



Issue Date: 16 April 2010

BALCA Case No.: 2010-PER-00097
ETA Case No.: A-07222-64962

In the Matter of:

PSI FAMILY SERVICES, INC.,
Employer,

on behalf of

OLUMUNMI ABIMBOLA AKINKUOWO,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: David E. Piver, Esquire
Wayne, Pennsylvania
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: **Colwell, Johnson and Wood**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

PER CURIAM. This matter involves an appeal of the denial by an Employment and Training Administration (“ETA”), Office of Foreign Labor Certification (“OFLC”),

Certifying Officer (“CO”) of permanent alien labor certification 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

The CO accepted the Employer’s Form 9089 Application for Permanent Employment Certification for processing on August 15, 2007. (AF 66). The Employer is sponsoring the Alien for a position as a social work “Case Manager.” (AF 71).¹ In its application, the Employer indicated that it had advertised the job in The Baltimore Sun on April 8, 2007 and April 15, 2007. (AF 73). Because the application was for a professional position, the Employer listed three additional types of recruitment, one of which was posting on the Employer’s web site. The Employer indicated on the Form 9089 that this posting occurred from April 24, 2007 to May 8, 2007. (AF 74).

On October 9, 2007, the CO issued an Audit Notification. (AF 66-68). Among other documentation, the CO directed the Employer to submit its recruitment documentation. (AF 66).

The Employer submitted its audit response under cover letter dated November 6, 2007. (AF 14-65). In the cover letter, the Employer’s attorney indicated that copies of original tearsheets from the Sunday, April 8, 2007 and April 15, 2007 editions of The Baltimore Sun were attached, as was a printout from the Employer’s web site illustrating that the offered position was posted on the company web site from April 24, 2007 to May 8, 2007. (AF 15). The Employer’s recruitment report, signed by the Employer’s Vice President of Human Resources, was part of the audit response. In the report, the Vice President stated that advertisements for the position were placed in The Baltimore Sun for two consecutive Sunday editions on April 8, 2007 and April 15, 2007. (AF 36). The Vice President also stated that “[t]he job opening was placed on PSI Family Services,

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

Inc.'s company website, www.psiservicesinc.net from April 24, 2007 to May 8, 2007, available both internally and externally.” (AF 38).

The newspaper tear sheets attached to the audit response consisted of two parts: (1) almost full facsimiles of classified pages dated April 8, 2007 and April 15, 2007 from The Baltimore Sun, and (2) enlargements of the advertisements specific to the Employer's application. The almost full facsimiles are not legible, and have the top and bottom cut off, but bear an authentication of date of publication from The Baltimore Sun. The two enlargements are legible, but only the April 8, 2007 enlargement specially bore the date of publication and name of the publication. (AF 46-49).

The audit response also contained an undated four page list of positions available at the Employer's organization. Printed at the bottom of each of these pages is “www.psiservicesinc.net.” (AF 50-53).

On January 16, 2009, the CO denied the application on the grounds that (1) the Employer “failed to provide original tear sheets, legible copies of tear sheets, or proof of publication and text of the ad furnished by the newspaper” as required by 20 C.F.R. §§ 656.17(e)(1)(i)(B)(3) or 656.17(e)(2)(ii)(C), and (2) “the employer failed to provide dated copies of the pages from the [company web] site that advertised the job opportunity” as required by 20 C.F.R. § 656.17(e)(1)(ii)(B). (AF 11-12).

On February 13, 2009, the Employer filed a request for reconsideration. (AF 3-10). It argued that the tear sheets had been provided by The Baltimore Sun, and were sufficient proof of publication under 20 C.F.R. § 656.17(e)(1)(i)(B)(3). It argued that an “FAQ” posted by the OFLC on its web site permitted documentation of the date of a web site posting through alternative evidence not specifically listed in section 656.17, to wit:

In the case of the employer's web site, in the absence of a copy of the posting, the employer may provide an affidavit from the official within the employer's organization responsible for the posting of such occupations on the web site attesting, under penalty of perjury, to the posting of the job.

Whether such evidence will be accepted depends upon the nature of the submission and the presence of other primary documentation. The more primary evidence is not provided, the more likely the audit response will be found to be non-responsive.

(AF 4, quoting OFLC FAQ). The Employer argued that its primary proof of the web site posting was the printed pages included with the audit response, and that although its copies of the web site pages had not been dated, it had clearly indicated the dates of the posting in the recruitment letter and had attested to the dates in the Form 9089. The Employer also provided an affidavit from its Vice President for Human Resources confirming that the posting had been made from April 24, 2007 to May 8, 2007. (AF 4). The Employer argued that the primary evidence was sufficient to prove actual posting of the position, and that its secondary evidence was sufficient to prove the dates of posting. (AF 5).

On November 13, 2009, the CO issued a letter of reconsideration. (AF 1). The CO stated that “[t]o be considered acceptable, a copy [of the newspaper advertisement] must include the name of the newspaper, the advertisement content, and the date it ran on one page.” (AF 1) (emphasis added). Since the April 15, 2007 enlargement did not show the date of publication or the name of the newspaper used, the CO found that the denial on this ground had been valid. In regard to the web site posting, the CO found that the affidavit accompanying the motion for reconsideration was new evidence not in the record on which the denial was based. Therefore, since the Employer failed to provide dated copies of its web site posting, the CO found that denial of certification on this ground was valid.

The Board issued a Notice of Docketing on December 1, 2009. The Employer filed a statement confirming that it would like to proceed with the appeal, but did not file an appellate brief. The CO filed an appellate brief urging that the denial of certification be affirmed.

DISCUSSION

Under 20 C.F.R. § 656.17(e)(1)(ii)(B), one of the additional recruitment steps an employer can utilize to advertise a professional occupation is to advertise the position on its own website. The regulations require an employer to maintain all supporting documentation of all recruitment steps taken and all attestations made in the application for labor certification. 20 C.F.R. §§ 656.17(a)(3), 656.17(e)(1). The regulation at 20 C.F.R. § 656.10(f) provides:

Copies of applications for permanent employment certification filed with the Department of Labor and all supporting documentation must be retained by the employer for 5 years from the date of filing the Application for Permanent Employment Certification.

For an employer that advertises by posting the job opportunity on its own website, the advertisement “can be documented by providing dated copies of pages from the site that advertise the occupation involved in the application.” 20 C.F.R. § 656.17(e)(1)(ii)(B). The regulation at 20 C.F.R. § 656.20(b), provides, in pertinent part:

A substantial failure by the employer to provide required documentation will result in that application being denied under § 656.24 and may result in a determination by the Certifying Officer pursuant to § 656.24 to require the employer to conduct supervised recruitment under § 656.21 in future filings of labor certification applications for up to 2 years.

The regulations do not preclude an employer from providing documentation of the advertisement posted on its website in a manner other than by submitting dated printouts of the website advertisement, and the Office of Foreign Labor Certification (OFLC) website notes that the CO may find documentation adequate even if the Employer cannot provide the dated copies of the advertisement from the website. The OFLC website includes a response to a Frequently Asked Question (FAQ) stating that if an employer does not have a copy of the posting from its website, “the employer may provide an affidavit from the official within the employer’s organization responsible for the posting of such occupations on the web site attesting, under penalty of perjury, to the

posting of the job.”² However, the FAQ states that such a submission does not guarantee that the CO will find such a submission to be adequate documentation of the posting on the website.³

In the instant case, the documentation provided by the Employer with the audit response concerning the company web site posting consisted of (1) the attorney’s cover letter stating the dates of posting, (2) a reference by the Employer’s Vice President for Human Resources in the recruitment report to the dates of the posting, and (3) a four page, undated document showing a listing of open positions for the Employer’s organization, and showing the Employer’s web site address at the bottom of each page.

Because the four page job announcement document did not show dates of posting, it did not by itself comply with the regulatory requirement of documentation through dated copies of the web site posting.⁴ Thus, the Employer needed some other proof of the dates of the posting. The statements of the attorney and the HR Vice President included with the audit response were not in affidavit form, nor attested to. Moreover, the statements did not indicate that the attorney or the HR Vice President was the official within the employer's organization responsible for the posting of such occupations on the web site. Thus, the audit response documentation did not establish the dates of posting in the affidavit format specified by the OFLC FAQ.

² www.foreignlaborcert.doleta.gov/faqsanswers.cfm#audit4 (last visited March 12, 2010). We note that the regulations do not articulate what the dated copies of website pages should look like. Certainly one option would be for an employer to print out the advertisement each day with a printing label on each page to reflect the date of printing. However, it may be more practical for an employer to document a website advertisement by printing the text of the website advertisement and submitting an affidavit from the person responsible for posting the advertisement regarding the dates of the posting.

³ The FAQ states that “[w]hether such evidence will be accepted depends upon the nature of the submission and the presence of other primary documentation. The more primary evidence is not provided, the more likely the audit response will be found to be non-responsive.”
www.foreignlaborcert.doleta.gov/faqsanswers.cfm#audit4 (last visited March 12, 2010).

⁴ We also note that there is nothing on the face of this document that establishes that it came from a web site, as opposed to a word processor or some other type of printed source. We note that the web site address printed at the bottom of the pages is not a full URL to a specific location on the Employer’s web site where job postings are located.

Web site pages are often ephemeral. Thus, retention of reliable contemporaneous documentation of the status of a web page on the dates attested to in the Form 9089 is essential for an employer to be able to meet the PERM documentation requirement of dated copies of company web site postings. In the instant case, the Employer failed to document the website advertisement through the method specified under the regulation, the alternate method articulated in the FAQ response, or any other adequately credible documentation. We find, therefore, that the documentation provided with the Employer's audit response was deficient as proof of the dates of a company web site recruitment effort.

The Employer provided an affidavit from its HR Vice President with its motion for reconsideration. The CO declined to consider the affidavit, finding that it was "new evidence." In its appellate brief, the CO explained that the regulation governing motions for reconsideration at 20 C.F.R. § 656.24(g)(2), limits the type of evidence that can accompany a motion for reconsideration for applications submitted after July 16, 2007 to:

- (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
- (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of §656.10(f).

The affidavit in question does not meet these criteria, and we therefore find that the CO's decision not to consider the affidavit was supported by the regulations. Since the affidavit was not part of the record upon which the application was denied, it is not part of the record the panel may review on appeal. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c).

Accordingly, based on the foregoing, we affirm the CO's denial of certification.⁵

ORDER

Based on the foregoing, **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

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.

⁵ Because we affirm the denial based on the Employer's failure to adequately document web site postings, we have not reached the issue of whether the documentation of the newspaper advertisements was adequate.