U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 October 2007

BALCA Case No.: 2007-INA-00022
ETA Case No.: D-05263-08287

In the Matter of:

CENTURY WILSHIRE HOTEL,
Employer,

on behalf of

JULIO VARENA CRUZ,
Alien.

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center

Appearances: Nadadur S. Kumar Esquire
Los Angeles, California
For the Employer

Before: Burke, Chapman, Vittone and Wood
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

ORDER VACATING JULY 10, 2007 DISMISSAL AND DECISION AND ORDER DENYING CERTIFICATION

This case arises from the Employer's request for review of the U.S. Department of Labor Certifying Officer ("CO") denial of its application for labor certification.

Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1]

STATEMENT OF THE CASE

The July 10, 2007 Dismissal and Subsequent Motion to Reopen

Because it obtained information suggesting that that the petitioning Employer was no longer in existence,[2] the Board issued an Order to Show Cause on June 13, 2007, directing the parties to establish why the appeal should not be dismissed. On July 10, 2007, the Board dismissed the appeal because it had no record of a response. On July 17, 2007, the Board received a package from the Employer's attorney seeking to have the matter reopened. The package contains evidence that the Employer's attorney served the response to the Order to Show Cause on all of the requisite government offices, except for the Board.[3]

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[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[2] Specifically, on June 12, 2007, the United States Postal Service returned the copy of the Notice of Docketing served on the Employer. The return envelope stated "Return to Sender – Attempted – Not Known Unable to Forward" and "Forwarding Order Expired." A hand-written note on the envelope states "Demolished." On June 13, 2007, the Board's staff performed a Google search for the name of the Employer in an attempt to find a valid mailing address. The web site at www.centurywilshirehotel.com (visited June 13, 2007) stated:

> Thank you for visiting the Century Wilshire Hotel. After thirty-one memorable years under the same ownership, our hotel was closed in August of 2006. While the building may no longer exist, the same ambiance and friendly service will continue throughout our other properties in West Los Angeles. We invite you to stay with us at our nearby boutique hotels, conveniently located 10-15 minutes from Westwood.

[3] The package also contains a copy of an appellate brief filed on behalf of the Employer by its attorney. It appears that the same error was made in serving this document, as the FedEx receipts do not show service on the Board, and the Board has no record of receipt of this brief prior to the submission of the Employer's motion to reopen.

The decision of BALCA whether to reconsider a decision is a matter of discretion. *See Edelweiss Manufacturing Company, Inc.*, 1987-INA-562 (Nov. 10, 1988) (en banc den recon). In the instant case, the Board's purpose in issuing the Order to Show Cause was simply to determine whether a potentially moot case should be removed from its docket. Although the Employer's response to the Order to Show Cause was not timely mailed to the Board, it is evident that the Employer had attempted to make a timely response, and would have but for its law firm's error in failing to address a copy of the response to the Board. Denials of labor certification on purely technical grounds are not favored. *J. Michael & Patricia Solar*, 1988-INA-56 (Apr. 6, 1989)(en banc). Consequently, in this matter we grant the motion to reopen.

The Response to the Order to Show Cause

The Employer's[4] response to the Board's June 13, 2007 Order to Show Cause is based on a request to be permitted to amend the ETA 750A giving the name and address of a new location (the Culver Hotel) at which the Alien will be employed. The response indicates that the Century Wilshire Hotel is owned and operated by Century Wilshire, Inc., which owns several hotels within a three mile radius of "the current location."[5] The response contends that the job title, job description and all information submitted with the application would still be valid. Before we rule on this request, we first consider whether the original application was properly denied.

The Denial of the Original Application

The Employer filed its application for labor certification on April 27, 2001 seeking to fill the position of Hotel Manager. (AF 96). The Employer required two years of experience in the job offered. *Id.* The Employer did not specify any educational

[4] Technically, the Response was filed on behalf of the corporate owner of the petitioning Employer.

[5] Since the Century Wilshire Hotel appears to be closed, it is not clear whether the Employer is referring to the location of that hotel, or the corporate headquarters.

requirements. The job posting and newspaper advertisements specified that two years of experience were required. (AF 62, 67).

The CO issued a Notice of Findings on November 20, 2006. (AF 41-49). The CO found that the Alien did not have two years of experience in the job offered, other than the experience he gained with the petitioning Employer. The CO gave the Employer four options for rebuttal: (1) show that the Alien had the requisite experience prior to being hired by the Employer, or (2) show that the Alien gained the requisite experience working in jobs which were not similar to the job for which labor certification was being sought, or (3) show that it is not presently feasible to hire a worker who has less than two years of experience in the job offered, or (4) delete the requirement and agree to readvertise. Finally, the CO stated that there had been excessive changes and amendments to the application, and that if the Employer wanted to continue the application process, it would need to submit two additional ETA 750A and B forms signed with original signatures, by the Employer and the Alien, as appropriate. Changes were to be initialed and dated.

After being granted an extension of time, the Employer filed its rebuttal on January 22, 2007. (AF 17-20). The Employer opted to argue that the Alien gained the requisite experience for the job while working for the Employer as a Hotel Clerk.

On February 15, 2007, the CO issued a Final Determination denying labor certification pursuant to 20 C.F.R. § 656.21(b)(5). (AF 1-2). The CO noted that none of the Clerk and Manager duties listed in the rebuttal were the same, and therefore it was unclear how the Alien could have gained the qualifying experience in the Clerk position. The CO also noted that neither the ETA 750A, the notice of filing, nor the advertisements indicated that the Employer would accept experience in a related occupation. Finally, the CO found that the Employer had failed to provide the two revised ETA 750A and B forms as directed in the NOF.

The Employer requested BALCA review by letter dated February 28, 2007, [6] taking issue with the CO's conclusion that none of the duties performed by the manager are performed by the Clerk. (AF 12-16). The Employer also provided an amendment to the ETA 750 A, Section 14 to reflect that two years of experience in a related occupation, such as a Hotel Clerk would be acceptable. (AF 16).

Following docketing of the Appeal by BALCA, the Employer submitted an appellate brief. The Employer argues that its application should be approved under the criteria specified in *Delitizer of Newton*, 1988-INA-482 (1990) (en banc), and that the position of a Clerk and a Manager in the Hotel Industry are dissimilar positions and, therefore, the experience gained as a Clerk can qualify for the position of Manager. The Employer argued that the positions of Hotel Clerk and Hotel Manager parallel the position of a Salesman and a Sales Manager, and cited *Paradise Produce, Inc.*, 1990-INA-463 (Apr. 30, 1992), as authoritative precedent.

DISCUSSION

The regulation at 20 C.F.R. § 656.21(b)(5) provides:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien. The employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990). If it appears that the alien gained qualifying experience or training with the employer, that employer may avoid the proscriptions of §

[6] It is not clear from the Appeal File when this request was actually filed with the CO. Two attachments to the request are signed by the Employer's President under the date March 13, 2007. (AF 15, 16).

656.21(b)(5) by proving that the alien was qualified when hired for the position as the result of either experience gained with a different employer, or experience gained with the same employer but in a different position.

In the instant case, the Employer attempted in rebuttal to establish that the Alien gained qualifying experience for its Hotel Manager position while working as a Clerk. Although we might be willing to accept that some hotels may promote clerks to manager,[7] the position taken by the Employer fails to establish that the requirements stated on the application were its actual minimum requirements for the job. The initial application required two years of experience in the job offered. (AF 96). The employer first sought to include alternative experience in related occupations such as hotel clerk in March 2007 – after the Final Determination of February 15, 2007 was issued. (AF 1-2, 16). This was a fundamental change in the job requirements as presented in the original application and one that went to the heart of the issue on which the CO denied certification. Moreover, the Appeal File contains no evidence to support the Employer's claims that it emphasized in its recruitment that it would accept applicants with two years of experience as a Hotel Clerk.

As the amendment to the application was not proposed until after the application had been denied, it was untimely,[8] and the CO's denial of certification must be affirmed.

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[7] In its rebuttal and request for Board review, the Employer argued that the Occupational Outlook Handbook (evidently citing the 1996-97 edition) provides evidence that Hotel Clerks may be promoted to Hotel Managers after two years of experience. This argument neglects the fact that the Handbook suggests that promotion of clerks and blue collar staff to management positions was something that happened "in the past." Occupational Outlook Handbook (1996-97 ed.). Moreover, the current 2006-2007 version of the Handbook does not contain any discussion of promotion of clerks or other hotel staff to manager positions. Rather, the current version states that specialized training is increasingly being emphasized for lodging managers. *See* http://www.bls.gov/oco/ocos015.htm

[8] *See* 20 C.F.R. § 656.26(b)(4) ("The request for review, statements, briefs, and other submissions of the parties and amicus curiae shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based); 20 C.F.R. § 656.27(c) (BALCA "shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made, the request for review, and any Statements of Position or legal briefs submitted ….''). *See also Ronald J. O'Mara*, 1996-INA-113 (Dec. 11, 1997) (en banc) (an employer may attempt to establish the business necessity for a job requirement and, if unsuccessful, readvertise the position only if the employer has unequivocally agreed in its rebuttal to readvertise in accordance with the requirements set forth by the CO in the NOF).

Consequently, it is not necessary to address the Employer's request to be permitted to amend the ETA 750A to provide a new location for employment of the Alien.

ORDER

IT IS ORDERED that the CO's Final Determination denying certification in this matter is hereby AFFIRMED.

For the Board:

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JOHN M. VITTONE
Chief Administrative Law Judge

Notice of Review: This Decision and Order was decided by the full Board, en banc. If a party wishes to petition for rehearing en banc, it must do so within twenty days from the date of service of this Decision. 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 rehearing 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.