U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 January 2009

BALCA Case No.: 2009-PER-00016
ETA Case No.: A-06075-97404

In the Matter of

PARKSIDE CONSTRUCTION CONTRACTORS, INC.,
Employer,

on behalf of

JULIO ENRIQUE YANQUI,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Niko Paul
ALTRA Consulting Services LLC
Astoria, New York
For the Employer

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

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 "Brickmason." (AF 21, 31). On October 30, 2007, the CO issued an Audit Notification letter. (AF 16-19, 43-46). Among other items, the CO directed the Employer to submit a copy of its recruitment documentation. (AF 16, 44). The Employer supplied the documents as directed. (AF 40-95). The newspaper advertisements did not include the Employer's name. (AF 60-62).[1]

The CO denied the application on May 21, 2008. (AF 13-15). One ground related to an experience requirement. The CO later withdrew this ground for denial. The other ground for denial was that the newspaper advertisements did not contain the name of the employer as required by 20 C.F.R. § 656.17(f)(1). The Employer filed a request for reconsideration/appeal to BALCA by letter dated June 6, 2008. (AF 11-12). The Employer's agent stated that he had prepared the application, and that it was an innocent mistake not to include the Employer's name. He noted that the advertisement did include the location of the business and the Employer's fax number. He argued that the job had clearly been available because three resumes had been received in application for the job. Therefore "[t]he absence of the name of the employer did not affect applicants to submit their resumes in response to the newspaper advertisements. Failure to include the employer's name was an innocent mistake, and in my opinion, harmless error." In support, the Employer cited the BALCA decision in *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc).

[1] We also observe that the America's JobBank printout submitted in response to the audit notification showed the company listing the brickmason position as the New York State Department of Labor. (AF 59).

On October 3, 2008, the CO issued a letter of reconsideration. (AF 1-2). The CO accepted the Employer's reasoning in regard to the experience requirement, but affirmed the denial based on the deficiency with the newspaper advertisements. The CO wrote: "Inclusion of the company name in the advertisement allows potential applicants to identify the employer and determine whether they'll apply for the advertised position. In addition, potentially qualified applicants may be unwilling to respond to blind advertisements, as they can not be certain who will receive their response. Finally, requiring the company's name allows DOL to match the advertisements to the sponsored job opportunity." (AF 1).

The Board issued a Notice of Docketing on October 17, 2008. The Employer filed an appellate brief, which was received by the Board on November 12, 2008. The Employer argued that applicants were not prevented from applying as evidenced by the fact that three resumes had been received. The Employer also argued that matching the advertisement to the sponsored job was not actually an issue, as the recruitment report had identified the exact newspaper and dates of advertisements, and that the Employer had in fact produced documentation of the advertisements and the Daily News affidavit of publication in response to the audit notification. The Employer reiterated its reliance on the Board's decision in *HealthAmerica*, and argued that "one innocent omission should not be the basis for the entire application to crumble."

The CO filed an appellate brief urging that the denial of certification be affirmed. The CO noted that the newspaper advertisement did not include the name of the Employer as required by the regulations, and argued that *HealthAmerica* was distinguishable because it was based on a typographical error in the application, and "not an express failure to follow the regulation governing the placement of an advertisement."

DISCUSSION

The regulation at 20 C.F.R. § 656.17(f)(1) provides that "[a]dvertisements placed in newspapers of general circulation or in professional journals before filing the Application for Permanent Employment Certification must: (1) Name the employer [and] (2) Direct applicants to report or send resumes, as appropriate for the occupation, to the employer…." In the instant case, the Employer's newspaper advertisements did not include its name. Thus, it was clearly in violation of this regulation.

The Employer's argument that applicants were not prevented from applying for the job is not convincing. The issue is not whether applicants were prevented from applying, but whether the advertisement constituted an adequate test of the labor market. As the CO stated in the letter of reconsideration, the company name in the advertisement aides potential applicants to determine whether they would like to apply for the advertised position. Moreover, potential applicants may be unwilling to respond to blind advertisements. Thus, although applicants may not have been prevented from applying, they also may have decided not apply because they did not know what company was advertising the job. The mere inclusion of the town in which the Employer was located and its fax number does not remedy this failure.[2] The advertisements may have been partly effective, but the Employer's failure to include its name rendered it impossible to know whether additional applicants might have applied if the name had been included in the advertisements.

Moreover, we agree with the CO that *HealthAmerica* is distinguishable. In *HealthAmerica*, the CO had cited the Employer for failure to comply with the regulatory requirement of running newspaper advertisements in two Sunday newspaper editions based on the date for the second advertisement listed on the Form 9089. The Employer's motion for reconsideration presented newspaper tear sheets establishing that it had, in

[2] The Employer also raised the question of whether the absence of an employer name in newspaper advertisements actually creates a matching problem for the CO when trying to determine whether the advertisement relates to the application before the CO. Given our ruling that the absence of the name caused uncertainty as to effectiveness of the recruitment effort, however, we decline to rule on the matching issue.

fact, run the second advertisement on Sunday, and that is had merely transposed the date when filling out the Form 9089. The Board in that case held that the CO erred in denying reconsideration. An important element in the Board's decision was the fact that the Employer had been able to document actual compliance with the regulation.

In the instant case, the Employer did not make a simple typographical error on the application. Rather, it failed to run newspaper advertisements in compliance with the applicable regulation. That noncompliance rendered its documentation of recruitment deficient, and it was proper for the CO to deny certification on this basis.

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.