



Issue Date: 13 April 2009

BALCA Case No.: 2008-PER-00228

ETA Case No.: A-06056-90378

In the Matter of:

KING'S GARDEN 1 CHINESE RESTAURANT INC.,

Employer,

on behalf of

WEI KE WU,

Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Kirk V. Wiedemer, Esquire
Asia America Law Group
For the Employer

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

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

DECISION AND ORDER

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.

BACKGROUND

In the instant case, the Employer filed an ETA Form 9089 application for permanent alien employment for the position of Cook. (AF 59). The Certifying Officer ("CO") selected the application for audit and directed the Employer to submit the documentation supporting its attestations, including a copy of the prevailing wage determination ("PWD") from the State Workforce Agency ("SWA"). (AF 54). By letter dated October 13, 2007, the Employer's attorney submitted the Employer's audit response, which purportedly included a copy of the PWD. (AF 51). On October 23, 2007, the CO denied the application for a variety of reasons, one of which was failure to provide a copy of a PWD issued by the SWA. (AF 26). By letter dated November 21, 2007, the Employer requested reconsideration. (AF 3-23). In regard to the missing PWD, the Employer stated that such had been enclosed with the audit response, and indicated that a copy of that PWD was now attached to the motion for reconsideration.¹ (AF 4). The attachment consisted of a printout from the FLC Wage Data Center website. (AF 20). On September 23, 2008, the CO issued a letter of reconsideration affirming the denial of certification. (AF 1-2). In regard to the missing PWD, the CO noted that the Employer had provided the FLC Wage Data Center printout, but that "[p]er 20 CFR 656.20(a), the employer must request a PWD from the SWA having jurisdiction over the proposed area of intended employment."

The Employer filed an appellate brief with the Board. In regard to the missing PWD, the Employer's attorney indicated that he was attaching the PWD and a Job Order posted with the SWA. Those attachments were (1) the same FLC Wage Data Center

¹ The portion of the Appeal File identified as the Employer's audit response does not contain a PWD, either from the SWA or any other source. In view of the Employer's two later submissions of what it called the PWD (which was actually only a printout from the FLC Wage Data Center Online Wage Library), it is unlikely that the audit response contained something different.

printout included with the motion for reconsideration, and (2) what appears to be a web site printout from the Pennsylvania SWA showing that the Employer had posted a job order on October 31, 2004.

The CO filed an appellate brief noting that although SWA often use the FLC Wage Data Center Online Wage Library to come up with a PWD, it is the SWA that must issue the prevailing wage determination.

DISCUSSION

The PERM regulations provide that “[t]he employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer.” 20 C.F.R. § 656.24(a). The regulations further provide that “[t]he SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.” 20 C.F.R. § 656.40(c). *See Heung K. Choe*, 2008-PER-145 (Jan. 5, 2009).

Here, the Employer appears to have simply gone onto the FLC Wage Data Center Online Wage Library and printed out what it believed to be the appropriate prevailing wage, and used this information in recruitment and in filing of the application. There is no evidence that the Employer ever requested a PWD from the SWA.²

Although it is possible that the SWA would have come up with the same wage determination as the Employer did on the FLC Wage Data Center, under the PERM regulations the Employer is not permitted to avoid the SWA in obtaining a PWD. As the CO’s attorney stated in her appellate brief, “[t]he SWA’s role is crucial in the PWD

² The web site printout from the Pennsylvania SWA only evidences that a job order was placed. It is not a prevailing wage determination request or determination.

process because the SWA makes the objective determination of the applicable job category and level to which the PWD would apply.”

The Employer failed to produce a PWD issued by the SWA when so directed by the CO in the audit notification. This was a substantial failure to provide required documentation, which under the audit regulation at 20 C.F.R. § 656.20(b) mandates denial of the application. But more to the point, it also exposed a violation of 20 C.F.R. § 656.40 – a failure to obtain a PWD from the SWA having jurisdiction over the area of intended employment. Based on the foregoing, we find that the CO properly denied certification.³

ORDER

IT IS ORDERED that the Certifying Officer's denial of labor certification in the above-captioned matter is **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

³ Because we affirm the denial of certification on this ground, we have not reviewed the other grounds for denial stated in the CO's letter on reconsideration.

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.