

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 January 2009

BALCA Case No.: 2008-PER-00132

ETA Case No.: A-06213-44771

In the Matter of

JJR MEXICAN GRILL, INC.

d/b/a

JJ CAFÉ,

Employer,

on behalf of

CATALINA MOLINA MARTINEZ,

Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: George Giosmas, Esquire
Hollywood, Florida
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 by an Employment and Training Administration, Office of Foreign Labor Certification, Certifying Officer (“CO”) 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 CO accepted the Employer’s labor certification application for processing on July 7, 2006. (AF 1). The Employer is sponsoring the Alien for a position as a Restaurant Manager. (AF 8). The Employer indicated in the application that this was not a professional occupation. (AF 10). The CO denied the application because the application did not indicate that a job order was placed with the State Workforce Agency (“SWA”) serving the area of intended employment for a period of 30 days. (AF 21-23). The Employer sought reconsideration on the ground that it placed a new advertisement with the SWA from November 7, 2006 to December 8, 2006. (AF 5). The CO denied reconsideration, holding that a new job order, placed after the application had been filed, could only be used to support a subsequent filing. (AF 1-2).

The Board issued a Notice of Docketing on August 20, 2008. The Employer filed a Statement of Intent to Proceed with the appeal, but did not file an appellate brief. The CO filed an appellate brief urging affirmance of the denial.

DISCUSSION

The PERM regulations provide that if the application is for a nonprofessional occupation, the employer must at a minimum place a job order and two newspaper advertisements within 6 months of filing the application. 20 C.F.R. § 656.71(e)(2). The job order must be placed with the SWA serving the area of intended employment for a period of 30 days. 20 C.F.R. § 656.71(e)(2)(i).

In the instant case, the Employer's job order was originally placed from February 9, 2006 to March 9, 2006. (AF 27). This is less than 30 days. Accordingly, the Employer's job order was not long enough in duration.

The Employer's motion for reconsideration was grounded in the placement of a new job order. But, as the CO stated in the letter denying reconsideration, the application must be supported by a job order within 6 months of the filing of the application. The Employer's placement of a job order after receiving the denial determination could be used to support a new application, but it did not cure the defect with the application as submitted. Accordingly, the CO properly denied 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:

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.