U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 November 2009

BALCA No.: **2009-PER-00068**
ETA No.: A-06362-95309

In the Matter of:

PALOMINO SERVICE, INC.,
Employer,

on behalf of

JUAN IGNACIO MARUSICH,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Karen L. Podell, Esquire
Stony Brook, New York
For the Employer and Alien

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

Before: **Chapman, Colwell and Johnson**
Administrative Law Judges

DECISION AND ORDER

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 December 1, 2006, the CO accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Automobile Mechanic." (AF 12-32).[1] The Employer required two years and one month (or 25 months) of experience in the job offered. (AF 14, ETA Form 9089, Sections H6, H6-A). In the portion of the Form 9089 that provides information about the Alien's qualifications for the job, the Employer answered "yes" to the Section asking whether the Alien possessed the required experience. (AF 17, ETA Form 9089, Section J18). In Section K of the Form, the Employer is required to list the Alien's work experience. The only job listed in Section K was the Alien's work from January, 2002 to the present for the petitioning Employer as an Automobile Mechanic. (AF 17, ETA Form 9089, Section K-a).

On June 14, 2007, the CO denied certification because the Alien was not shown to have had the required 25 months of experience prior to being hired by the Employer.[2] (AF 6-11). The CO stated that pursuant to 20 C.F.R. § 656.17(i), the job requirements must represent an employer's actual minimum requirements, and the employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity. The CO contended that all of the required experience as an Automobile Mechanic was gained while the Alien worked for the petitioning Employer.

On July 10, 2007, the Employer submitted a request for review, asserting that "The alien has the required experience that was gained by employment with an employer other than the petitioning employer." (AF 3). The Employer stated that it was enclosing "a letter from the prior owner of this now non-entity, namely Poma Tire Center, which closed May of 2003." The Employer asserted that "[t]his letter was not submitted with

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

[2] The CO also asserted that the company applying could not be verified as a bonafide entity under § 656.3. However, the CO stated in his appellate brief that he was no longer relying on this ground for denial, thus we will not discuss this issue here.

the original labor certification application because the prior owner was difficult to locate and contact due to her relocation outside of the United States." The attached letter stated:

> Juan Ignacio Marusich was employed by Poma's Tire Center from March of 2000 to May of 2003. Juan was a trustworthy employee and always maintained a professional work ethics. [sic] Mr. Marusich worked as a mechanic and a repairer. Poma's Tire Center was sold in May of 2003 and I could no longer employ Mr. Marusich.

(AF 4). The return address is shown to be an address in Bayshore, New York. The letter was not dated.

On October 28, 2008, the CO issued a letter of reconsideration, finding that the denial of certification was valid because the Alien did not meet the requirements listed on Section H of the ETA Form 9089. (AF 1). The CO asserted that, although the Employer stated that the Alien had the required experience and that it was not listed on the ETA 9089, this information "constitute[d] new evidence not in the record at the time the application was filed and on which the denial was based." The CO contended that under BALCA's decision in *HealthAmerica*, 2006-PER-1 (July 18, 2008) (en banc), documentation created after the fact to address a deficiency may be discounted. Therefore, the CO determined the denial reason to be valid.

BALCA issued a Notice of Docketing on November 13, 2008. The Employer filed a Statement of Intent to Proceed, dated November 17, 2008, but did not file an appellate brief.

The CO filed a Statement of Position on December 29, 2008, reiterating the argument that the Alien did not meet the Employer's minimum experience requirements at the time he was hired.

DISCUSSION

In pertinent part, the regulations at 20 C.F.R. § 656.17(i) provide:

> (i) *Actual minimum requirements*. DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
>
> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
>
> (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.
>
> (3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
>
> (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
>
> (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.
>
> (4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.
>
> * * *

In the instant case, the Form 9089 submitted by the Employer failed to list any employment by the Alien other than his employment with the petitioning Employer. The ETA Form 9089 states at the beginning of Section K, where the Employer is required to list the Alien's work experience:

> **List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification.**

(AF 36) (emphasis as in original). The instructions to Form 9089 state:

> List all jobs held by the alien in the past three years whether or not the job is related to the job opportunity for which the employer is seeking certification. Also list all other experiences that qualify the alien for the job opportunity. If you need more space to complete this section, you may use additional pages as attachments for mailed applications, but you must list the primary jobs and experiences in these spaces. For electronic applications, the system will allow employers to enter additional jobs.

(www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf). Thus, the Form 9089 and accompanying instructions clearly advise petitioners to list all experience that qualifies the alien for the job opportunity. The Employer failed to heed that advice and now finds itself in the position of having submitted a deficient application because it did not establish that, prior to hire, the Alien had the experience the Employer is now requiring of U.S. applicants.

The Employer's motion for reconsideration was grounded in the submission of a statement from a prior employer. The regulation governing reconsideration in effect at the time that this application was filed provided that "[t]he request for reconsideration may not include evidence not previously submitted." 20 C.F.R. § 656.24(g)(2).[3] Moreover, the regulations also provide in regard to the Board's scope of review, that it "must review a denial of labor certification under § 656.24 … on the basis of the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs submitted." 20 C.F.R. § 656.27(c). Similar language in the pre-PERM regulations was held to prevent the Board's consideration of additional evidence submitted in conjunction with a request for review. *See Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (en banc); *Misha Carpet Corp.*, 2008-PER-143 (Jan. 6, 2009). *See also HealthAmerica, supra*, slip at 21 (document supporting a motion for reconsideration must have been demonstrably in existence at the time of application).

[3] This regulation was amended to further restrict the type of evidence than can be considered on reconsideration. That amendment, however, only applies to applications filed on or after July 16, 2007. *See Final Rule, Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 28903 (May 17, 2007). The instant application was accepted for processing on December 1, 2006.

In the instant case, the Employer required 25 months of experience in the job offered, however the only job listed in Section K for the Alien's work experience was the Alien's work from January, 2002 to the present for the petitioning Employer. (AF 14; 17). Although the Employer later submitted a letter from a former employer, attesting that the Alien had additional work experience, we cannot consider this letter as evidence under 20 C.F.R. §§ 656.24(g)(2) and 656.27(c).[4] Since the Alien was not shown to have the required experience on ETA Form 9089 and the Employer did not assert that the Alien fit into one of the exceptions at 20 C.F.R. § 656.17(i)(3), the Alien has not met the minimum requirements for the job offered. Accordingly, we decline to reverse the CO's 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

[4] The CO raised a question as to the authenticity of this letter in his appellate brief. Because we cannot consider this letter as evidence under the regulations, we will not consider its authenticity here.

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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.