**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 30 May 2012**

**BALCA Case No.: 2011-PER-01250**
ETA Case No.: A-08200-71187

*In the Matter of:*

**MT HEATING, INC.,**
*Employer*

*on behalf of*

**MARIUSZ TALAGA,**
*Alien.*

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Christopher Kurczaba, Esquire
Kurczaba Law Offices, P.C.
Chicago, IL
*For the Employer*

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

Before: **Romero, Kennington, and Rosenow**
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 July 18, 2008, the Certifying Officer ("CO") accepted for filing Employer's Application for Permanent Employment Certification for the position of "Traditional Heating & AC Systems Installer" (AF 66-75).[1] On February 25, 2009, the Department of Labor issued an Audit Notification Letter, requesting more information from Employer (AF 62-65). Employer responded with supplemental documentation on March 24, 2009 (AF 15-61). On September 9, 2010, the CO issued his denial letter, listing two reasons for denial (AF 12-14). One of these reasons was that Employer did not indicate the location of where the Notice of Filing had been posted.[2] Employer submitted a request for reconsideration on October 4, 2010 (AF 2-11) and the CO found the request did not overcome the stated deficiency on May 2, 2011 (AF 1).

The CO forwarded the case to the BALCA on May 2, 2011, and the BALCA issued a Notice of Docketing on July 21, 2011. Employer filed a Statement of Intent to Proceed on July 28, 2011, and filed an appellate brief on September 2, 2011, arguing that it had attested to the fact it complied with the regulations, including that the NOF was posted in an appropriate place. In the alternative, Employer argued that not indicating where the posting was placed was harmless error.

On September 8, 2011, the CO filed a Statement of Position, requesting the BALCA affirm his denial determination.

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

[2] Because we affirm the denial based on the reason discussed herein, we have not considered the other ground cited by the CO for denial of certification. Moreover, on reconsideration, the CO accepted Employer's information provided in clarification of the second reason for denial.

## DISCUSSION

PERM is an attestation-based program. 20 C.F.R. § 656.10(c). Among others, an employer must attest that the job opportunity in the permanent labor application has been and is clearly open to any U.S. workers. 20 C.F.R. § 656.10(c)(8). Accordingly, the regulations require an employer to conduct mandatory recruitment steps and make a good-faith effort to recruit U.S. workers prior to filing an application for permanent alien labor certification. *See* 20 C.F.R. § 656.17; 69 Fed. Reg. 77326, 77348 (Dec. 27, 2004).

The CO may only certify permanent labor applications if there are not sufficient United States workers who are able, willing, qualified, and available at the time of the application. *See* 20 C.F.R. § 656.1(a)(1). Therefore, the CO must determine whether the employer conducted the mandatory, and, in the case of professional positions, additional recruitment steps designed to apprise U.S. workers of the job opportunity in the labor application. 20 C.F.R. § 656.20(b)(1). Further, the regulations require the employer to document all recruitment steps and retain documentation for five years after the date of filing the application. *See* 20 C.F.R. §§ 565.10(f), 656.17(a)(3), 656.17(e)(1).

PERM is also an exacting process, designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *HealthAmerica*, 2006-PER-1, slip op. at 19 (July 18, 2006) (en banc). An employer bears the burden of proof to establish eligibility for labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b).

The regulations require that an employer that files an application for permanent labor certification must provide notice to the employer's employees at the facility or location of employment. 20 C.F.R. § 656.10(d)(ii). The applicable regulation provides, in pertinent part:

> The notice must be posted for at least 10 consecutive business days.[3] The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job

[3] For the purposes of complying with the Notice of Filing requirement, a "business day" is any day that an employer has employees working on the premises. *Il Cortile Restaurant*, 2010-PER-683 (Oct. 12, 2010).

> opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.3 or occupational safety and health notices required by 29 CFR 1903.2(a). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation required may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

20 C.F.R. § 656.10(d)(1)(ii).

The Notice of Filing is not a mere technicality, but is an implementation of a statutory notice requirement designed to assist interested persons in providing relevant information to the CO about an employer's certification application. It is not a regulation to be lightly dismissed under a harmless error finding. *See Riya Chutney Manor, LLC*, 2010-PER-177 and 191 (Apr. 7, 2010); *Voodoo Contracting Corp*., 2007-PER-1 (May 21, 2007).

In this case, there was no deficiency in the content of the NOF, but Employer did not provide supplemental documentation that the NOF was actually posted in the proper place. In response to the Audit Notification, Employer submitted the NOF, which did not indicate the location in which it was posted (AF 30). Employer also submitted a signed statement from its President attesting that no applicants contacted Employer in response to its advertisements or NOF posting, but which also failed to state where the NOF had been posted (AF 31). The only evidence presented that the NOF was posted in the proper place was Employer's attestation in Section I.e.25 of the ETA Form 9089 that the NOF was posted for 10 business days in a conspicuous location at the place of employment (AF 70). Because it is not administratively feasible for the CO to investigate the circumstances of each applicant's business, however, the employer must state in its response to an audit notification that the NOF was posted at the proper location. *See In the Matter of Fairplay Farm*, 2010-PER-966 (August 4, 2011) (denial appropriate where neither employer's NOF nor other audit response materials contained information stating where the NOF was posted); *In the Matter of Little Angels Head Start Program*, 2010-PER-1208 (September 26, 2011).

In *The Matter of Sonora Desert Dairy, LLC*, the BALCA upheld the CO's denial where the employer did not submit the dates on which the NOF was posted. 2011-PER-66 (April 13, 2012). The panel found that "[b]y not submitting the dates of posting to the CO, in its response to the Audit Notification, the Employer failed to document its attestation that the notice was timely posted." *Id.* In the same way, by not providing documentation that the NOF was posted in the proper location, Employer failed to document its attestation to that effect, in violation of Section 656.20(b) (substantial failure to provide documentation required by an audit). 20 C.F.R. § 656.20(b).

Employer argues that *Pickering Valley Contractors* supports its position that the regulations do not require a statement identifying where the NOF was posted. 2010-PER-1146 (August 23, 2011). In that case, however, the CO's denial was based on his inability to verify sponsorship of the alien, not because the employer failed to identify where the NOF was posted. The BALCA vacated the CO's denial as improper, because it found the CO's inability to reach the employer by telephone was not enough to invalidate its attestation that it was in full compliance with the regulatory requirements.

The regulations state "[t]he documentation required may be satisfied by providing a copy of the posted notice and stating where it was posted." 20 C.F.R. § 656.10(d)(1)(ii). While this language supports an argument that there may be other ways to satisfy the requirements besides stating where the NOF was posted, employer has not presented any. There is support in the record and in prior case law for the CO's finding that failure to state where the NOF was posted is grounds for denial.

As to Employer's other argument that this omission was harmless error, it is well-settled that deficiencies of the NOF and its supporting documentation are not to be dismissed under a harmless error finding.

## ORDER

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

For the Panel:

A

**Patrick M. Rosenow**
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 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.