of the PERM regulations states the procedure for audits. Section 656.20(b) provides:

> (b) A substantial failure by the employer to provide required documentation will result in that application being denied § 656.24 under [sic] and may result in a determination by the Certifying Officer pursuant to § 656.24 to require the employer to conduct supervised recruitment under § 656.21 in future filings of labor certification applications for up to 2 years.

The Employer's argument is that this provision prevents the CO from denying an application that has been audited if the overall application is in substantial compliance with the regulations. We find, however, that this regulation relates to failures to provide documentation in an audit response, and not to the CO's authority to review that documentation to determine whether it complies with the regulations. In other words,

[2] The CO also denied the application based on the Employer's publication of its newspaper advertising in two different newspapers on the same Sunday, rather than two "different" Sundays as required by the regulations. *See* 20 C.F.R. § 656.17(e)(1)(i)(B)(1) and 656.17(e)(2). Since we affirm the denial based on the Employer's failure to post a conforming Notice of Filing, we do not reach the newspaper recruitment issue.

section 656.20(b) constitutes authority for the CO to deny an application based on a substantial failure to produce all of the documentation required to be retained under 20 C.F.R. § 656.10(f). It does not mean that the CO is barred from denying an application if, except for the deficiency identified by the CO in the audit, the Employer's application substantially complied with regulations overall.

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

John M. Vittone, Chief Administrative Law Judge, concurring.

I concur with the lead decision. I write separately to emphasize that the PERM regulations cannot be read to mean that, when the audit procedure is invoked, an application that is in substantial compliance with the regulations cannot be denied pursuant to 20 C.F.R. § 656.20(b). "A cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes." Congressional Research Service, Report 97-589, *Statutory Interpretation: General Principles and Recent Trend*s at CRS-2 (Aug. 28, 2008). As we noted in *Richard M. Robinson*, 2007-PER-84 (Oct. 15, 2007), the PERM regulatory process was a response to criticism that the prior regulatory process was too complicated and time consuming. PERM sought to streamline and simplify the process. A consequence of that streamlining is that PERM is an exacting process, and unforgiving of mistakes in filling out the application or misunderstandings about the regulatory requirements. *See also Kay Mays*, 2008-PER-11 (Aug. 27, 2008) ("The PERM regulations very purposefully were designed to eliminate back-and-forth

between applicants and the government, and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program.") Interpreting section 656.20(b) to prevent the CO from denying an application based on a deficiency in recruitment if the Employer's application was otherwise in substantial compliance with the regulations would be nonsensical in the context of the clear intent of the drafters of the PERM regulations to require exacting compliance with the regulations.

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.