**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 27 August 2008**

**BALCA Case No.: 2008-INA-00013**
ETA Case No.: D-05178-85629

*In the Matter of:*

**YUJIN S & T AMERICA, INC.,**
*Employer,*

*on behalf of*

**RYEO OG LEE**
*Alien.*

Appearance: Mark Loukides, Esquire
John K. Kim, Esquire
Law Offices of Loukides & Associates
Garden Grove, California
*For the Employer*

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center[1]

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

**JOHN M. VITTONE**
Chief Administrative Law Judge

## DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification.

[1] The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about this application should be directed to the Chicago Processing Center.

Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[2] This decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

## STATEMENT OF THE CASE

On February 25, 2003, the Employer – a garment manufacturer and wholesaler – filed an application for labor certification on behalf of the Alien to fill the position of Fabric and Apparel Patternmaker. (AF 53)[3]. In its application, the Employer described the duties of the position as "draping; flat pattern design; computer grading and marking; sewing; handknitting; life drawing; sportswear design; estimate yardage of garment." The Employer required two years of experience in the job offered. (AF 53).

In a Notice of Findings (NOF) issued June 14, 2007, the CO found that the Employer's advertisement did not meet the criteria for certification because the advertisement did not state the minimum job requirements that appeared on Form ETA 750, Part A. Specifically, the CO noted that on the form the job requirements included two years of experience with no formal education required. The advertisement, however, listed the requirements for the job opportunity as "2 years exp/AA degree." The CO stated that is unduly restrictive to advertise for job requirements in excess of those that were specified on the original application for alien employment.

The CO stated that in rebuttal to the NOF, the Employer was required to provide a copy of the advertisement and internal posting notice that was placed during the 30-day

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[3] In this decision, AF is an abbreviation for Appeal File.

recruitment period. The CO further stated that the advertisement must reflect the same job requirements that were stated by the Employer on ETA Form 750-A. (AF 19-22).

The Employer submitted rebuttal on July 12, 2007. (AF 10). In its rebuttal, the Employer's representative stated that the additional education requirement included in the advertisement was due to a clerical error at the Employer's law firm. To rectify this mistake, the law firm drafted another advertisement and ran the new advertisement for three days in June, 2007. The new advertisement did not include any requirements for formal education or an AA degree. A tear-sheet for an advertisement on June 22, 2007 was submitted. In addition, the Employer submitted a revised written report regarding the response received to the posting and new advertisement. In this revised report, Employer stated that the advertisements were run June 22, 23 and 24, 2007 in the Register and no applicants responded. (AF 13, 15).

The CO issued a Final Determination on July 24, 2007. (AF 7-9). In the Final Determination the CO found that the Employer's rebuttal evidence did not correct the deficiencies raised in the NOF. Specifically, the CO stated that the Employer re-advertised the position without first obtaining permission or further instructions. The CO stated that the NOF did not offer the option of re-advertisement to Employer. Rather, the only acceptable rebuttal to the NOF was to submit proof that the Employer followed the instructions issued in the original Recruitment Instructions letter. Since the evidence submitted was deemed insufficient to rebut the deficiencies outlined in the NOF, the application for labor certification was denied.

By letter dated August 22, 2007, and by letter dated August 27, 2007, the Employer requested reconsideration, or in the alternative, BALCA review. (AF 1-6). In its request for review, the Employer argued that the NOF did not state that permission to re-advertise was required, nor did it state when or how to obtain permission to re-advertise.

BALCA docketed the appeal on October 15, 2007, and issued a Notice of Docketing on October 24, 2007. Neither the CO nor the Employer filed appellate briefs.

## DISCUSSION

Pursuant to the regulation at 20 C.F.R. § 656.25(c), if a CO does not grant certification, an NOF must be issued which states:

1. the date on which the NOF was issued;
2. the specific grounds for issuing the NOF; and
3. the date by which a rebuttal must be made.

The NOF must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. *Downey Orthopedic Medical Group*, 1987-INA-674 (Mar. 16, 1988) (*en banc*). An adequate notice of deficiencies should identify the section or subsection allegedly violated, the nature of the violation, the evidence supporting the challenge, and instructions for rebutting or curing the violation.

In this case, the NOF listed the sections allegedly violated, the nature of the violation, and the evidence supporting the challenge. The NOF, however, included only one set of instructions for rebutting the violation – to submit evidence contradicting the findings. In this case, however, the Employer admitted that the alleged violation had occurred. That is, the Employer agreed the newspaper advertisement erroneously included an education requirement which was not included in the requirements listed in form ETA 750-A. The NOF did not include any instructions for curing the violation if the Employer agreed such a violation had occurred. More specifically stated, the NOF did not include any instructions to the Employer if the Employer agreed to cure the defect by re-advertising the position. The Board's caselaw, however, permits an error in

recruitment to be cured, if appropriate, by re-advertisement during the rebuttal period. *See, e.g., Altair Engineering, Inc.*, 1988-INA-61 (Apr. 19, 1988).

While the Employer did not coordinate the re-advertisement and job posting with the CO or local employment office, the Employer's re-advertisement as submitted in its rebuttal evidence establishes the Employer's intention to correct the advertisement deficiencies noted in the NOF. Under these circumstances, the Final Determination was wrongly issued, where the NOF failed to include instructions on how to re-advertise. Rather, the CO should have issued a second NOF clarifying what actions the Employer could take to cure the admitted defects. *Fepco Tool & Supply, Inc.*, 1992-INA-287 (May 12, 1994).

In summary, the Employer's re-advertisement subsequent to the NOF indicated its intention to correct the defects in the initial advertisement. This matter will be remanded to the CO to instruct the Employer regarding the proper procedures to follow to re-advertise.

## ORDER

The Final Determination denying labor certification is **VACATED** and this matter is **REMANDED** to the Certifying Office.

For the panel:

**A**

**JOHN M. VITTONE**
Chief Administrative Law Judge

**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.