U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 05 January 2009

BALCA Case No.: 2008-PER-00145
ETA Case No.: A-05270-36615

In the Matter of

HEUNG K. CHOE
d/b/a
SENGYO,

Employer,

on behalf of

DAOJI ZHANG,

Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Jeffrey F. Dragon, Esquire
Jeffrey F. Dragon & Associates, P.A.
Cherry Hill, 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, Vittone and Wood**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter involves an appeal of the denial 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 Certifying Officer ("CO") accepted the Employer's labor certification application for processing on September 26, 2005. (AF 1). The Employer, a restaurant specializing in Japanese cuisine, is sponsoring the Alien for a position as a "Specialty Chef." (AF 8, 18). On March 27, 2006, the CO denied the application based on numerous deficiencies. (AF 13-16). For purposes of this appeal, we will focus on only one of the deficiencies – the failure of the Employer to specify the date for expiration of the prevailing wage determination it obtained from the State Workforce Agency ("SWA").[1]

[1] Our review of the appeal in this matter was complicated by a confused set of answers by the Employer on the ETA Form 9089, and by inconsistencies between the record and the CO's determinations. For example, one of the grounds for denial was that the Employer had failed to specify a skill level in Section F-3. Indeed, on the original Form 9089, this Section is blank. In its request for review, the Employer's agent in response to this deficiency wrote "F-3 (4) Skill level: Resource management and technical skills of specialty chef food preparation." (AF 3). In the letter of reconsideration, the CO stated that the Employer failed to provide the skill level in the request for review for Section F-3 in the form of a number, but only wrote "Resource Management and Technical Skills." (AF 1). But the CO only quoted part of the answer, apparently not recognizing that the Employer had written "(4)." We find that the Employer was asserting that the skill level was "4."

Similarly, the CO stated in the denial of reconsideration that the Employer had not specifically addressed the issue of the Alien's qualifications. (AF 1). But the Employer in fact did address the issue, writing that the Alien "is a trained Specialty Chef by education and experience, who has worked in the position described for several years." (AF 4). Nowhere in the Appeal File did the CO state exactly why she found that the Alien did not meet the Employer's requirements for the job.

The CO also found that Employer had given an "incomplete" answer to the closing of the SWA Job Order. On the original handwritten application, the Employer wrote "NONE" for the end date of the SWA job order. (AF 20). The keyboarded version is merely blank at Section I-c-7. In its request for review, the Employer's agent provided the date "2006" for the end date. The CO's letter of reconsideration, however, stated that the Employer provided the date "2004" for the end date. So the CO got the year stated in the letter requesting review wrong. However, the CO was correct in concluding that answering Section I-c-7 with a year rather than a month, day and year, is an incomplete response to the question. We note that the Form 9089 instructions are unambiguous about the format of the answer. The

The Employer's application was handwritten and signed on September September 21, 2005. (AF 17-25). It appears that the CO's staff later keyboarded the application into the Office of Foreign Labor Certification's electronic case management system. (AF 26-35). The Employer's original application stated in response to Section F-7, which asked for the determination date for the prevailing wage determination it obtained from the SWA, "November 2003." Section F-8, which asked for the expiration date of the Employer's prevailing wage determination, was answered "N/A." (AF 18). The keyboarded version is merely blank for this section. (AF 27). The CO's March 27, 2006, denial letter found that a selection had not been made for the prevailing wage expiration date. (AF 15).

The Employer's attorney filed a request for review, received by the CO on April 27, 2006. (AF 3-11). The Employer's attorney indicated that he had requested that the Employer address the deficiencies, but having no record of a response, he would "attempt to address several of the *reasons for denial* … and request that the Application be reviewed in view of the totality of the information supplied." (AF 3) (emphasis as in original). The Employer's attorney provided answers for a number of the omissions from the ETA Form 9089 (AF 3-4), and attached several documents. (AF 5-11). In regard to the expiration date for the prevailing wage determination, the Employer's attorney provided the date "2004." (AF 3).

In a letter of reconsideration dated August 22, 2008 the CO found that the Employer had successfully answered several of the deficiencies, but nonetheless affirmed the denial of certification for a number of reasons. (AF 1-2). In regard to the issue concerning the expiration date of the prevailing wage determination, the CO found that

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instructions state: "Enter the end date for the State Workforce Agency job order. Enter the date in mm/dd/yyyy format." (www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf).

"2004" was an inadequate response for Section F-8, which requires a month and day in addition to a year.

The Board docketed the appeal on August 25, 2008. By letter postmarked October 15, 2008, the CO filed an appellate brief urging affirmance of the denial because the application was incomplete. The Employer filed a statement of intent to proceed with the appeal, but did not file a brief.

DISCUSSION

The instructions for ETA Form 9089 expressly state in regard to Section F-8: "Enter the expiration date of the validity period of the PWD received from the appropriate SWA. Enter the date in *mm/dd/yyyy* format."[2]

The PERM regulations provide that "[t]he employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer." 20 C.F.R. § 656.24(a). The regulations further provide that "[t]he SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA."

The Employment and Training Administration ("ETA") explained the reason the application needed to specify the validity period of the prevailing wage determination in the notice of proposed rulemaking for the PERM regulations:

2. Validity Period of PWD

[2] www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf

> We are proposing that the SWA must specify the validity period of PWD on the PWDR form, which in no event shall be less than 90 days or more than 1 year from the determination date entered on the PWDR. Employers filing LCA's under the H-1B program must file their labor condition application within the validity period. Since employers filing applications for permanent labor certification can begin the required recruitment steps required under the regulations 180 days before filing their applications, they must initiate at least one of the recruitment steps required for a professional or nonprofessional occupation within the validity period of the PWD to rely on the determination issued by the SWA.

Employment and Training Administration, Proposed Rule, Implementation of New System, *Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 67 Fed. Reg. 30466, 30478 (May 6, 2002). The final rule made no substantive changes with respect to validity dates as proposed in the notice of proposed rulemaking. There, ETA wrote that "[t]he SWA must specify the validity of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the date of the determination. Employers are required to file their applications or commence the required pre-filing recruitment within the validity period specified by the SWA." Employment and Training Administration, Final Rule, *Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 69 Fed. Reg. 77326, 77365 (Dec. 27, 2004).

In the instant case, the application indicated that the prevailing wage determination was dated November 2003. The application was signed on September 21, 2005, and the CO accepted the application for processing on September 26, 2005. Thus, it was possible that the prevailing wage determination was no longer valid when the Employer filed the application or initiated the requisite recruitment steps. The SWA's prevailing wage determination was required by regulation to specify its validity period, and therefore the Employer's answer to Section F-8 of "N/A" was nonsensical. Moreover, the Employer's provision of the year 2004 in the request for review was too imprecise to permit the CO to assess whether the Employer's prevailing wage determination was valid within the time parameters of the PERM regulations. Consequently, we affirm the CO's denial of certification.

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:

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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.