



Issue Date: 30 March 2010

BALCA No.: 2009-PER-00337
ETA No.: A-07025-04077

In the Matter of:

NATURAL NATURE INC.,
Employer,

on behalf of

LUIS FABIAN SIGUENCIA SIGUENICA,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Diogenes Rodriguez
American Immigration Federation
New York, New York
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: Colwell, Johnson and Wood
Administrative Law Judges

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 governing

permanent alien labor certification found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).

BACKGROUND

On December 18, 2006, the Certifying Officer (“CO”) accepted for processing the Employer’s Form 9089 application for permanent alien labor certification for the nonprofessional position of Construction Laborer. (AF 45-56).¹ In the application, the Employer indicated that it ran its first newspaper advertisement in the Star Ledger on October 29, 2006, and its second newspaper advertisement in that same newspaper on November 5, 2006. (AF 49-50).

On May 31, 2007, the CO denied certification on the ground that the Employer could not be verified as a bona fide business entity. (AF 41-43). By cover letter dated June 12, 2007, the Employer requested review of the denial, and presented documentation to show that it was a bona fide business entity. (AF 32-39).

In response, the CO issued an Audit Notification on February 4, 2009 instructing the Employer to submit certain specified documentation, including documentation of the recruitment. (AF 13-15).² The Employer filed an Audit Reply under cover letter dated February 11, 2009. (AF 11-31). Included with the reply was a copy of an October 20, 2006 letter to The Star Ledger, Classified Ads department in payment for “advertisement # 2008373.” The letter requested that the advertisement be placed on October 29, 2006 and November 5, 2006, and requested provision of tear sheets of publication to the Employer’s representative upon placement of the advertisements. (AF 29). A copy of a check made out to the Star Ledger was attached.

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

² The issue of the Employer’s bona fides as a business entity was not mentioned again by the CO. Accordingly, we find that it is not before the Board on appeal.

On March 19, 2009, the CO issued a letter denying certification on the ground that the Employer failed to provide proof of its print advertisements. (AF 3-5).

Under cover letter dated April 10, 2009, the Employer requested review of the denial, attaching thereto copies of newspaper classifieds. (AF 2-10). The Employer's representative stated:

The copies were obtained from the New Jersey public library files and we were unable to copy the whole page, including date of publication. Star Ledger's Affidavit of Publications Department ... was unable to provide us with an affidavit of publication due to its oldness, for its [sic] no longer in the system. We pray that you accept this evidence.

(AF 2). The dates of publication are handwritten on the newspaper photocopies. (AF 8-9).

On May 13, 2009, the CO issued a letter of reconsideration affirming the denial of certification. (AF 1). Specifically, the CO stated: "Since the employer did not provide original tear sheets, proof of publication from the Star Ledger or copies of advertisements with the name and date of the newspaper, the Certifying Officer has determined [that the] reason for denial [was] valid." (AF 1). The CO cited 20 C.F.R. § 656.20(b) for the proposition that "a substantial failure by the employer to provide required documentation will result in that application being denied." (AF 1). The CO then forwarded an Appeal File to the Board of Alien Labor Certification Appeals ("BALCA" or "the Board").

On appeal, the Employer provided original tear sheets provided from The Star Ledger, which appear to confirm that the advertisements were run on the dates stated in the Form 9089. Attached e-mail correspondence indicates that a specialist from The Star Ledger was required to be able to pull PDF copies of tear sheets for publications dating from 2006.

The CO's position on appeal is that the Employer failed to provide the complete documentation requested in the audit letter, and that such a failure mandates denial of

certification pursuant to 20 C.F.R. § 656.20(a)(3)(ii). The CO also argued that BALCA does not have jurisdiction to hear this matter because of the failure to comply with the CO's audit request.

DISCUSSION

Jurisdiction

In *Mildred Schwartz*, 2008-PER-115 (Oct. 28, 2008), the panel held that once it found that the employer failed to timely submit a recruitment report as directed in the CO's Audit Notification letter, the panel did not have authority³ to further review the denial of certification because, under the PERM audit regulation at 20 C.F.R. § 656.20(a)(3), if the employer fails to provide documentation required to be submitted by the date specified in the audit letter, the application is automatically denied, the employer is considered to have refused to exhaust available administrative remedies, and administrative-judicial review before BALCA is not available.

In the instant case, the Employer did not fail to provide documentation on its newspaper advertisements, but rather failed to provide adequate documentation. Thus, this was not such a failure of the Employer to respond to the Audit Notification that it should be considered not to have effectively exhausted its administrative remedies, but merely a failure to provide documentation that the CO considered to be adequate. Thus, we find that section 656.20(a)(3) does not bar BALCA review.

Adequacy of documentation presented to the CO with the audit reply

The Audit Notification in this matter directed the Employer to supply its recruitment documentation as outlined in 20 C.F.R. § 656.17(e). (AF 13). Section

³ The panel, however, found that the regulation was not technically "jurisdictional," citing the pre-PERM decision in *Madeleine S. Bloom*, 1988-INA-152 (Oct. 13, 1989) (en banc), *recon. den.* (Dec. 20, 1989) (per curiam).

656.17(e) states the basic labor certification process, which, among other requirements, mandates that most employers, such as the Employer in this matter, place advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate for the occupation and the workers likely to apply for the job. 20 C.F.R. § 656.17(e)(2)(ii). The regulations provide that the newspaper advertising can be documented “by furnishing copies of the newspaper pages in which the advertisements appeared or proof of publication supplied by the newspaper.” 20 C.F.R. § 656.17(e)(1)(i)(B)(3) (as cross-referenced by 20 C.F.R. § 656.17(e)(2)(C)).

The letter to the Star Ledger Classified Advertisement department, together with the copy of the check in payment for the proposed advertisement, was some evidence that the Employer had sought to place advertisements in support of its labor certification application as required by the regulations. The regulation at 656.17(e)(1)(i)(B)(3) is phrased permissively. Thus, we do not view it as mandating newspaper tear sheets or an affidavit from the publisher as the only types of documentation that might be sufficient to show compliance with the regulations. Nonetheless, a letter to the publisher asking for an advertisement to be placed together with proof suggesting payment for the advertisement, does not, in itself, prove that the advertisements were run in compliance with the regulations. Moreover, the failure to produce tear sheets or a publisher affidavit deprived the CO of concrete evidence of the timing of the advertisements, the publication actually used, and the text of the advertisements. Accordingly, we find that the CO properly denied certification based on the inadequacy of the newspaper advertisement documentation supplied with the Employer’s audit reply.

Adequacy of documentation presented to the CO with the request for review

When the Employer presented the newspaper advertisement photocopies with its request for review, it obviously knew that it had an evidentiary problem because the library copies evidently did not permit it to create a printout that showed the name of the publication used or the dates of publication. The CO, treating the request for review as a motion for reconsideration, had the discretion to accept the Employer’s new

documentation. *See* 20 C.F.R. § 656.24(g) (2006).⁴ However, given the evidentiary defects with the library photocopies, we affirm the CO's denial of reconsideration.

Timeliness of documentation presented on appeal

On appeal, the Employer presented e-mails and print-outs of tear sheets for the newspaper advertisements, which appear to conclusively establish that the Employer was actually in compliance with the recruitment requirements. The Board's review authority, however, is strictly constrained to the record upon which the CO's decision was made, the request for review, and any Statements of Position or legal briefs submitted. 20 C.F.R. § 656.27(c). Moreover, the regulations provide that the request for review, statements, briefs, and other submissions of the parties must contain only such evidence that was within the record upon which the denial of labor certification was based. 20 C.F.R. § 656.26(a)(2). Thus, since the tear sheets and e-mail submitted with the Employer's appellate statement were not before the CO when he denied reconsideration, the Board is prohibited from consideration of those documents on appeal.

Moreover, we note that the PERM regulations explicitly require that an employer maintain documentation in support of its application. This documentation is not filed with the Form 9089, but must be retained by the employer and produced in the event of an audit. The applicable regulations state:

§. 656.10 General instructions.

* * *

(f) *Retention of documents.* Copies of applications for permanent employment certification filed with the Department of Labor and all supporting documentation must be retained by the employer for 5 years from the date of filing the *Application for Permanent Employment Certification*.

* * *

⁴ This regulation was amended in 2006 and 2007. Those amendments, even if they applied to this appeal, would not

§ 656.17 Basic labor certification process.

* * *

(3) Documentation supporting the application for labor certification should not be filed with the application, however in the event the Certifying Officer notifies the employer that its application is to be audited, the employer must furnish required supporting documentation prior to a final determination.

Thus, applicants are on notice that they must maintain supporting documentation when applying for labor certification. An employer that fails to gather and preserve the documentation contemporaneous with the filing of the application is gambling that it will be able to timely produce the documentation if the CO audits the application. Newspaper advertisements are a core documentation requirement for PERM applications. Thus, although the Employer was ultimately able to obtain documentation of the newspaper advertisements, its failure to be able to do so timely may have been a foreseeable consequence of its failure to create and retain an adequate file of its recruitment documentation at the time of the submission of the application.

Based on the foregoing, we affirm the denial of certification.

ORDER

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