U.S. Department of Labor

Board of Alien Labor Certification Appeals
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BALCA Case No.: 2010-PER-00224
ETA Case No.: A-08325-07903

In the Matter of:

A CUT ABOVE CERAMIC TILE,
Employer,

on behalf of

FERNANDO BUENO-PEREZ,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Dustin W. Dyer, Esquire
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For the Employer

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Office of the Solicitor
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For the Certifying Officer

Scott D. Pollock, Esquire
Chicago, Illinois
For Amicus Curiae, American Immigration Lawyers Association

Before: **Colwell, Krantz, Malamphy, Price, and Purcell**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

EN BANC DECISION AND ORDER
REVERSING 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 Title 20, Part 656 of the Code of Federal Regulations. *En banc* review was granted in the matter to resolve a conflict among panels of the Board regarding whether an Employment and Training Administration ("ETA"), Office of Foreign Labor Certification, Certifying Officer ("CO") may deny certification based on an employer's failure to provide proof of publication of the State Workforce Agency ("SWA") job order containing the content of the job order.

STATEMENT OF THE CASE

On January 8, 2007, the Employer filed an application for permanent labor certification on behalf of the foreign worker for the nonprofessional position of "Tile Setter." (AF 63-73).[1] As a part of its domestic recruitment efforts, the Employer attested that it placed a job order with the SWA in the area of intended employment from July 13, 2006 through August 12, 2006. (AF 65).

The CO issued an Audit Notification on June 11, 2009, instructing the Employer to submit, among other documentation, "[a] copy of the job order placed with the SWA serving the area of intended employment downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the content of the job order, where a job order is required by the recruitment provisions of 20 CFR 656 and/or a job order is listed on the ETA Form 9089 as a recruitment source." (AF 48-50).

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

The Employer responded to the Audit Notification and included a copy of its completed Employer Job Order Information Sheet from VaEmploy.Com. (AF 41-44). On October 14, 2009, the CO denied the Employer's application for permanent labor certification because the Employer "failed to provide proof of publication of the job order from the State Workforce Agency (SWA) containing the content of the job order, as requested in the Audit Notification letter." (AF 10-11). Citing 20 C.F.R. § 656.20(b) as the regulatory basis for denial, the CO found that the copy of a completed Employer Job Order Information Sheet from VaEmploy.Com "does not confirm that the SWA ran the job order and does not show the final content of the job order as run by the SWA." (AF 11).

The Employer requested reconsideration, arguing that the PERM regulations provide that the SWA job order is documented by the start and end date as entered on the application. (AF 1-9). The Employer also argued that it had attempted to obtain proof of publication of the SWA job order from the Virginia SWA, but was unable to obtain the requested documentation. The Employer included an email from a representative from the Virginia SWA, who stated that "any job orders that were in [the SWA's] database 13 months prior to the November 2007 transition [were] deleted." (AF 4).

The CO affirmed the denial on January 13, 2010 and forwarded the matter to BALCA. On April 6, 2011, a BALCA panel affirmed the denial, finding that the Employer's documentation only showed that the job order was placed for the required 30-day period. The panel found that the Employer failed to provide proof of publication of the job order containing the job order's content, as requested in the CO's Audit Notification. Therefore, the panel found that the Employer substantially failed to provide the required documentation and affirmed the CO's denial under Section 656.20(b).

On May 3, 2011, the Employer requested en banc review, arguing that the Employer fully complied with the applicable regulations pursuant to the panel decision in *Mandy Donuts Corp*., 2009-PER-481 (Jan. 7, 2011). The Board granted en banc review

on September 26, 2011 in order to resolve the conflict between *Mandy Donuts* and the panel decision in this case. The Board invited the American Immigration Lawyers Association ("AILA") and the American Immigration Council to participate as *amici curiae* and required the parties and *amici* to file briefs within 45 days.

The Employer filed its en banc brief on November 10, 2011, arguing that Section 656.17(e)(2)(i) provides that the SWA job order recruitment step is documented by the start and end dates on the application, and that the Employer fully complied with this regulation. Additionally, the Employer drew a contrast between the SWA job order documentary requirements under the PERM program and the H-2B program in support of its argument that the PERM regulations do not require an employer to provide proof of publication of the SWA job order. The Employer noted that unlike the PERM regulations, the H-2B regulations specifically require an employer to maintain proof of publication from the SWA containing the text of the job order. The Employer also contrasted the evidence required by the PERM regulations to document a SWA job order as opposed to a newspaper advertisement.

Counsel for the CO submitted its en banc brief on November 16, 2011. The CO argues that the *Mandy Donuts* panel decision was improperly decided and urges the Board to follow the panel decision in *Bettina Equities*, 2010-PER-151 (Mar. 4, 2011). The CO argues that the PERM regulations require the employer to maintain all documentation necessary for approval of the labor certification application and submit its supporting documentation when required by the CO. The CO asserts that the panel in *Mandy Donuts* misinterpreted Section 656.17(e)(2)(i) because Section 656.17(e)(2)(i) governs how to document the timing of the SWA job order, rather than the actual placement of the SWA job order. The CO contends that the regulations require an employer to maintain documentation to establish that the job order was published.

AILA filed an amicus brief on November 17, 2011, arguing that ETA's response to comments during rulemaking demonstrates ETA's intent that employers are not

required to submit additional evidence to document that the job order was placed. AILA points out that during rulemaking, ETA noted that supporting documentation is that which is "specified in the regulations." As the regulations do not specifically require retention of the SWA job order, AILA contends that the SWA job order is not "required supporting documentation," and therefore, the CO may not deny certification for failure to submit a copy of the job order in the event of an audit.

DISCUSSION

The PERM regulations require an employer filing for permanent labor certification to place a job order with the State Workforce Agency ("SWA") serving the area of intended employment. 20 C.F.R. § 656.17(e)(2). Specifically, the PERM regulations require:

> Placing a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application serve as documentation of this step.

20 C.F.R. § 656.17(e)(2)(i).

The regulations also require that all documentation supporting the permanent employment certification application be retained for five years after filing the application. 20 C.F.R. § 656.10(f). An employer must furnish "required supporting documentation" to the CO if its application is audited. 20 C.F.R. § 656.17(a)(3). The audit regulations provide that a substantial failure by the employer to provide the required documentation will result in denial of the application. 20 C.F.R. § 656.20(b).

The Employer urges us to adopt the holding in *Mandy Donuts*. In *Mandy Donuts*, the employer submitted a copy of its SWA job order request and order form in response to the audit, but the CO denied certification based on the employer's failure to provide proof of publication of the SWA job order containing the content of the job order. The

Mandy Donuts panel noted that the PERM regulations require "placement" of a SWA job order and provide that placement of a job order for 30 days is documented by the start and end dates entered on the application. Therefore, the panel found that the regulations do not permit the CO to deny certification based on failure to produce evidence establishing that the SWA job order was actually run. Slip op. at 5-6. The panel considered the language in Section 656.17(e)(2)(i) and contrasted it to the regulatory language used to state how placement of a newspaper advertisement is documented. Unlike SWA job order regulations,[2] the regulations governing placement of a newspaper advertisement provide that "[d]ocumentation of this step can be satisfied by furnishing copies of the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper." 20 C.F.R. §§ 656.17(e)(1)(i)(B)(3) (professional occupations); 656.17(e)(2)(ii)(C) (nonprofessional occupations).

We agree with the *Mandy Donuts* panel that this distinction is one of relevance. While the PERM regulations clearly require an employer to be able to provide proof of publication of its newspaper advertisement, the regulations do not require an employer to be able to provide proof of publication of its SWA job order. Likewise, we are also mindful of the Employer's argument that had ETA intended employers filing an application for permanent labor certification to provide proof of publication of the SWA job order, it would have drafted the PERM SWA job order regulation the same way that it drafted the H-2B SWA job order regulation. Under the H-2B temporary nonagricultural labor certification program, which is also administered by ETA, documentation of the placement of the SWA job order "shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting." 20 C.F.R. §

[2] An employer sponsoring a foreign worker for a nonprofessional occupation is required to place a job order with the SWA under Section 656.17(e)(2)(i) and an employer sponsoring a foreign worker for a professional occupation is required to place a job order with the SWA under Section 656.17(e)(1)(i)(A).

655.15(e)(1).[3] When the CO audited the Employer's application, it requested the precise documentation required by the *H-2B* regulations. The PERM regulations, however, do not state that an employer must maintain documentation of proof of publication of the job order, and we find that the CO has conflated the documentation requirements of the PERM and the H-2B regulations.

A fundamental principle of statutory construction is that where Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion of exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). As such, we presume that ETA intentionally drafted the H-2B and PERM SWA job order regulations with different documentary requirements. We acknowledge that the H-2B regulations are more recent than the PERM regulations, and therefore the distinction may reflect either a policy change or concern with the PERM SWA job order regulation as written. Nevertheless, both the plain language of the regulation and the regulatory history of the PERM regulations support the conclusion that, at the time that the PERM regulations were published, ETA did not mandate retention of documentation that the SWA job order was actually run.

The *Mandy Donuts* panel considered the regulatory history of the PERM program to determine if ETA provided any guidance about the type of documentation, if any, that an employer needed to retain to document the placement of a SWA job order. While the CO asserts that we should not consider the regulatory history where the regulatory requirements are explicit, neither Section 656.17(e)(2)(i), nor any other section of the

[3] *See also* 73 Fed. Reg. 78020, 78031 (Dec. 19, 2008) (final H-2B regulations) ("Documentation of a SWA job order will be satisfied by copies of the job order downloaded from the Internet showing the beginning and the ending date of the posting or a copy of the job order provided by the SWA with the dates of posting listed, or other proof of publication from the SWA containing the text of the job order."); 73 Fed. Reg. 29942, 29949 (May 22, 2009) (proposed H-2B regulations) ("Documentation of a SWA job order will be satisfied by copies of the job order downloaded from the Internet on the first and last day of the posting, or a copy of the job order provided by the SWA with the dates of posting listed.").

PERM regulations explicitly requires employers to retain and furnish published copies of the SWA job order when requested by the CO. Accordingly, we find it appropriate to consider the regulatory history. Like the panel in *Mandy Donuts*, we find that the regulatory history indicates that employers are not required to maintain proof of publication of the SWA job order. In responding to comments regarding the audit process and expanding the time an employer has to respond to an audit to 30 days, ETA stated:

> 3. Sending and Responding to the Audit Letter
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> ***
>
> To account for possible delays in mail delivery, and for other delays caused by circumstances beyond the control of the employer, we have extended the response time to 30 days. Employers' responses must be sent within the 30-day time limit, but need not be received by DOL by that date. As stated in the preamble to the proposed rule, the employer is expected to have assembled the documentation required before filing the application. None of the commenters stated this expectation is unreasonable.
>
> One commenter stated some records may be purged in the state system after a short period of time, such as 30 or 60 days, making it impossible to retrieve information by the time an audit is requested.
>
> The *Application for Permanent Employment Certification* requires the employer to provide the start and end date of the job order on the application form *to document the job order has been placed*. Gathering additional information on the job order from the SWA will not be necessary; therefore, no extension of the response time is warranted for this purpose.

ETA, Final Rule, *Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 69 Fed. Reg. 77326, 77359 (Dec. 24, 2004) (emphasis added). Accordingly, contrary to the CO's assertion that Section 656.17(e)(2)(i) only relates to how an employer documents the timing of a SWA job order, the regulatory history clearly indicates that Section 656.17(e)(2)(i)

establishes how an employer documents the placement of the SWA job order. Neither the regulation nor the regulatory history provide any indication that an employer is required to retain documentation of proof that the job order ran. In fact, the regulatory history suggests the opposite – that all an employer has to do to document the placement of a SWA job order is to list the relevant dates on the application and that the CO will not later request additional information about the SWA job order.

The CO urges the Board to adopt the holding from *Bettina Equities*, where a BALCA panel found that an employer was required to provide proof of publication of the SWA job order if requested by the CO. The panel held that "where a document has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document, if requested by the Certifying Officer, must be adduced." *Bettina Equities*, 2010-PER-151, slip op. at 4 (*quoting Gencorp,* 1987-INA-659 (Jan. 13, 1989)(en banc)). The panel found that proof of publication of the SWA job order had a direct bearing on the resolution of the issue, and, in light of the regulations' requirement that an employer retain all supporting documentation for five years after filing the application, found that proof of publication should be obtainable by reasonable efforts. *Bettina Equities*, 2010-PER-151, slip op. at 5.

We disagree with the panel's holding in *Bettina Equities* and find that reliance on *Gencorp* is misplaced. In *Gencorp*, the employer claimed that a U.S. applicant lacked the academic coursework that was required for the position, and stated that it based that determination on the applicant's academic transcript. *Gencorp,* 1987-INA-659, slip op. at 2. While the employer described the transcript, it did not submit a copy of the U.S. applicant's transcript for the CO's verification. *Id.* The Board determined that the transcript had a direct bearing on whether the employer had lawfully rejected the U.S. applicant and that the transcript was reasonably obtainable by the employer, as the employer had already indicated that it had the transcript in its possession. *Id.* at 3. The Board remanded the case to provide the CO the opportunity to specifically request, and the employer the opportunity to submit, the U.S. applicant's transcript. *Id.*

In *Gencorp*, the Board explained that where a provision of the regulations requires information to be furnished in a specific form, the regulation controls. *Id*. at 2. Only if the regulation does not provide any specific manner of documentation does the "direct bearing/reasonably obtainable" standard apply. In this case, the SWA job order regulation is not silent. Rather, it clearly states that start and end dates of the job order, as entered on the ETA Form 9089, serve as documentation of placement of the job order. In *Gencorp*, the Board considered whether an employer had submitted sufficient documentation to demonstrate why a U.S. applicant was not qualified for the job. Here, on the other hand, we are considering whether the employer submitted sufficient documentation of one of its pre-filing recruitment steps under Section 656.17(e). The "direct bearing/reasonably obtainable" standard has limited, if any, applicability to the pre-filing recruitment provisions under Section 656.17(e), as these provisions specify how each of the steps is to be documented.

Finally, assuming *arguendo* that the "direct bearing/reasonably obtainable" standard has any applicability to the pre-filing recruitment provisions under Section 656.17(e), we disagree with the assumption in *Bettina Equities* that an employer can obtain a copy of the published SWA job order by reasonable efforts if requested by the CO. As was discussed during rulemaking, SWAs may purge closed job orders from their systems prior to the CO's request for this information. In this case, the Employer has argued that it attempted to obtain proof of publication of the SWA job order upon receipt of the Audit Notification, but was unable to receive this documentation from the Virginia SWA. In fact, the Employer's request for reconsideration includes email correspondence with a representative from the Virginia SWA, who stated that "any job orders that were in [the SWA's] database 13 months prior to the November 2007 transition [were] deleted." (AF 4). The CO has not challenged the Employer's contention that its SWA job order has been purged from the SWA's system.[4]

[4] We note that an employer that waits until receipt of an audit notification to begin compiling the specific documentation required to be maintained under the regulations is not be excused from producing this evidence merely because it is later difficult to obtain the documentation.

When a regulation does not require an employer to retain a particular type of evidence to document compliance with a recruitment step, such evidence is not "required documentation," and the CO may not deny certification based on a failure to produce such documentation. *See e.g., SAP Labs, LLC*, 2010-PER-1233 (Nov. 15, 2011); *Schnabel Engineering, Inc.*, 2010-PER-1125 (Nov. 9, 2011). In *Schnabel Engineering*, a BALCA panel reversed the CO's denial of certification based on the Employer's failure to provide a copy of the prevailing wage determination ("PWD") request form that the CO requested in the Audit Notification. The panel noted that "the CO does not have carte blanche to require just any documentation. The application may only be denied under § 656.20(b) when the absent documentation is *required*." (emphasis in original) Slip op. at 5. Likewise, a separate panel in *SAP Labs* also reversed the CO's denial of certification based on the Employer's failure to provide a copy of the PWD request form that the CO had requested in the Audit Notification. The panel followed the same approach as the *Schnabel Engineering* panel, finding that because the PWD regulation specifically requires that an employer maintain its PWD, under the doctrine of *expressio unius est exclusio alterius*, an employer need not maintain or submit any other evidence, including the PWD request, to comply with the regulation. *SAP Labs, LLC*, 2010-PER-1233, slip op. at 4. Therefore, the panel in *SAP Labs* found that the PWD request was not "required supporting documentation" within the meaning of Sections 656.17(a)(3) and 656.20(b).

This approach is consistent with ETA's own guidance during rulemaking about the meaning of "supporting documentation." In explaining the PERM program's new attestation-based process, ETA stated:

> The employer will not be required to submit any documentation with its application, but will be expected to maintain the supporting documentation *specified in the regulations*. The employer will be required to provide the supporting documentation in the event its application is selected for audit and as otherwise requested by a Certifying Officer.

69 Fed. Reg. at 77327 (emphasis added). This guidance plainly notifies employers that they must maintain the recruitment documentation that is specified in the regulations. Correspondingly, evidence that is related to recruitment but that is not specified by the regulations is not "supporting documentation," and therefore need not be maintained under Sections 656.10(f) and 656.17(a)(3). Based on the foregoing, we find that proof of publication of the SWA job order is not "required supporting documentation," and therefore, the CO's denial of certification under Section 656.20(b) was improper.

Likewise, we note that the SWA job order request is also not required documentation, as the regulations provide that placement of the SWA job order is documented by start and end dates on the application. Nevertheless, as the panel noted in *Mandy Donuts*, the CO has both a reasonable and highly useful purpose in requesting this documentation to ensure that the job opportunity was clearly open to U.S. workers.[5] As such, we endorse the CO's authority to request documentation of the SWA job order, and any employer that has this documentation should submit it. However, because this documentation is not "required" under the PERM regulations, the CO may not deny

[5] The spirit and context of the PERM regulations, which are grounded in attestations backed up by retained documentation to support the attestations, strongly suggest that an employer should retain and be able to produce documentation about the content and dates of action on all elements of recruitment. We would anticipate that most employers recruiting in good faith will have retained documentation in some form to show the content of the job order, and if so be able to produce it. Moreover, the CO is not barred from denying certification based on a deficiency in the content of the SWA job order. *See, eg., Chemical Abstracts Service*, 2010-PER-1164 (Sept. 23, 2011) (denial affirmed where the wage in the SWA job order was more than $18,000 less than the prevailing wage); *Vila & Son Landscaping*, 2010-PER-1332 (Sept. 23, 2011) (denial affirmed where the wage in SWA job order was $1,200 less than the wage offered to the foreign worker); *Wright State University*, 2010-PER-1220 (June 3, 2011) (denial affirmed where documentation of SWA job order strongly suggested that the employer's law firm's name was displayed on the job order rather than the employer's name); *Xceed Technologies, Inc*., 2010-PER-80 (July 27, 2010) (denial affirmed where the SWA job order listed a 24-month experience requirement, whereas no experience requirement was listed on the Form 9089).

In view of our finding, however, that documentation of the SWA job order is not expressly and specifically required to be retained under the PERM regulations, an employer's failure to produce the SWA job order cannot be the sole basis for a denial. If ETA wants an employer to retain such documentation, it needs to revise the PERM regulations along the lines of the H-2B regulations.

certification under Section 656.20(b) solely based on an employer's failure to provide this documentation.

Based on the foregoing, we reverse the CO's denial and remand this matter for certification.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **REVERSED** and **REMANDED** for certification.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge