

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 08 August 2013

BALCA Case No.: 2011-PER-02738
ETA Case No.: A-08325-08073

In the Matter of:

REDYK TRAVEL, INC.,
Employer

on behalf of

KUPS, KATARZYNA EWA,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Christopher Kurczaba, Esquire
Chicago, Illinois
For the Employer

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

Before: **Sarno, Bergstrom and Krantz**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING 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 20 C.F.R. Part 656. The Employer filed an Application for Permanent Employment Certification for the position of "Travel Agent." (AF 76-85).¹ On January 28, 2010, the Certifying Officer ("CO") selected the application for

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

audit. (AF 73-75). The CO directed Employer to provide the “[n]otice of filing documentation as outlined in 656.10(d).” (AF 73). Employer responded to the audit on March 1, 2010. (AF 16-72). With its response, Employer submitted a copy of the Notice of Filing (“NOF”). (AF 30). The NOF did not state where it had been posted. On March 4, 2011, the CO denied the application. (AF 13-15). The CO gave three reasons for denial. One of the reasons for denial was that the NOF did not specify where it was posted. The CO noted that, pursuant to 20 CFR § 656.10(d)(1)(ii), the NOF must be posted at employer’s facility or location “in conspicuous places where the U.S. workers can readily read the posted notice on their way to or from their place of employment.”

On April 4, 2011, Employer submitted a request for reconsideration. (AF 3-12). Employer argued that 20 CFR 656.10(d)(3)(i)-(iv) and 656.10(d)(4) enumerate the required posting requirements and do not list the location of the posting as a requirement. On September 7, 2011, the CO stated that Employer’s request did not overcome the deficiencies stated in the determination letter. The CO explained that 20 CFR § 656.10(d)(1)(ii) requires that the NOF be clearly visible and unobstructed while posted and must be posted in conspicuous places where employer’s U.S. workers can readily read the posted notice on their way to or from their place of employment. The CO forwarded the case to the Board of Alien Labor Certification Appeals (“BALCA”).

BALCA issued a Notice of Docketing on December 20, 2011. Employer filed a Statement of Intent to Proceed on January 5, 2012. On February 3, 2012, Employer filed a Statement of Position. Employer argued that the regulations simply give an employer the option to inform the CO of the location where the NOF was posted.

DISCUSSION

The regulations require that an employer filing an application for permanent labor certification must provide notice to the employer’s employees at the facility or location of employment. 20 CFR § 656.10(d)(1)(ii). Pursuant to 20 CFR § 656.10(d)(1)(ii):

The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer’s U.S. workers can readily read the posted notice on their way to or from their place of employment. . .

The regulations also provide that “the documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted. . .” 20 CFR § 656.10(d)(1)(ii).

In this case, there was no deficiency in the content of the NOF, but Employer did not provide documentation that the NOF was posted in the proper place. In response to the Audit Notification, Employer submitted the NOF, which did not indicate the location in which it was posted. (AF 30). The only evidence presented that the NOF was posted in the proper place was Employer’s attestation in Section I.e.25 of the ETA Form 9089 that the NOF was posted for 10 business days in a conspicuous location at the place of employment. (AF 80). Because it is not administratively feasible for the CO to investigate the circumstances of each applicant’s

business, the employer must state in its response to the audit notification that the NOF was posted at the proper location. *See In Matter of Fairplay Farm*, 2010-PER-00966 (August 4, 2011)(denial appropriate where neither employer’s NOF nor other audit response materials contained information stating where the NOF was posted).

The regulations state that “[t]he documentation required may be satisfied by providing a copy of the posted notice and stating where it was posted.” 20 CFR § 656.10(d)(1)(ii). Although Employer is not required to satisfy the regulation in this manner, Employer has not offered another method by which the CO could verify that the NOF was posted in an area where it was clearly visible and unobstructed and where the U.S. workers could readily read it.

The NOF is not a mere technicality, but is an implementation of a statutory notice requirement designed to assist interested persons in providing information to the CO about an employer’s certification application. It is not a regulation to be lightly dismissed under a harmless error finding. *See Riya Chutney Manor, LLC*, 2010-PER-00177 & 191 (Apr. 7, 2010); *Voodoo Contracting Corp.*, 2007-PER-00001 (May 21, 2007).

Accordingly, **IT IS ORDERED** that the denial of labor certification in this matter is **AFFIRMED**.²

For the panel:



Digitally signed by Daniel Sarno
DN: CN=Daniel Sarno,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR./ECD/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

² Because we affirm on this ground, we need not reach the CO’s other grounds for denial.

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.