U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 May 2013

BALCA Case No.: **2011-PER-02677**
ETA Case No.: A-08329-08931

In the Matter of:

SUSHI SHOGUN,
Employer,

on behalf of

RAMOS, MARIA,
Alien.

Certifying Officer: Atlanta National Processing Center Certifying Officer

Appearance: Sonia S. Amin, Esquire
Encino, California
For the Employer

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

PAUL R. ALMANZA
Administrative Law Judge

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.

BACKGROUND

The Employer filed an Application for Permanent Employment Certification ("Application") for the position of "Cook Assistant, Japanese Cuisine." (AF 31-42).[1] The Certifying Officer ("CO") audited the Application, and denied certification (AF 22-23) on the following ground:

[1] References to the 71 page Appeal File are abbreviated as "AF."

> The information listed in ETA Form 9089 [the Application] for section F does not match the information contained in the Prevailing Wage Determination (PWD) submitted by the employer. Specifically, the prevailing wage of $10.14 per hour listed on the PWD does not match the ETA Form 9089, which lists the prevailing wage as $10.04 per hour.

(AF 23).

The Application lists the prevailing wage, as well as the offered wage, as "$10.04" per hour. (AF 32). The Prevailing Wage Determination submitted by the Employer lists the prevailing wage as "$10.14" per hour. (AF 54).

The Employer requested reconsideration of the denial of certification, arguing that the discrepancy which was the basis for the denial was a "**minor typographical error**" (AF 2, emphasis in original) and "a **clerical mistake of minor importance**." (AF 3, emphasis in original). In support of its position, Employer noted that the Notice of Filing contained the proper wage and cited *HealthAmerica*, 2006-PER-1 (July18, 2006) (*en banc*) for the proposition "that a Certifying Officer abuses his discretion in denying a PERM application simply for typographical errors." (AF 3.) The Employer also pointed out that to correct the Application and refile it, it would have to "start the [time-consuming] recruitment process all over again" and "in this case, *the consequences to the employer are out of proportion to the mistake*, warranting an approval." (AF 3, emphasis and omission of cite to *HealthAmerica*, slip. op. at 23, in original).

The CO reconsidered but continued to find the ground for denial valid. Of particular note, the CO pointed out that under the PERM regulations employers must "present an application that is complete and accurate to ensure the integrity of the PERM process," the Employer twice typed "10.04" on the Application, and that requests for modifications to applications submitted after July 16, 2007, will not be accepted pursuant to 20 C.F.R. § 656.11(b). (AF 1). The CO also stated that the ground for denial was valid under 20 C.F.R. § 656.10(c)(1) (requiring employers to certify in applications for permanent employment certification that the "offered wage equals or exceeds the prevailing wage"). (AF 1).

Upon denial of the request for reconsideration, the matter was then forwarded to the Board of Alien Labor Certification Appeals for administrative review. (AF 1). On January 12 2012, the Office of Administrative Law Judges received a letter brief dated January 6, 2012, from the Employer ("Employer's Brief"). Employer's Brief generally restated Employer's argument in its request for reconsideration, and pointed out that "[n]o potential applicant was exposed to the clerical error" because the Notice of Filing ("NOF") contained the proper wage, $10.14 per hour, while the newspaper advertisements and State Workforce Agency ("SWA") posting did not list the prevailing wage. Employer's Brief, at 2.

DISCUSSION

The error in this case is that the Application listed $10.04 per hour as the prevailing wage and as the offered wage rather than $10.14 per hour. Because the NOF provided the proper wage and the newspaper advertisements and SWA posting did not provide wage information, no potential job applicant could possibly have been misled by this error.

Upon review of the Appeal file, we find it is likely that whoever filled out the Application simply mistyped "$10.04" per hour as the prevailing wage and as the offered wage when in fact the prevailing wage and offered wage was $10.14 per hour. This ten-cent difference, approximately one percent of the prevailing wage and offered wage, was the result of typographical errors.

Were we considering this case prior to the promulgation of 20 C.F.R. § 656.11(b), we would follow the reasoning of *HealthAmerica.* Specifically, we would find that "[t]he CO's denial of the application based on the typographical error[s] in the Form 9089 elevates form over substance," *HealthAmerica*, slip op. at 19, and would reverse the denial of certification.

Unfortunately for the Employer, however, *HealthAmerica* has effectively been overruled by the promulgation of 20 C.F.R. § 656.11(b). In short, correcting the typographical errors in the Form 9089 would constitute a modification to the application, and the regulation clearly states that "[r]equests for modifications to an application will not be accepted for applications submitted after July 16, 2007." Accordingly, the plain text of 20 C.F.R. § 656.11(b) dictates the outcome of this matter.

We recognize that in a case not involving an amendment to an application, a divided BALCA panel found that even though there was a slight variance between the wage advertised on the SWA job order and the wage offered to the alien, the job was "clearly open to any U.S. worker" and thus that divided panel declined to affirm the denial of certification. *See Jesus Covenant Church*, 2008-PER-200, slip op. at 4-5 (Sept. 14, 2009). While we respect the majority opinion in that case, we also recognize that the Secretary promulgated a regulation that categorically disallows modifications to applications filed after July 16, 2007. We are reluctant to second-guess the Secretary's policy determination requiring applications filed after July 16, 2007, to be error-free. As a result, like the panel in *Saini Medical, Inc.*, 2011-PER-1001, slip op. at 2 (Sept. 27, 2012), "we reject the approach of the majority in *Jesus Covenant Church* judicially creating a 'close enough' exception."

ORDER

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

For the panel:

Digitally signed by PAUL R. ALMANZA
DN: CN=PAUL R. ALMANZA,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

PAUL R. ALMANZA
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless, within twenty (20) 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 at the following address:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400N
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and 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.