



Issue Date: 05 January 2009

BALCA Case No.: 2008-PER-00187

ETA Case No.: A-06079-98379

In the Matter of

STONE TECH FABRICATION,

Employer,

on behalf of

LESZEK GARDOCKI,

Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Joseph J. Parlapiano, Esquire
Newark, New Jersey
For the Employer

Gary M. Buff, Associate Solicitor
Clarette H. Yen, 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 Employer is sponsoring the Alien for a position as a "Stone Inspector." (AF 31). On February 7, 2008, the CO issued an Audit Notification letter. (AF 41-45). Among other documentation, the CO directed the Employer to submit a copy of its Notice of Filing. (AF 41). The Employer supplied the Notice as directed. (AF 66).

The CO denied the application on May 21, 2008 on the ground that the Employer had not included its name on the Notice. (AF 14-17). By letter dated June 18, 2008, the Employer's attorney filed a motion for reconsideration, arguing that "[s]ince the notice of filing is posted within the job premises, the name of the company would not seem to be required, so long as the name and phone number of the president of the company is listed." (AF 3). Attached to the motion was a copy of the Notice. The Notice did not contain the Employer's business name, but did display the Employer's president's name and phone number. (AF 13). The CO summarily denied reconsideration on September 8, 2008 because the Notice did not list the hiring company as required by the regulations at 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(1). (AF 1-2).

The Board issued a Notice of Docketing on September 18, 2008. The Employer filed a letter in response to the Notice of Docketing indicating that it would rely on the reasoning stated in the motion for reconsideration. The Employer also argued for a decision based on common sense rather than statutory construction.

The CO filed an appellate brief urging that the denial of certification be affirmed. Counsel for the CO elaborated on why the name of the company is required on the Notice of Filing even though it is posted at the work facility. She wrote:

[I]t is not always the case that only one employer resides at a single facility or location. For instance, multiple employers may share an office, and a notice of filing posted in a common area in that office potentially could apply to either employer. Also, a contractor or subcontractor that is performing work at a third party facility may post its notice of filing at that facility because it serves as the “location of employment” for the contractor or subcontractor. Without the name of the employer, it would not be possible to tell to which employer the notice of filing applies. Accordingly, the requirement to list the name of the employer cannot be dismissed as unnecessary just because the notice of filing is posted in the employer’s facility or location of employment.

DISCUSSION

The regulation at 20 C.F.R. § 656.10(d)(1) provides that for the basic labor certification process, an employer is required to give notice of the filing of its labor certification application and be able to document that the notice was provided. When the application is processed under the certification process described in 20 C.F.R. § 656.17, the notice “must contain the information required for advertisements by § 656.17(f)...” The very first item of information listed in section 656.17(f) is the name of the employer. 20 C.F.R. § 656.17(f)(1). Thus, in the instant case, the Notice of Filing should have included the Employer’s name. The Employer does not argue that the name was listed on its Notice of Filing. Rather, its argument in essence is that the inclusion of the Employer’s president’s name and phone number was the functional equivalent of the name of the company given that the Notice of Filing was posted at the workplace, and that this is only common sense.

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). In *Subhashini Software Solutions*, 2007-PER-43, 44 and 46 (Dec. 18, 2007), the Employer submitted Form 9089 applications for three positions. The recruitment supporting the applications would have been timely if the applications had been accepted for processing when originally submitted. The CO, however, rejected the applications because they did not display the official DOL logo. By the time the Employer re-submitted the applications, the recruitment was no longer

timely. The panel in that case held that “under the precise circumstances of these cases, fundamental fairness mandates that the Employer be permitted to have the applications processed as if they were filed when first received by the CO...” The panel stated that “the denial of reconsideration would be an injustice and would not satisfy the requirements of due process. The consequences to the Employer were out of proportion to the mistake. To deny labor certification for such an error would be to elevate form over substance....”

The Employer makes an attractive argument in the instant case that technical interpretation of the regulations has defeated common sense. In some situations, the purpose of the Notice of Filing would be fully served without the name of the company on the Notice if it was nonetheless clear that the Notice applied to the petitioning Employer, as for example where a the petitioner is a small company where everyone knows the owner on a first name basis. We stop short of reversing the CO in this instance, however, because we do not have enough information to simply accept the Employer’s attorney’s contention that the posting was adequate because it contained the Employer’s president’s name and telephone number. In order to make out a compelling case for equitable relief, the Employer needed to do more than simply assert that the president’s name and phone number were adequate substitutes for the actual name of the petitioning company because the Notice was posted at the work facility. The portion of CO’s appellate brief quoted above illustrates why assumptions cannot be made that the absence of the petitioning employer’s name would not be material to the effectiveness of a Notice of Filing. Thus, in order to establish a compelling case for relief from the regulatory requirement that an employer’s name must appear on a Notice of Filing, the Employer should have, for example, provided information about the size of the company, how well-know the president’s name would be among the work force, and whether the place it posts notices is used exclusively for company bulletins. Although we are adverse to elevating form over substance, we cannot make arguments for employers and we cannot simply assume the truth of generalizations. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof).

Moreover, the Notice of Filing is not a mere technicality. The purpose of section 656.10(d) is to implement the statutory requirement provided by Section 122(b) of the Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649, 104 Stat. 4978, effective October 1, 1991, that provides 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)." *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007) (quoting 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)). In *Voodoo Contracting*, *supra*, this panel held that "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).

The regulatory requirement of inclusion of the Employer's name on the Notice of Filing is found in a cross reference – but it is not a difficult cross reference to follow. And when making the cross reference, the requirement of including the Employer's name is the very first element listed. Thus, it is not an obscure requirement, nor a difficult one to implement.

Based on the foregoing, we decline to reverse the CO's denial of certification.

ORDER

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.