U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 October 2010

BALCA No.: **2009-PER-00453**
ETA No.: A-06340-88192

In the Matter of:

ROBERT VENUTI LANDSCAPING, INC.,
Employer,

on behalf of

MARCOS AGUDELO,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Yanitza N. Brignoni, Esquire
Yanitza N. Brignoni, P.C.
Bay Shore, New York
For the Employer

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

Before: **Colwell, Johnson and Rae**
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 governing permanent alien labor certification found at Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").

STATEMENT OF THE CASE

On December 1, 2006, the CO accepted for processing Employer's Application for Permanent Employment Certification, ETA Form 9089, on behalf of Alien for the position of chef. (AF 72-81).[1] The CO denied the application on December 14, 2006 because the Alien did not meet the employer's minimum education, training and experience requirements as listed in Section H of the form. (AF 69-71). On August 23, 2007, Employer requested review and authorized the application. (AF 37-42). The CO reopened the file and issued an audit notification on January 15, 2009, requesting, *inter alia*, a copy of the Notice of Filing (NOF). (AF 33-36).

The Employer responded by forwarding the requested documents on February 11, 2009. (AF 9-32). The one-page copy of the NOF provided in the documents stated the position title, the position duties, the rate of pay, and the address of the job location. (AF 27). It also contained the required information that the notice was being posted in conjunction with a PERM application, stated that any person with documentary evidence pertaining to the application could provide it to the Department, and gave the address of the CO in accordance with 20 C.F.R. § 656.10(d)(3)(i)-(iii). *Id.* At the bottom of the copy of the NOF was a space providing information regarding its posting. This portion of the document showed that the notice was posted from September 1, 2006 until September 13, 2006 at the address of the job location. It also contained an attestation clause that "the above notice was provided as shown" under which "Robert J. Venutti, Owner,"[2] signed his name on September 13, 2006. *Id.*

[1] "AF" is an abbreviation for Appeal File.

[2] We note a slight discrepancy in the spelling of the proprietor's name and business name, as the ETA Form 9089 was filed by Employer, "Robert Venuti Landscaping, Inc." represented by its president, "Robert Venuti."

The CO denied Employer's application on March 16, 2009, stating that the NOF contained neither the Employer's name nor contact information sufficient enough to allow applicants to apply for the position. (AF 6-8). Employer requested reconsideration of the denial on April 13, 2009,[3] arguing that "[a]lthough the name of the company is not technically stated on the notice, the filing itself contained the location of the employment which is the same address where the notice was posted and is the office of the company . . . [i]n addition, the name and title of the owner of the company was right on the notice." (AF 2-4).

On August 31, 2009, the CO found that the Employer's request for reconsideration did not overcome the deficiencies in the application and forwarded the case to the Board. (AF 1). Specifically, the CO disputed Employer's contention that the name and title of the owner of the company were actually on the NOF as posted, asserting that these requirements were "indicated in the disclosure statement rather than in the notice itself," which meant that they were appended to the NOF after its posting had already been completed. The CO maintained that omission of these requirements under 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(1) resulted in a denial under § 656.24(b)(1). *Id.*

BALCA issued a Notice of Docketing on September 10, 2009. Employer did not file an appellate brief. The CO filed an appellate brief on October 29, 2010. In his brief, the CO reiterated his interpretation of the NOF contained in the Appeal File as showing that Employer's name and address were added to the document after it had already been posted per the "disclosure statement" attesting to the circumstances of its posting. He further argued that "[a]bsent additional information as to the situation regarding the company and why the employer's name is not listed, the CO may properly deny certification," citing *Stone Tech Fabrication*, 2008-PER-187 (Jan. 5, 2008) and noting that no information was given regarding whether Employer was the only company at that location or whether there were also postings for other jobs in other places at the location of the NOF's posting. The CO also noted that the requirement of the NOF "is not a mere technicality," citing *Voodoo Contracting Corp.*, 2007-PER-1 (May 21, 2007), and that

[3] The letter was mis-dated August 22, 2007.

denial was proper on grounds that the application was out of compliance with the regulations and therefore incomplete.

DISCUSSION

The regulation at 20 C.F.R. § 656.10(d) provides, in pertinent part:

> (d) *Notice*
> (1) In applications filed under... [§] 656.17 (Basic Process)… the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the Certifying Officer . . .
>
> (4) If an application is filed under § 656.17, the notice must contain the information required for advertisement by § 656.17(f)…"

The regulation at Section 656.17(f) requires that advertisements must "[n]ame the employer" and "[d]irect applicants to report or send resumes, as appropriate for the occupation, to the employer." Therefore, a Notice of Filing posted pursuant to the basic recruitment process must also conform to these requirements.

In *Stone Tech Fabrication*, 2008-PER-187 (Jan. 5, 2008), a panel decision, the Board contemplated the possibility that the requirement that the NOF name the employer could potentially be waived where the interests of due process and common sense strongly dictated that the name requirement would be a matter of formalism. In dicta, the panel recognized that requiring the employer's name would be superfluous in the event that the name of the company president and contact information given were the functional equivalent of naming the employer. Slip op. at 3. However, the panel also recognized that arriving at this "functional equivalent" finding would require the consideration of other evidence describing the employer's company, such as the size of the company, how well-known the president's name would be among the work force, and whether the place it posts notices is used exclusively for company bulletins. *Id*. at 4. The panel ultimately concluded that because Stone Tech had argued only that inclusion of the president's name and contact information sufficiently displaced the requirement that the

name of the employer be listed on the NOF, the record did not evidence that the requirements for the NOF's posting were fulfilled. *Id.*

In the instant case, the contention between the CO and Employer focused on whether the President's name, signature, and contact information made it onto the NOF prior or subsequent to its actual posting. The wording of the NOF's disclosure statement utilizing past tense to refer to the NOF's posting certainly suggests that the language was added subsequent to its posting. However, we need not resolve this issue for purposes of this appeal. As in *Stone Tech, supra*, Employer does not argue that the context in which the NOF was posted clearly shows that use of the President's name and contact information – if it was actually on the NOF at the time of its posting – were the functional equivalent of stating Employer's company name, let alone supply the information that would support such a finding.[4] Therefore, insofar as *Stone Tech* contemplated a possible exception to the NOF's requirements, this situation does not fit that possible exception.[5] Moreover, *Stone Tech* was decided by an entirely different panel of judges and this panel is not bound by their mere suggestion of a hypothetical exception to the regulations. We hold today that the suggestion in *Stone Tech* that exceptions to the NOF requirements are possible is no longer viable under the current regulatory scheme. Regardless of the context in which it is posted, the NOF must contain the information outlined in Section 656.17(f), including the name and geographic location of the employer.

As this panel has previously explained, the PERM process, designed with the primary goal of streamlining the system under the old regulations, is a system of bright-line rules that do not leave much opportunity to correct errors once an application is filed. In *Alexandria Granite & Marble*, 2009-PER-373 (May 26, 2010), an appeal involving the failure of the Notice of Filing to state the geographic location of a job opportunity, this panel noted that the PERM regulations were designed as an attestation based program

[4] Notably, *Stone Tech* was decided under an older version of the PERM regulations. The *Stone Tech* decision contemplated an exception to the NOF rule that would potentially conflict with the new regulations governing what evidence may be considered on reconsideration. *See* 20 C.F.R. § 656.24 (Effective July 16, 2007) (requests for reconsideration may include only documentation actually received from the employer in response to a request from the CO or must be documentation that the Employer did not previously have an opportunity to present to the CO but existed at the time of filing the application).

[5] As previously noted by this panel, the *Stone Tech* "exception" was simply a hypothetical suggestion that did not create a rule. *See Alexandria Granite & Marble, infra*, slip op. at 5.

which sacrificed in-depth individual adjudication of applications for a faster and more efficient attestation process that demands that applicants strictly adhere to rigorous regulatory requirements. Slip op. at 5. The panel noted that PERM's requirements "were designed to limit the opportunities for applicants to misrepresent the job opportunity and increase the quality of information about the job opportunity received by job applicants and other interested persons" and "to assist the CO in processing a high volume of applications consistently and in a timely fashion in a central location." *Id.*

The goals sought to be attained by the implementation of PERM result in a heavy burden on the employer to prepare the application carefully and exactly and to maintain complete documentation in support thereof. In *Alexandria Granite*, we explained that applicants "are sometimes required to conduct recruitment in ways that are different from the manner in which they normally recruit, and which may seem unnecessary or unimportant in the particular employer's circumstances." *Id.* at 6. We acknowledged that at times, certain information required in the NOF may be obvious in the context of the particular employer's business -- but that "[i]t is simply not administratively feasible … for the CO to investigate the circumstances of each applicant's business. Therefore, if the employer fails to comply with the regulatory requirements by failing to include all of the required information on the NOF, it has the difficult burden of proving to the CO that its error was inconsequential based on the circumstances in which the NOF was posted." *Id.*

We note these aspects of the PERM program for the purpose of illuminating the intent behind the regulations we are bound to follow. We encourage future applicants to offer thorough documentation of their applications when first directed to do so, to interpret requests for information broadly, and to continually anticipate the documentation that will support each portion of the PERM application. It is the employer's responsibility to build the record in support of its application. The regulations that stipulate the content of the NOF are not unclear or difficult to find. When an employer fails to follow the regulations, it bears the difficult burden of offering sufficient evidence in a procedurally appropriate manner in order to show that the application should otherwise be granted. Today we hold that the so-called *Stone Tech* exception is no longer an available means by which to offer this plea for relief.

For these reasons, we find that it was fatal to Employer's application to fail to include its business name on the NOF. Additionally, the NOF did not contain any language directing potential applicants to report or send resumes as appropriate to the position and Employer has not contested the validity of this alternative ground for denial.

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

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **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

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.