U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 May 2011

BALCA Case No.: 2011-PER-00087
ETA Case No.: A-08267-89782

In the Matter of:

CUMBERLAND FOOD MARKET,
Employer

on behalf of

REYES-MATEO, EVANGELISTA,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Tahir Mella, Esquire
Philadelphia, Pennsylvania
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

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 20 C.F.R. Part 656. On July 21, 2010, the CO denied the Employer's Application for Permanent Employment Certification for the position of "First Line Supervisor/Manager of Retail Sales Workers" (AF 64-83)[1] on several grounds, one of which was that the Notice of Filing (AF 32) did not state the rate of pay.[2] (AF 14-16). In response, the Employer proffered an amended Notice of Filing. (AF 1, 3).

The parties' appellate briefs focused almost exclusively on whether the Board has jurisdiction to decide the appeal because the Employer's motion for reconsideration was postmarked at least 86 days after the date of the CO's denial letter. *See* 20 C.F.R. § 656.24(e)(4) (if a request for review is not filed within 30 days of the date of the determination, the denial becomes the final decision of the Secretary of Labor); *but see Madeleine S. Bloom*, 1988-INA-152 (Oct. 13, 1989) (*en banc*), *recon. den*. (Dec. 20, 1989) (per curiam) (distinction between unwaivable statutory or jurisdictional time limits and the procedural rules of courts and administrative agencies which may be waived in appropriate instances). The Employer argued, essentially, that the time period for filing a motion for reconsideration should have been tolled because neither it nor its attorney received the CO's July 21, 2010 denial letter, and the only reason it knew about the denial was because it had contacted the CO in September 2010 requesting an update about the status of the application. (AF 2). In response, the CO argued that the Employer did not present grounds for tolling of the period for requesting reconsideration because the denial letter had been sent to the address for the Employer's attorney, and properly addressed mail is rebuttably presumed to have been delivered. We find, however, that the CO did not present sufficient evidence to invoke a presumption that the denial letter was received. *See Gentis Inc. v. USDOL*, No. 2:09-cv-05490-LP, slip op. at 9-10 (E.D.Pa. Jan. 11, 2011) (proof of internal mailing procedures required to invoke presumption). *See also Gentis, supra* slip op. at 10 (where only regular mail used, the

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

[2] Because we affirm the CO's denial on this ground, we have not addressed the other grounds cited by the CO for denial of the application.

presumption of delivery is weak); *22 E. 41St Street Corp. / O'Casey's*, 2009-PER-402 (Jan. 7, 2011) (presumption of delivery is rebuttable); *Vincheer Fashion, Inc.*, 1998-INA-24, slip. op. at 5 (Sept. 23, 1998). (same). Accordingly, we find that the Employer presented grounds for tolling the limitations period, and that we have authority to decide the merits of the appeal.

The regulation at 20 C.F.R. § 656.10(d) required the Employer to post a Notice of the Filing of the permanent labor certification application. That Notice of Filing was required to state the rate of pay. 20 C.F.R. § 656.10(d)(4). The Notice of Filing posted by the Employer clearly failed to state the rate of pay. (AF 32). The Employer's submission of an amended Notice with its motion for reconsideration did not remedy that failure.

First, the PERM rules provide that "a request for reconsideration may include only …. [d]ocumentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of § 656.10(f). 20 C.F.R. § 656.24(g)(2)(ii) (2010). An amended Notice created after the CO's denial letter is clearly barred under this regulation.

Second, the Notice of Filing's primary purpose is to serve as way for interested parties to submit documentary evidence bearing on the application for certification pursuant to Section 122(b) the Immigration Act of 1990 ("IMMACT90", Public Law 101-649, 104 Stat. 4978 (Nov. 29, 1990, effective Oct. 1, 1991). *See Hawai'i Pacific University*, 2009-PER-127 (March 2, 2010) (en banc). IMMACT90 expressly includes "information on wages and working conditions" as information that the Department of Labor must consider when submitted by interested parties. *Phoenix Interiors, Inc.*, 2010-PER-208 (Jan. 4, 2011). A Notice posted without stating the rate of pay does not give interested persons the information about wages needed to report any concerns to the

Department of Labor. Thus, an amended Notice created after the CO's denial does not cure the failure to post a compliant Notice prior to the filing of the application.

Thus, we find that 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.