U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 October 2015

BALCA Case No.: 2012-PER-00292
ETA Case No.: A-09169-50949

In the Matter of:

GUILBERT TEX, INC.,
Employer

on behalf of

PARK, JONG-AH,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Jim Kahng, Esq.
Law Offices of Jim Kahng
Torrance, CA
For the Employer

Gary M. Buff, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **ROMERO, KENNINGTON** and **ROSENOW**
Administrative Law Judges

PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

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 ("C.F.R.").

BACKGROUND

On June 22, 2009, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Administrative Assistant" (AF 21-30).[1] The CO denied certification on March 25, 2010 because the prevailing wage validity period, as stated on the ETA Form 9089, is less than the minimum 90 days, specifically from April 4, 2009 to July 1, 2009, required by 20 C.F.R. § 656.40(c). (AF 18-20).

Employer requested reconsideration on April 20, 2010 arguing harmless error when it entered the incorrect expiration date of the prevailing wage validity period. Employer argues the PWD issued by the State Workforce Agency did not include specific validity dates, only indicated a validity period of "90 days from the date of this determination." (AF 2-17).

The CO denied the request for reconsideration and forwarded the case to BALCA on October 27, 2011. In its denial of reconsideration, the CO noted that the burden is on Employer to ensure the application is complete and accurate before filing and that pursuant to 20 C.F.R. Section 656.11(b), any "requests for modifications to an application will not be accepted for applications submitted after July 16, 2007." (AF 1).

BALCA issued a Notice of Docketing on February 3, 2012. The Employer filed a Statement of Intent to Proceed on February 9, 2012 and an appellate brief on March 15, 2012. In its brief, Employer argues it made a harmless typographical error when filling out Form 9089, mistaking the expiration date of the prevailing wage validity period. Also, Employer argues that supporting documentation, specifically the Prevailing Wage Request from the State Workforce Agency with the accurate dates, existed at the time of filing and thus a simple correction to the Form is permissible. The CO did not file a Statement of Position.

DISCUSSION

PERM is an exacting process, designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *HealthAmerica*, 2006-PER-1, slip op. at 19 (July 18, 2006) (en banc). An employer bears the burden of proof to establish eligibility for labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b).

The applicable regulation in this case provides:

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

> (c) *Validity period*. The National Processing Center 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 prevailing wage rate provided by the NPC, employers must file their applications or begin the recruitment period required by §§ 656.17(e) or 656.21 of this part within the validity period specified by the NPC.

20 C.F.R. § 656.40(c)(2009).[2]

The PERM regulations require an employer seeking to apply for permanent labor certification on behalf of an alien to file an ETA Form 9089. 20 C.F.R. § 656.17(a). The regulations provide that incomplete applications will be denied. 20 C.F.R. § 656.17(a). Additionally, the regulations provide that once an application is filed, requests for modifications to the application will not be accepted. 20 C.F.R. § 656.11(b).[3] For applications submitted after July 16, 2007, a request for reconsideration submitted on behalf of an application may include only documentation received from the employer in response to a request from the CO or documentation the employer did not have an opportunity to present to the CO but existed at the time the application was filed. 20 C.F.R. § 656.24(g)(2).

[2] In 2009, the cross-reference to refiling was changed to a cross-reference to the regulation governing pre-filing recruitment without comment. *See* 20 C.F.R. Parts 655 and 656, Final Rule, 73 Fed. Reg. 78020, 78068-69 (Dec. 19, 2008); 20 C.F.R. Parts 655 and 656 Proposed Rule, 73 Fed. Reg. 29942, 29946-47 (May 22, 2008). Before the change, the applicable regulation provided:

> (c) *Validity period*. The 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.

[3] Employer cites *HealthAmerica* for the proposition that the clerical mistake on its application is harmless error and that it really did comply with the regulations. However, following the decision in *HealthAmerica*, the Employment and Training Administration ("ETA") amended the regulations to prevent an employer from modifying its application. 20 C.F.R. § 656.11(b); ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives for Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27916 (May 17, 2007) ("To the extent the BALCA favored allowing the employer in *HealthAmerica* to present evidence that effectively change the response to a question on the application, the BALCA's approach is inconsistent with the Department's objective and the NPRM proposal that applications cannot be changed or modified after submission."). The regulatory history succinctly explains that ETA considered the costs associated with permitting employers the opportunity to modify their applications and determined that it would be a significant and costly resource drain on the PERM case management system and staff. 72 Fed. Reg. at 27918. Additionally, ETA rejected the argument that typographical errors were immaterial, noting that "typographical or similar errors are not immaterial if they cause an application to be denied based on regulatory requirements." 72 Fed. Reg. at 27917. Employer argues that the Final Rule permits corrections to denied applications where the denial was based on a typographical error and the correction is supported by documentation that existed at the time the Application was filed. *Gunnels*, 2010-PER-00628 (Nov. 16, 2010). However, while the error may have been supported by documentation at the time of filing, the burden remains on Employer to submit a complete and accurate form, which Employer did not do in this case. In this instance, the CO decided that it would not permit Employer to correct the error on the Form and in the interest of administrative efficiency, we affirm the denial.

Employer improperly completed ETA Form 9089, noting the prevailing wage validity period went from April 10, 2009 through July 1, 2009, which is a period less than ninety days. The CO's above reason for denial is valid and supported by the record.[4]

Accordingly, **IT IS ORDERED** that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel

PATRICK M. ROSENOW
Administrative Law Judge

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

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.

[4] Employers are regularly frustrated by this Agency regulatory policy that they believe values form over substance. Agency regulations and its interpretations of those regulations clearly establish a public policy determination that even an obviously *de minimis* procedural or clerical error that has no meaningful bearing on the substantive validity of the application is still grounds for denial. The Agency explains that it must take that approach because of its limited resources. The answer to this Employer frustration is to encourage a change in the Agency public policy.