



Issue Date: 27 August 2008

BALCA Case No.: 2008-PER-00062
ETA Case No.: C-05350-65349

In the Matter of:

NORTH FOREST INDEPENDENT SCHOOL DISTRICT,
Employer,

on behalf of

MAMTA VERMA,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Martin R.G. Marasigan, Esquire
Houston, Texas
For the Employer

Gary M. Buff, Associate Solicitor
R. Peter Nessen, 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 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.¹ In this case, the Employer – an independent school district – filed a pre-PERM ETA Form 750A application for permanent alien labor certification on October 20, 2004 for the position of Middle School Teacher. (AF 66-71). The work location was East Houston Intermediate School, 8115 E. Houston Rd., Houston Texas 77028. The job duties were:

[T]each middle school students social, academic and motor skills inclusive of course preparation in accordance with State and District Guidelines; lecture, demonstrate and use audio-visual aids to present subject matter to the class; prepare, administer and correct achievement tests and other measures of class performance and subsequently records the results; assign lessons, correct papers and hear oral presentation; attend regular staff meetings and professional development activities; meet with students and parents as required; participate in school wide and district wide activities.

(AF 67).

On January 11, 2006, the Employer filed a Form 9089 under PERM for the same Alien for the position of Elementary School Teacher. (AF 51-65). The work location was Hilliard Elementary School, 6511 N. Wayside Drive, Houston, Texas 77028. The job duties were:

Teach elementary school students academic, social and motor skills inclusive of the preparation of course objectives and outlines for course of study following State and District Guidelines; lecture, demonstrate and use audio-visual aids to present subject matter to the class; prepare, administer and correct achievement tests and presentations; attend regular staff meetings and professional development activities; meet with students and parents as required; participate in school-wide and district-wide activities.

¹ The Final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 77386, and are applicable to permanent labor certification applications filed on or after March 28, 2005. The regulations were amended on June 21, 2006, 71 Fed. Reg. 35522, and May 17, 2007, 72 Fed. Reg. 28903.

(AF 61). The Employer noted on the ETA Form 9089 that it was seeking to utilize the filing date from the previous ETA Form 750, and that the previous filing date was October 20, 2004. (AF 51).

On May 13, 2006, the Dallas Backlog Elimination Center (BEC) sent the Employer a letter directing that the Employer inform the BEC within 45 days which of several options it wished to pursue in continuation of the pre-PERM application. (AF 49).

By letter dated May 30, 2006, the Employer sent a letter to the BEC withdrawing 20 pre-PERM applications, one of which was the application at issue in this appeal, for the reason that the applications had also been filed under PERM and were still pending. (AF 45-46).²

On January 18, 2007, the Chicago Processing Center issued a letter granting certification on the PERM application. (AF 47). The CO set the date of acceptance for processing as January 11, 2006.

By letter dated January 29, 2007, the Employer's attorney sent a letter to the Chicago Processing Center requesting that the CO reconsider the decision not to use the earlier pre-PERM filing date on the approved application. (AF 14-15). The Employer noted that this application (and two others) had been part of a batch of applications, and that all except three had been given the pre-PERM filing date. The Employer speculated that the CO had made a clerical error.

On December 10, 2007, the CO sent the Employer a request for additional information regarding the motion to reconsider. (Attachment I to Employer's Appellate Brief). The Employer provided the information in a submission dated December 12, 2007. (Attachment J to Employer's Appellate Brief).

² On July 20, 2006, the BEC closed the pre-PERM application on the ground that a timely response had not been made to the May 13, 2006 45-day letter. (AF 48).

The CO issued a formal ruling on the motion to reconsider on May 6, 2008. (AF 1-2). The CO denied the motion because the job descriptions in the ETA 750 and the ETA 9089 were not identical. Under the PERM regulation at 20 C.F.R. § 656.17(d)(4), the job descriptions must be identical in order for the Employer to retain the filing date from an earlier pending pre-PERM application. The CO pointed out that the job title, job description, and job location were all different. The CO's letter also stated: "For the reason cited ... above, the Certifying Officer is upholding its decision to deny the application."

The CO then forwarded the matter to BALCA for review. The Board docketed the appeal on May 13, 2008, and issued a Notice of Docketing on May 14, 2008. The Board received an appellate brief from the Employer on June 30, 2008. The Employer argued that it was unfair for the CO to turn a motion for reconsideration of the assigned filing date on an approved application into a denial of the application. The Employer argued that middle school teachers are functionally identical to elementary school teachers, and therefore the CO erred in his determination of the filing date. The Employer's argument was based on the fact that the Dictionary of Occupation Titles does not contain a definition separately covering a middle school teacher, and that its job descriptions were identical except that Middle School Teachers teach middle school students while Elementary School Teachers teach elementary students. The Employer also noted that the Occupational Outlook Handbook (2008-09 Edition), places Elementary and Middle School Teachers under SOC Code 25-2020, while Secondary Teachers are under SOC Code 25-2030.

The Board received an appellate brief from the CO on July 1, 2008. The CO argued that there were obvious differences in the job title, job description, and job location, and therefore BALCA must affirm the CO's decision to use January 11, 2006 as the filing date.

DISCUSSION

Issue on Appeal

The CO's letter denying reconsideration of the filing date assignment concluded by stating that the application had been denied. In reviewing the Appeal File, however, it is clear that this was boilerplate language that was not applicable to the issue before the CO, which was solely whether the CO had determined the correct filing date on an approved application. The CO does not argue in its appellate brief that the application had been denied, but only that the filing date had been correctly determined. Accordingly, we find that the sentence in the CO's letter denying reconsideration stating that the application had been denied was clearly in error, and that there had been no intent to "de-certify" the application. We find that the only issue on appeal is whether the CO correctly determined the filing date for the PERM application.

Requirement That Applications Be Identical in Order to Retain pre-PERM Priority Date

The regulation at 20 C.F.R. § 656.17(d) clearly supports the CO's decision not to retain the pre-PERM priority date. Section 656.17(d) provides:

(d) *Refiling Procedures.* (1) Employers that filed applications under the regulations in effect prior to March 28, 2005, may, if a job order has not been placed pursuant to those regulations, refile such applications under this part without loss of the original filing date by:

(i) Submitting an application for an identical job opportunity after complying with all of the filing and recruiting requirements of this part 656; and

(ii) Withdrawing the original application in accordance with ETA procedures. Filing an application under this part stating the employer's desire to use the original filing date will be deemed to be a withdrawal of the original application. The original

application will be deemed withdrawn regardless of whether the employer's request to use the original filing date is approved.

(2) Refilings under this paragraph must be made within 210 days of the withdrawal of the prior application.

(3) A copy of the original application, including amendments, must be sent to the appropriate ETA application processing center when requested by the CO under § 656.20.

(4) For purposes of paragraph (d)(1)(i) of this section, a job opportunity shall be considered identical if the employer, alien, job title, job location, job requirements, and job description are the same as those stated in the original application filed under the regulations in effect prior to March 28, 2005. For purposes of determining identical job opportunity, the original application includes all accepted amendments up to the time the application was withdrawn, including amendments in response to an assessment notice from a SWA pursuant to § 656.21(h) of the regulations in effect prior to March 28, 2005.

In the instant case, the Employer changed the job title from Middle School Teacher to Elementary School Teacher. The job location was changed from the East Houston Intermediate School to the Hilliard Elementary School – schools with different street addresses. The job description was changed to refer to an elementary school teacher instead of a middle school teacher.

The Employer did not address in its motion for reconsideration or in its appellate brief the fact that the job location had changed. For that reason alone, the CO was correct in finding that the applications were not identical.

We also affirm the CO's finding that the job title and job description were not identical based on the distinction between an elementary school teacher and a middle school teacher. It is true as the Employer argued in its appellate brief that the SOC Coding system lumps Elementary School Teachers and Middle School Teachers into the broad occupational code at 25-2020, while Secondary School Teachers are broadly categorized into the code at 25-2030. However, the broad occupational code at 25-2020 contains a more detailed breakdown of "25-2021 Elementary School Teachers, Except

Special Education” and “25-2022 Middle School Teachers, Except Special and Vocational Education.” (www.bls.gov/soc/soc_h2c0.htm). Code 25-2021 describes the job as “Teach pupils in public or private schools at the elementary level basic academic, social, and other formative skills.” Code 25-2022 describes the job as “Teach students in public or private schools in one or more subjects at the middle, intermediate, or junior high level, which falls between elementary and senior high school as defined by applicable State laws and regulations.”

The Occupational Outlook Handbook (2008-09 Ed.) describes an Elementary School Teacher as specializing in early childhood development, and notes that most such teachers “instruct one class of children in several subjects.” Middle School teachers, in contrast, delve more deeply into subjects introduced in elementary school and specialize in a specific subject, such as English, Spanish, mathematics, history or biology, and may teach career oriented subjects.³ (www.bls.gov/oco/pdf/ocos069.pdf).

Thus, although the functions of an Elementary School Teacher and a Middle School Teacher may be similar, the Employer has not presented a convincing case that they are identical, notwithstanding the similarity of the job descriptions in the ETA Form 750 and Form 9089.

Because the job title, job description and job locations were not identical, we find that the CO correctly determined that the filing date for the PERM application was the date that the Form 9089 was accepted for processing rather than the filing date of the pre-PERM application.

³ The Occupational Outlook Handbook also notes that different jurisdictions may have different licensing requirements for teachers depending on the grades taught. The Appeal File in this case, however, contains no information on what the licensing requirements are in Texas.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's determination of the filing date for the approved PERM labor certification in the above-captioned matter is hereby **AFFIRMED**. **IT IS FURTHER ORDERED** that the portion of the Certifying Officer's letter denying reconsideration stating that the application had been denied is hereby **VACATED**.

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.