

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: 09 April 2009

BALCA Case No.: 2008-PER-00192

ETA Case No.: A-06021-77635

In the Matter of:

DAVID W. JACKSON,
Employer,

on behalf of

ROSEMARIE PARUNGAO MANALANG,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Delfin M. Castro, Esquire
Bowie, Maryland
For the Employer and the Alien

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: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises 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

In the instant case, the Employer filed, by mail, an ETA Form 9089 application for permanent alien employment for the position of "Cook, Private Household." (AF 26-38). The mailed-in application indicated that the prevailing wage offer was based on an "Employer Conducted Survey" (AF 27, ETA Form 9089, Section F-6) but failed to identify a "Determination date" (AF 27, ETA Form 9089, Section F-7) or an "Expiration date" (AF 27, ETA Form 9089, Section F-8) for the wage determination.¹ The Certifying Officer ("CO") accepted the application for processing on January 6, 2006.

On April 14, 2006, the CO denied the application on several grounds. (AF 13-15). One of the grounds was the failure of the Employer to complete Section F-8.²

By submission with cover letter dated May 10, 2006, and received by the CO on May 16, 2006, the Employer requested reconsideration. (AF 3-12). The Employer stated:

Prevailing Wage: We indicated in our application that our source of the prevailing wage information is the result of our survey, and not based on OES. The survey was made among several employer whom we are aware of as employing private home cooks with similar qualifications and doing similar duties. We decided to adopt this basis inasmuch as we did not receive any response to our prevailing wage request that we faxed to the Maryland DLLR, Division of Workforce Development on September 28, 2005[.]

¹ See also AF 17, which is apparently the version of the Form 9089 keyboarded into the PERM system by the CO's office.

² The other grounds for denial were later withdrawn by the CO, and are not in contention on appeal.

(AF 6). Attached to the motion for reconsideration was a new version of the Form 9089, on which was typed at Section F-8 “PW based on Employer Conducted Survey.” (AF 8). The Employer also attached a copy of a September 28, 2005 fax from the Employer’s attorney to the SWA requesting a prevailing wage determination. (AF 11-12).

On reconsideration, the CO denied the application because the Employer “failed to identify the prevailing wage expiration date.” (AF 1).

On appeal, the Employer filed a Statement of Intent to Proceed with the appeal, but did not file a statement of position or an appellate brief. The CO filed an appellate brief explaining that even when an employer bases the prevailing wage determination on its own survey, the regulations require that the survey be submitted to the SWA, which is responsible for determining whether employer’s survey was acceptable and issuing the prevailing wage determination.

DISCUSSION

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.” 20 C.F.R. § 656.40(c). *See Heung K. Choe*, 2008-PER-145 (Jan. 5, 2009). The instructions for ETA Form 9089 direct in regard to Section F-8 that the Employer is to enter the expiration date of the validity period of the prevailing wage determination received from the appropriate SWA.³

³ www.foreignlaborcert.dol.gov/pdf/9089inst.pdf.

Completion of ETA Form 9089, Section F-8, which requires an employer to report the expiration date for the prevailing wage determination, is essential for the CO's review of the application to determine whether the application was filed, or the required pre-filing recruitment occurred, within the validity period of the prevailing wage determination. In the instant case, the Employer did not report an expiration date for the prevailing wage determination, rendering it impossible for the CO to make a determination on the validity of the prevailing wage determination for the application.

The fact that the Employer in this case was relying on its own survey does not excuse the failure to complete Section F-8. Where an employer intends to use its own survey for determination of the prevailing wage, it must submit the survey to the SWA "with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the SWA to make a determination about the adequacy of the [survey]." 20 C.F.R. § 656.40(g)(2). In other words, an employer can only request that the SWA use its survey for the prevailing wage determination, and must support that request with sufficient information to permit the SWA to find that the survey is valid. It is still the SWA, and not the employer, that makes the prevailing wage determination. If the employer disagrees with the SWA's determination, the regulations specify a procedure for the employer to provide supplemental information to the SWA, 20 C.F.R. § 656.40(h), or to take an appeal to the CO. 20 C.F.R. § 656.41. An employer which goes forward with the application without following this regulatory procedure is guaranteed to have its application rejected. That is what the Employer did in this case, and the CO's denial of certification was inevitable.

The Employer in this case maintained that it went ahead with its own survey information because the SWA failed to respond to its request for a prevailing wage determination. Going ahead with its own survey without validation of that survey by the SWA, however, was not a solution to lack of timely assistance from the SWA.

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.