

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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Washington, DC 20001-8002

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**Issue Date: 23 March 2012**

**BALCA No.: 2010-PER-01374**  
**ETA No.: C-08031-19102**

*In the Matter of:*

**UNITED BROTHERS USA,**  
*Employer,*

*on behalf of*

**AMIN JESSANI,**  
*Alien.*

Certifying Officer: William Carlson  
Atlanta Processing Center

Appearances: Anne T. Nguyen, Esq.  
George R. Willy P.C.  
Sugar Land, TX  
*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: Malamphy, Sarno, Krantz  
Administrative Law Judges

**DECISION AND ORDER**  
**REVERSING DENIAL OF CERTIFICATION**

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 January 31, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Evening Manager.” (AF 157-168).<sup>1</sup> On March 11, 2008, the CO issued an Audit Notification. (AF 153-155). In the Audit Notification, among other documentation, the CO required the Employer to submit its “recruitment documentation as outlined in 656.17(e). (AF 153). On April 10, 2008, the Employer responded to the Audit Notification. (AF 39-152).

The CO denied the application on April 30, 2008. (AF 35-38). The CO stated that the Employer failed to provide a copy of the job order and that the regulation at 20 C.F.R. 656.20(b) provides that “a substantial failure by the employer to provide required documentation will result in that application being denied.” (AF 37).

On May 14, 2008, the Employer submitted a request for reconsideration and attached a copy of the job order. (AF 2-13).

On August 3, 2010, the CO again denied certification, explaining that the Employer had an opportunity to submit the job order in response to the audit but did not, so therefore 20 C.F.R. 656.24(g)(2) precluded the CO from considering the copy submitted with the Employer’s request for reconsideration. (AF 1).

The CO forwarded the case to BALCA on August 4, 2010, and BALCA issued a Notice of Docketing on September 29, 2010. The Employer filed a Statement of Intent to Proceed on October 6, 2010. The CO filed a Statement of Position on November 10, 2010 and a brief on November 15, 2010. In its brief, the Employer listed six documents relating to the job order it contended it had submitted with its audit response and request for reconsideration.<sup>2</sup> The

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

<sup>2</sup> Those documents are a faxed cover letter from Illinois Skills Match mentioning the placement of a job order, a printout from the Illinois Skills Match Workforce Development system showing a job listing for “evening manager,” a copy of a fax cover page from the Employer to the Illinois Department of Employment Security asking that the job

Employer also attached additional documents, including a copy of the job order. The CO filed a letter asking that the denial of certification be affirmed on October 29, 2010.

## **DISCUSSION**

An employer sponsoring an alien for permanent employment certification under the basic certification process must conduct certain pre-filing recruitment within time frames specified by the PERM regulations. One of the required pre-filing recruitment steps for a nonprofessional occupation to place a job order with the State Workforce Agency (“SWA”) serving the area of intended employment. 20 C.F.R. § 656.17(e)(2). Specifically, the PERM regulations require:

Placing a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application serve as documentation of this step.

20 C.F.R. § 656.17(e)(2)(i). The regulations also require that all documentation supporting the permanent employment certification application be retained for five years after filing the application. 20 C.F.R. § 656.10(f). An employer must furnish “required supporting documentation” to the CO if its application is audited. 20 C.F.R. § 656.17(a)(3). Audit regulations provide that a substantial failure by the employer to provide the required documentation will result in denial of the application. 20 C.F.R. § 656.20(b).

Thus, the issue before us is whether a copy of the job order is “required supporting documentation.” In *A Cut Above Ceramic Tile*, 2010-PER-224, slip op. at 8 (Mar. 8, 2012)(en banc), BALCA found that the PERM regulations provide that the placement of a SWA job order is documented by stating the start and end dates of the job order on the ETA Form 9089. The Board found that when a regulation does not require an employer to retain a particular type of evidence to document a recruitment step, such evidence is not “required documentation,” and the CO may not deny certification based on a failure to produce such documentation. Slip op. at 11.

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order be placed, and a copy of the completed job order form. Although those documents appear as attachments to the Employer’s request for reconsideration (AF 10-13), they do not appear in the Appeal File as part of the Employer’s Audit Response.

In the instant case, the Employer did list the start date (08/24/2007) and end date (09/23/2007) for the SWA job order on the ETA Form 9089 as required by 20 C.F.R. § 656.17(e)(2)(i) to document the recruitment step. (AF 160). Its failure to submit a copy of the job order is not a valid reason for denial.

### **ORDER**

**IT IS ORDERED** that the denial of labor certification in this matter is hereby **REVERSED** and the matter is **REMANDED** to the CO to grant labor certification.

For the Panel:

**A**

RICHARD K. MALAMPHY  
Administrative Law Judge

RKM/AMC/jcb  
Newport News, Virginia

**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.