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: 06 August 2009

BALCA Case No.: 2009-PER-00008
ETA Case No.: A-06298-73607

In the Matter of:

MORETA & ASSOCIATES, INT.,
Employer,

on behalf of

EDUARD MRACKA,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Ronald D. Richey, Esquire
Ronald D. Richey & Associates
Rockville, Maryland
For the Employer and the Alien

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

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

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

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.

STATEMENT OF THE CASE

Moreta & Associates, Int. ("Employer") filed an Application for Permanent Employment Certification on behalf of the Alien for an "Accountant" position. (AF 29-60). In the application, the Employer described the duties for the position as:

> Analyze financial information; prepare financial reports and tax reports, quarterly and annual state and federal unemployment insurance tax reports/forms; analyze financial information detailing assets /liabilities and capital; prepare balance sheets, profit and loss statements, and other reports to summarize current and projected company financial position, using a computer; and establish, modify, document and coordinate implementation of accounting control procedures.

(AF 31). For specific skills and other requirements, the Employer listed "Speak, write and read in Spanish fluently and know QB required. M-F: 1:00 p.m. to 9:00 p.m., overtime, evenings, holidays and weekends as needed." *Id.* The Employer also required a Bachelor's degree in Accounting or equivalent. (AF 30).

The Certifying Officer ("CO") accepted the application for filing on October 26, 2006. (AF 19). On December 4, 2006, the CO sent the Employer an Audit Notification. (AF 19-22). The CO stated that the reason for the audit was that the job opportunity requires the capability to speak a foreign language. (AF 22). The CO requested documentation demonstrating business necessity for a foreign language requirement. *Id.*

On January 25, 2007, the CO denied certification on the ground that "Section K [of the Form 9089] shows that the alien did not meet the employer's minimum education, training, and experience requirements, as listed in Section H, at the time of hire." (AF 8). Specifically, the CO stated that the Employer required QB (QuickBooks) and that the

application did not document that the Alien had the required knowledge of QB. *Id.* The CO asserted that per 20 C.F.R. § 656.17(i), the job requirements described on ETA Form 9089 must represent the employer's actual minimum requirements and the employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity. *Id.*

The Employer submitted a Request for Review on February 21, 2007. (AF 4). In this request, the Employer asserted that the Alien beneficiary does meet the actual minimum requirements for the job stated on ETA Form 9089 and that he does have knowledge of Quickbooks. The Employer submitted an affidavit, attesting that before the Alien was hired he was "interviewed and tested for many accounting requirements and duties required by our company, and one of them was knowledge of Quickbooks." (AF 5). The Employer further contended that "the ETA Form 9089 did not require written proof of knowledge of Quickbooks, it just required 'knowledge,' which the alien does possess." (AF 4).

On October 1, 2008, the CO issued a letter of reconsideration, stating that the Employer did not overcome all of the deficiencies noted in the determination letter. (AF 1). The CO noted that since the additional information provided by the Employer (the Employer's affidavit) was not included on the initial ETA Form 9089, it constituted new evidence and therefore could not be considered on appeal per the Board's decision in *Health America*, 2006-PER-1 (July 18, 2006). *Id.*

The matter was forwarded to BALCA on October 1, 2008 and a Notice of Docketing was issued on October 10, 2008. The Employer notified BALCA on October 23, 2008, that it would like to proceed with the appeal but did not file an appellate brief. The CO filed a brief urging that the denial be affirmed because the Alien was not qualified for the position as it was described on ETA Form 9089, which violates the regulation at section 656.17(i). Further, the CO argued that the Employer failed to correct this deficiency because it could not submit an affidavit after the fact. 20 C.F. R. § 656.24(g)(2); *see Health America, supra* at 10.

DISCUSSION

We agree with the CO that, based on the face of the ETA Form 9089, it did not appear that the Alien possessed the Employer's special skill requirement of knowledge of QuickBooks. We further agree that the affidavit submitted by the Employer with its request for reconsideration attesting that the Alien already had knowledge of QuickBooks when he started in the position, could not overcome this deficiency because it was created after the denial determination, and therefore constituted new evidence that could not be considered under 20 C.F.R. § 656.24(g)(2).[1]

We decline, however, to affirm the CO's denial of certification, because the CO was not justified in basing the denial solely on the failure of the Form 9089 to show the Alien's qualifications for special skill requirements, without first providing the Employer an opportunity to clarify the Alien's qualifications.

In *Federal Insurance Co.*, 2008-PER-37 (February 20, 2009), this panel considered whether the Employer's application should be denied because the Employer did not affirmatively write the "*Kellogg*" language on the application. In that case, the panel found that "because the existing Form 9089 does not reasonably accommodate an employer's ability to express this attestation, we hold that it would offend fundamental due process to deny an application for failure to write the attestation on the Form 9089." *Id*. at 3. Similarly, in the instant case we have carefully reviewed ETA Form 9089, and find that it does not provide a section for the Employer to state the Alien's qualifications in regard to the special skills and requirements listed on the application in section H-14. Accordingly, as in *Federal Insurance*, it would offend fundamental due process to base a denial of the application solely on the absence of such information on the Form 9089

[1] At the time that this application was filed, the rule governing motions for reconsideration provided that "[t]he request for reconsideration may not include evidence not previously submitted." 20 C.F.R. § 656.24(g)(2) (2005).

without first giving the Employer an opportunity to address the Alien's qualifications for a special skill requirement.[2]

This is not to say that the CO cannot deny an application based on an alien's lack of special skills qualifications now being required of U.S. applicants. The application in this matter was audited. If the CO had questions about the Alien's possession of required special skills, the Audit Notification could have directed the Employer to submit relevant supplementary information and/or documentation. 20 C.F.R. § 656.21(d)(1). If the CO had done so, and the Employer had failed to produce credible information and/or documentation on the issue, the denial of certification on this basis may have been warranted. In the instant case, however, the procedure followed by the CO was plainly unfair.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is hereby **REVERSED** and that this matter is returned to the CO for issuance of a labor certification.

For the Panel:

A

JOHN M.VITTONE
Chief 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 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

[2] In contrast, Form 9089 contains a specific section for listing an alien's level of educational achievements. Thus, if an application failed to show that the alien had a required level of education, a denial based solely on the omission of such information from the Form might not be procedurally unfair.

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

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.