U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 January 2016

BALCA Case No.: **2012-PER-00887**
ETA Case No.: A-08330-09036

In the Matter of:

SWDWII, LLC,
Employer,

on behalf of

ALCALA-DELGADO, MAICKEEL SOLEIL,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Tahir Mella, Esquire
Law Offices Of Tahir Mella, P.C.
Philadelphia, Pennsylvania
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Morris D. Davis and Larry S. Merck, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

PER CURIAM. This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the "PERM" labor certification regulations at 20 C.F.R. Part 656.[1]

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[1] "PERM" is an acronym for the "Program Electronic Review Management" system established by the regulations that went into effect on March 28, 2005.

BACKGROUND

The Employer filed an *Application for Permanent Employment Certification* (ETA Form 9089) sponsoring the Alien for permanent employment in the United States for the position of "Food Service Manager." (AF 70-81).[2] In Box C.1 of the Form 9089, the Employer listed its name as "SWDWII, LLC." (AF 60). On the State Workforce Agency ("SWA") job order, the Employer's name was listed as "SWOWII, Inc."[3] (AF 32). The Certifying Officer ("CO") audited the application and subsequently denied certification on three grounds, only one of which remains at issue on appeal. (AF 12-41). Citing 20 C.F.R. § 656.10(c)(1), the CO denied certification because the SWA job order did not list the same name for the Employer as the Form 9089. (AF 13).

The Employer filed a request for reconsideration and argued its name was inadvertently misspelled on the SWA job order. (AF 4). On reconsideration, the CO affirmed its denial on the basis of 20 C.F.R. § 656.10(c)(1), and found that "the inclusion of the company name on recruitment efforts allows potential applicants to identify the hiring employer and allows the Office of Foreign Labor Certification Certifying Officer to confirm the employer's compliance with the recruitment requirements." (AF 1).

Neither party filed a brief on appeal.

DISCUSSION

The Certifying Officer in this case cited § 656.10(c)(1), which requires an employer to make a certification about the prevailing wage determination,[4] in order to deny certification due to an error on the Employer's SWA job order. When explaining his rationale in the denial letter and in the determination on reconsideration, the CO appears to describe § 656.10(c)(8), which requires an employer to attest that the "job opportunity has been and is clearly open to any U.S. worker." We will therefore analyze whether the SWA job order in this case undermined the Employer's § 656.10(c)(8) attestation. Specifically, the question is whether the typographical error so misinformed potential job applicants about the identity of the Employer that the Employer could not properly attest that the job opportunity was clearly open to any U.S. worker. *The China Press*, 2011-PER-2924 (Aug. 20, 2015).[5]

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[2] Citations to the Appeal File are abbreviated as "AF" followed by the page number.

[3] We note that both the Employer and the CO mistakenly describe the misspelling as "SWOWII, LLC."

[4] 20 C.F.R. § 656.10(c)(1) requires an employer to certify that "[t]he offered wage equals or exceeds the prevailing wage determined pursuant to § 656.40 and §656.41, and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment."

[5] The panel subsequently vacated its original decision and determined that it was not proper to decide the § 656.10(c)(8) issue because the CO had waived his authority to deny certification under that provision of the regulations. *The China Press*, 2011-PER-2924 (Nov. 30, 2015) (Decision and Order on Reconsideration Vacating August 20, 2015 Decision and Order Directing Grant of Certification). While it may not have been proper for the panel to reach the § 656.10(c)(8) issue in the original decision, we nevertheless agree with the analytical framework the panel used to determine whether the SWA job order complied with § 656.10(c)(8).

On reconsideration, the Employer submitted evidence to demonstrate that it is a franchisee of Saladworks and that it primarily conducts business under the trade names "Harmony Saladworks" and "Harmony Plaza Saladworks."[6] (AF 4, 6-8). We find on the basis of this evidence that potential applicants and the general public would be familiar with the Employer through its trade names, not its legal name. Because the Employer's legal name has little to do with the Employer's public identity, we find that a minor typographical error in the Employer's legal name on the SWA job order would do little to confuse potential applicants about the Employer's identity. Accordingly, the CO's denial of certification is not supported by the regulations.

ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2).

Entered at the direction of the panel by:

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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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

[6] BALCA's review of a denied labor certification is limited to evidence that was part of the record upon which the CO's decision was made. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c). In this case, the CO accepted the Employer's trade name documentation for the purposes of reversing other denial grounds. (AF 1). Because the CO relied on the trade name documentation to make his decision, it is part of the record before us.

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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.