U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 January 2009

BALCA Case No.: 2008-PER-00128
ETA Case No.: C-07107-28558

In the Matter of

FRANCO'S CONSTRUCTION,
Employer,

on behalf of

MARIO VIZCARRA ORTEGA,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Ismael Franco, Owner
Pro se for the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones, 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 April 16, 2007. (AF 1). The Employer is sponsoring the Alien for a position as a "Framer." (AF 10). On April 18, 2007, the CO issued a denial letter based on the Employer's failure to make selections for eight sections of the ETA Form 9089. The CO also based the denial on the Employer's use of an Occupational Employment Statistics ("OES") prevailing wage issued prior to March 8, 2005. (AF 6-8).

On May 7, 2007, the CO received a request for review from the Employer's owner. (AF 4-5). The Employer supplied information regarding the omitted selections, and attached a copy of a January 23, 2007 OES prevailing wage report.

On July 11, 2008, the CO issued a letter of reconsideration. (AF 1-2). The CO accepted the Employer's reasoning as to several of the omissions, but found that the Employer did not cure five deficiencies.

First, the Employer had left the Form 9089 blank at Section I-6. That section asks for the start date for the State Workforce Agency job order. In its request for review, the Employer stated that the answer to Section I-6 was "none" because "[t]his was an on-the-job-site hire." The CO rejected the Employer's reasoning, noting that under the regulations a 30-day SWA job order is a mandatory recruitment step.

Second, the Employer in its application had not answered Section I-8, which asks whether a Sunday edition of a newspaper was available in the area of intended employment. In its request for review, the Employer stated that the answer to Section 1-8 was "none" because "This was an on-the-job-site hire." The CO rejected this reasoning,

noting that under the regulations an employer is required to place two print advertisements in a Sunday edition unless the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition.

The third, fourth and fifth deficiencies were all related to the Employer's failure to run Sunday print advertisements on the theory that such advertisements were not applicable because the Employer had made an on-the-job-site hire. The Employer had not provided the name of the newspaper in which the first advertisement should have been run (Section I-9), the date of such an advertisement (Section I-10), or the name of the newspaper for the second advertisement (Section I-11). Again, the CO found that the newspaper advertising was mandatory.

The Board issued a Notice of Docketing on August 1, 2008. The Employer's owner filed a statement stating that the Alien is a very good employee and that he would like to keep him. The CO filed an appellate brief urging that denial of certification be affirmed.

DISCUSSION

The regulation at 20 C.F.R. § 656.17(e)(2) provides that "[i]f 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." Nothing in the regulations suggests that there is an "on-the-job-hire" exception to these mandatory steps to support a PERM labor certification application. Since the Employer did not place a job order or conduct any newspaper advertising, the CO correctly 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.