U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 September 2016

BALCA Case No.: 2012-PER-01868
ETA Case No.: A-10341-36882

In the Matter of:

ALLIANZ GLOBAL INVESTORS OF AMERICA, L.P.,
Employer,

on behalf of

LAGAN SRIVASTAVA,
Alien.

Certifying Officer: William Carlson, Ph.D.
Atlanta National Processing Center

Appearance: Valarie H. McPherson, Esq.
Proskauer Rose LLP
Newark, NJ
For the Employer

Before: **McGrath, Geraghty, Calianos**
Administrative Law Judges

TIMOTHY J. McGRATH
Administrative Law Judge

DECISION AND ORDER
AFFIRMING 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 ("C.F.R."). For the reasons set forth below, we affirm the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On February 25, 2011, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Senior Legal & Compliance Mutual Fund Specialist." (AF 18-31).[1] On October 7, 2011, the CO denied the Employer's application pursuant to 20 C.F.R. § 656.24(e)(6). (AF 16-17). Section 656.24(e)(6) provides that if a labor certification is denied, the final determination form will "[a]dvise that a new application in the same occupation for the same alien can not be filed while a request for review is pending with the Board of Alien Labor Certification Appeals."

In the denial letter, the CO stated the Employer previously submitted an application on March 11, 2008 for a Paralegal and Legal Assistant position offered to foreign worker, Lagan Srivastava. (AF 17). The CO noted the Employer's March 11, 2008 application was forwarded to BALCA for review on December 12, 2010. (AF 17). The CO denied certification because the present application was filed for the same position and alien identified in the March 11, 2008 application. (AF 17, 18-31). The CO also stated the Employer failed to respond to an e-mail on July 28, 2011 asking which application it wished to proceed with. (AF 17).

On October 31, 2011, the Employer requested reconsideration. (AF 3-15). The CO forwarded the case to BALCA on April 3, 2012. (AF 1-2). In the transmittal letter, the CO reiterated its denial pursuant to section 656.24(e)(6). (AF 1).

On August 16, 2012, BALCA issued a Notice of Docketing. The Employer submitted its Statement of Intent to Proceed on September 28, 2012. Neither the CO nor the Employer submitted a statement of position or legal brief. On August 2, 2016, BALCA issued an Order Requiring Certification on Mootness. On August 10, 2016, the Employer responded with a Statement of Intent to Proceed with its application for the Senior Legal & Compliance Mutual Fund Specialist position offered to Srivastava.

DISCUSSION

The PERM regulations state that when a CO issues a denial determination it must advise the employer that a new application in the "same occupation for the same alien cannot be filed

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

while a request for review is pending with the Board of Alien Labor Certification Appeals." § 656.24(e)(6). In the present case, the CO denied certification because the Employer had another application pending BALCA review for the same job opportunity offered to Srivastava. (AF 1-2, 16-17). After review of both applications, the CO found the job opportunities consisted of "substantially comparable" job duties. (AF 1).

The CO's initial denial letter stated that on March 11, 2008, the Employer submitted an application for permanent labor certification. (AF 17). The CO noted the Employer's March 11, 2008 application was forwarded to BALCA for review on December 12, 2010. (AF 17). The CO denied certification because the February 25, 2011 application involves the same alien and job opportunity as the Employer's March 11, 2008 application.[2] (AF 1, 17).

On reconsideration, the Employer argues that its first application filed in March 2008 sought certification for a different occupation, or a "Senior Paralegal" position. (AF 8-9). The Employer asserts that it now seeks certification for a "Senior Legal & Compliance Mutual Fund Specialist" position for the same foreign worker. (AF 8-9). In its reconsideration memorandum, the Employer details the differences between both occupations. (AF 8-9). However, the Employer failed to submit any documentation, such as its March 11, 2008 ETA Form, distinguishing the two job positions. An employer bears the burden of proof to establish its eligibility for labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). We find the Employer's mere assertion insufficient to demonstrate that the job opportunities identified in both applications are not the same occupation.[3] 20 C.F.R. § 656.2(b); *Jakob Mueller of America,*

[2] The CO also indicated the Employer failed to respond to an e-mail on July 28, 2011 sent to both the Employer's attorney and Employer's contact listed on the ETA Form 9089. (AF 1, 17). The CO stated the e-mail requested the Employer to designate which of the two applications it wished to proceed with, but the Employer failed to respond. (AF 1, 17).

[3] An Office of Foreign Labor Certification FAQ addresses multiple PERM filings by an employer:

> **Under PERM, is it permissible for an employer to have more than one labor certification application actively in process for the same foreign worker for the same job opportunity at any given time? What should an employer do if it has already filed multiple applications for the same foreign worker for the same job opportunity?**
>
> Under the old and new permanent labor certification regulations, DOL certifies that there are not available U.S. workers for a particular "job opportunity." *See, e.g.*, 20 CFR 656.10(c) (new PERM regulation) and 656.20(c) (prior regulation). DOL's longstanding policy has been that an employer is not prohibited from filing applications for the same foreign worker involving different, legitimate job openings to which U.S. workers may be referred. *See, e.g.*, Field Memorandum 48-94 (May 16, 1994) (Policy Guidance on Alien Labor Certification Issues at § 6). However, DOL has not processed or certified multiple labor certifications for the same foreign worker and same

Inc., 2010-PER-1069, PDF at 5 (*citing Your Employment Service, Inc*., 2009-PER-151 (Oct. 30, 2009)). Thus, because the Employer filed a new application while its original application for the same alien and occupation was pending BALCA review, denial of certification was proper pursuant to Section 656.24(e)(6).[4]

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED.**

For the panel:

SO ORDERED.

Digitally signed by TIMOTHY MCGRATH
DN: CN=TIMOTHY MCGRATH, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

TIMOTHY J. McGRATH
Administrative Law Judge

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job opportunity on grounds that the additional applications cannot represent a bona fide different job opportunity available to U.S. workers.

http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#Perm_Program (lasted visited September 6, 2016).

[4] The CO also cited to 20 C.F.R. § 656.17(i)(5)(ii) which defines a "substantially comparable" job. (AF 1). However, we do not find that section applicable as it concerns evaluating whether the alien satisfies an employer's actual minimum requirements. *See* 20 C.F.R. § 656.17(i).

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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.