



Issue Date: 12 January 2011

BALCA Case No.: 2010-PER-00280
ETA Case No.: A-07249-72832

In the Matter of:

APOLLO CONSULTING SERVICES CORPORATION,
Employer,

on behalf of

ANBAZHAHAN SIVALINGAM,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Rami J. Fakhoury, Esquire
Poughkeepsie, New York
For the Employer

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

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

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

PER CURIAM. 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 Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).

BACKGROUND

On September 6, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Team Lead/Software Engineer.” (AF 119-21).¹ The Employer indicated on the ETA Form 9089 that a Prevailing Wage Determination (“PWD”) of \$81,349 issued by the State Workforce Agency (“SWA”) contained a determination date from July 15, 2007, to June 1, 2008. (AF 124).

On October 19, 2007, the CO issued an Audit Notification. (AF 119-21). Among other documentation, the CO directed the Employer to submit a copy of the PWD received from the SWA, or alternatively a copy of the request for the PWD as originally submitted to the SWA. (AF 120).

The Employer submitted its audit response under cover letter dated November 2, 2007. (AF 47-118). In the response, the Employer attached a PWD of \$89,544 with a determination date from October 30, 2007, to June 30, 2008. (AF 66). The PWD form also contained a handwritten note on the top stating “Duplicate. Lost Original.” *Id.* In the cover letter, the Employer explained:

Please be advised that the attached prevailing wage determination is a duplicate as it appears that the original determination was lost or misplaced from our file. Please note that there was a change of attorneys in this office on October 1, 2007, and that the original prevailing wage request was filed by the previous counsel. Therefore, the attached is a duplicate and it shows that Apollo’s rate of pay is above the minimum prevailing wage determination set by the Department of Labor. (AF 47).

On April 9, 2009, the CO denied certification. The CO stated that the Employer did not comply with the requirement at 20 C.F.R. § 656.10(c)(1) that:

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

... the prevailing wage be determined pursuant to § 656.40, the PWD provision, which requires in part that the employer request a PWD from the SWA and § 656.41, the PWD review provision, which requires, in part, that the employer must seek review of a disputed PWD prior to using the PWD in an application.

(AF 41).

The Employer filed a request for reconsideration on April 22, 2009, arguing that “the offered wage of \$90,000 exceeds the PWD of both the original misplaced/lost PWD as set forth on the ETA Form part F (\$81,349.00) and the renewal PWD dated October 30, 2007 (\$89,544.00) which was submitted . . . in response to the Audit Notification.” (AF 4).

The CO forwarded the file to BALCA, and the Board issued a Notice of Docketing on February 4, 2010. The Employer filed a statement of intent to proceed with the appeal on March 8, 2010. The CO filed an appeal letter urging that the denial of certification be affirmed.

DISCUSSION

An employer filing an application for permanent alien labor certification must maintain documentation of the attestations made in its application for five years. 20 C.F.R. § 656.10(f). One of the steps an employer must attest to is the PWD for the position listed in the application for labor certification. The regulation at 20 C.F.R. § 656.40(a) provides that the employer must request a PWD from the SWA having jurisdiction over the proposed area of intended employment.² The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. The applicable regulations at 20 C.F.R. § 656.41(a) provide that any employer desiring review of a PWD must make such request within 30 days of the date that the PWD was issued.

² For applications filed on or after January 1, 2010, employers must request a PWD from the National Processing Center. 20 C.F.R. § 656.40(a).

In this case, the Employer attested on its ETA Form 9089 that it received a PWD of \$81,349 per year from a SWA, and the determination period was July 15, 2007, to June 1, 2008. Pursuant to the CO's Audit Notification, the Employer submitted an entirely different PWD, with a new monetary amount and a new determination period. Because the version of section 656.40(a) that applies to this application required retention of a PWD obtained from the appropriate SWA, the CO properly denied certification on this ground.

The Employer argues that this error resulted from lost or misplaced paperwork, and that it is inconsequential because the new PWD still amounts to less than the amount paid to the foreign worker.

The loss of the original PWD, however, was not inconsequential. Because of the Employer's error, the CO had no way to determine the accuracy of the original PWD attestation submitted with the application. As the CO argued, "[f]ailure to document the PWD utilized in this application creates a major problem for the CO in evaluating the application.... Since the SWA makes the objective determination of the applicable job category and level to which the PWD would apply, this information is essential for proper review of the audited application by the CO." (CO's Brief at 2). We agree with the CO's observation that obtaining a new PWD outside the applicable time period does not cure the error of failure to retain documentation of the PWD attested to in the application. (CO's Brief at n.1).

Moreover, both the regulations and the Office of Foreign Labor Certification ("OFLC") website give employers notice that they are responsible for ensuring the accuracy of the PWD. The OFLC website includes a response to a Frequently Asked Question (FAQ) stating that if a PWD is incomplete or inaccurate:

[T]he Department of Labor will hold the employer responsible for ensuring Prevailing Wage Determinations obtained from a SWA are complete and in compliance with the PERM regulation. DOL will deny request for review that seek to correct or complete PWD information. Therefore, prior to filing a permanent labor certification application, the employer should review PWDs for completeness and compliance with the

PERM regulation. If necessary, the employer should request that the SWA fix any identified problems.³

While the FAQ response is not a regulation, we note that it provides employers notice of the manner in which incorrect prevailing wage determinations will be handled, and this response is consistent with the regulations.

Accordingly, we affirm the CO's denial of labor certification in this case.

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

³ See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#prevwage21> (last visited December 7, 2010).

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.