U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

MAY - 8 2006

The Honorable John M. Vittone
Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

Re: HealthAmerica, Case No. 2006-PER- 1

Dear Judge Vittone:

Please find enclosed the Certifying Officer's Brief in the above referenced case. Copies have been served on Petitioner and Amicus.

Thank you for your attention to this matter.

Sincerely,

GARY M. BUFF
Associate Solicitor for
Employment and Training
Legal Services

By: _____
R. PETER NESSEN
Attorney

Enclosure

cc: Shirin Egodage, Esq. (w/ encl.)
Josie Gonzalez, Esq. (w/ encl.)

UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, DC

MATTER OF HEALTHAMERICA.	)	BALCA Case No.
	)	2006-PER-1
	)	
	)	
	)	

CERTIFYING OFFICER'S BRIEF

The Certifying Officer ("CO") files its Brief as required by the Board of Alien Labor Certification Appeals' ("BALCA") order of March 9, 2006. The CO does not request oral argument, and does not believe oral argument to be necessary.

I.

LEGAL BACKGROUND

This case arises under Section 212(a)(5)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(5)(A), and Title 20 of the Code of Federal Regulations. Under the INA and the regulations, an employer such as HealthAmerica can apply for permanent labor certification for an alien to work for the employer in a certain position. It is the Department of Labor's ("DOL") responsibility, through the CO, to guarantee that granting the application will not harm the American labor market.

On March 28, 2005, DOL instituted a new regulatory framework for the filing of and consideration of permanent labor certification applications. First, an employer can choose to file an application electronically or by regular mail. See 20 CFR § 656.17. If the application is filed by mail, an agency worker inputs the information into the

electronic system. See June 1, 2005, Frequently Asked Questions at 4 (attached hereto as Exhibit A). The application is then examined by the computer to determine if it satisfies certain elementary requirements necessary for the application to receive further consideration. Only if the application passes these purely mechanical tests of the computer is it examined by the CO.[1] If the application does not withstand the computer's review, a denial letter is generated and sent to the applicant.

After a computer denial, the applicant then has the option to refile or to seek reconsideration. If the applicant takes the latter course, the CO will review the request for reconsideration. 20 CFR § 656.24(g). The request for reconsideration may not include evidence not previously submitted. 20 CFR § 656.24(g)(2). If the request is meritorious under the regulations, the CO will place the application back in the process for a more thorough check by the CO. The CO will only grant reconsideration when the applicant points out that the CO has made a mistake. If, however, the motion for reconsideration is without merit, the CO will deny it and automatically forward the case to the BALCA for consideration as an appeal. 20 CFR § 656.24(g)(3).

II.

FACTUAL BACKGROUND

On June 29, 2005, appellant HealthAmerica electronically filed an application for Permanent Foreign Labor Certification for an Associate Financial Analyst, a "professional occupation."[2] Administrative Record ("AR") at 11-12. In Section I.c. of

[1] There can be no surprise that there is more than one level of review – the computer review and then the CO's final review. The preamble to the regulations states clearly that an application not selected for audit that "satisfies all other reviews" will be certified. 69 Fed. Reg. 77326, 77328 (Dec. 27, 2004) (emphasis added). The use of the plural demonstrates the possibility of various layers of review.

[2] The regulations define a "professional occupation" as "an occupation for which the attainment of a bachelor's or higher degree is a usual education requirement." 20 CFR § 656.3. HealthAmerica required a

the application, HealthAmerica stated that it had advertised in two editions of The Patriot News. Id. at 14-15. According to HealthAmerica's application, the dates that the advertisements ran were Sunday, February 27, 2005, and Monday, March 7, 2005. Id. On July 25, 2005, the application was denied because HealthAmerica had not advertised in two Sunday editions of The Patriot News. Id. at 10; 20 CFR § 656.17(e)(1)(i)(B)..

HealthAmerica filed a request for reconsideration on August 22, 2005, offering evidence that it had actually advertised on Sunday, March 6, 2005. Id. at 3. In the request, HealthAmerica's attorney claimed that the March 7, 2005, date in the application was a typographical error and that the CO should reconsider the denial. Id. The CO denied the request for reconsideration on February 24, 2006, refusing to consider the new evidence. Id. at 1-2. The file was automatically sent to BALCA as required by the Department of Labor's ("DOL") regulations. 20 C.F.R. § 656.24(g)(3).

On March 9, 2006, BALCA issued a Notice of Docketing and Order Granting En Banc Review. In the Notice, BALCA ordered the CO to address three separate issues: (1) how 20 C.F.R. § 656.24(g)(2) applies to the case; (2) what relief is available if the BALCA concludes the CO should have granted reconsideration; and (3) whether the application would have been granted save for the reasons given in the letter denying the application, or whether there is more review necessary.

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bachelor's degree in mathematics for an Associate Financial Analyst. AR at 12. Therefore, HealthAmerica was required to recruit pursuant to the regulations for "professional occupations." See 20 CFR 656.17(e)(1).

III.

ARGUMENT

A. The Request For Reconsideration Consists Entirely of Improper New Evidence.

An employer seeking approval of an application under Section 212(a)(5)(A) of the INA and Title 20, Part 656 of the CFR must first explore the American labor market to determine if any Americans are willing and able to fill the position. See 20 CFR § 656.1. Only if the employer can demonstrate that no American can or will fill the position will the Department of Labor approve the application. Id. One of the steps required by the DOL is that an employer advertise in two consecutive Sunday editions of a local newspaper, if a newspaper with Sunday editions exists. 20 CFR § 656.17(e)(1)(i)(B).

It is undisputed that HealthAmerica, on its application, stated that it had not advertised in two consecutive Sunday editions of the Patriot News. AR at 14-15. Instead, HealthAmerica clearly stated that it had advertised on one Sunday (February 27, 2005), and then eight days later on a Monday (March 7, 2005). Id. Therefore, it is obvious that the CO was correct to deny the application as it was filed and HealthAmerica has not, to this point, argued otherwise.

Now, HealthAmerica comes forward with new evidence, claiming it actually advertised on Sunday, March 6, 2005, and that the application should be granted. HealthAmerica is incorrect. As the BALCA noted in its Order Granting En Banc Review, 20 C.F.R. § 656.24(g)(2) bars an applicant from including any "evidence not previously submitted" to the CO with its request for reconsideration. Here, HealthAmerica has submitted newspaper tear sheets and the statement of

HealthAmerica's attorney that the Monday date was simply a typographical error. AR at 3-6. Obviously, the tear sheets are new documentary evidence not previously submitted to the CO, and must be excluded. Therefore, the only way for HealthAmerica to succeed is to argue that the statement of its attorney is not "evidence not previously submitted" to the CO. Such an interpretation, however, leads to an absurd result. Obviously, if the attorney submitted a sworn affidavit saying there had been a mistake, that would be new evidence – sworn testimony. To allow a "correction" to be made simply by filing a request for reconsideration without an affidavit, but rejecting it if it includes sworn testimony is ridiculous. The regulation clearly does not allow the latter, therefore, it cannot permit the former, and the statements of HealthAmerica's attorney are new evidence and must be rejected by the CO.

Because HealthAmerica's new evidence must be rejected, reconsideration is an inappropriate vehicle for HealthAmerica. It is commonly accepted in courts and administrative agencies that reconsideration is only meant to permit a losing party to point out changes in law, errors in the reasoning of the decisionmaker, or to file new evidence not available at the time of the decision. See, e.g., Messina v. Krakower, 439 F.3d 755, 758 (D.C. Cir. 2006); Max's Seafood Café ex rel Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). See also Randolph W. Lenz, 2004 WL 513640 (Jan. 14, 2004 F.D.I.C.); Rambus, Inc., 2003 WL 1866416 (Mar. 26, 2003 F.T.C.). Under its regulations, DOL has explicitly rejected any reconsideration for the purposes of considering new evidence. 20 C.F.R. § 656.24(g)(2). Also, DOL has already made clear to the public that it will not allow applicants to do what HealthAmerica seeks to do here - make corrections to their applications. See August 8, 2005, Frequently Asked Questions

(attached hereto). Therefore, reconsideration of the CO's denial of HealthAmerica's application would only be appropriate if HealthAmerica were able to point out new law or errors made by the CO. But it is undisputed that the CO correctly denied the application as HealthAmerica entered it into the computer. The regulations require advertisements on two consecutive Sundays and HealthAmerica's application explicitly stated that HealthAmerica had not done so. HealthAmerica has not, and cannot, claim any error by the CO. Nor has HealthAmerica claimed any change in controlling law. Therefore, reconsideration is not a proper remedy for HealthAmerica.

The CO's interpretation of "evidence not previously submitted" and subsequent denial of reconsideration requests such as HealthAmerica's also serves important interests of DOL. The new regulations were written, in part, "to streamline processing and ensure the most expeditious processing of cases, using the resources available." 69 Fed. Reg. 77326, 77327 (Dec. 27, 2004). As stated in the letter to HealthAmerica denying its request for reconsideration, DOL decided that, in the long run, it would "achieve substantial reductions in processing times" not to allow corrections to applications.[3] See AR at 1.

Moreover, DOL's policy serves its interest of avoiding fraud. If DOL were to allow changes to an application after the CO had pointed out a flaw to the applicant, nothing would stop a dishonest applicant from simply asking the CO to make the required change – claiming an innocent mistake. Such an applicant could easily claim that any substantive flaw in its application was a scrivener's error, or perhaps that the applicant had accidentally filed an earlier draft of the proper application. DOL's policy

[3] DOL's belief that not allowing corrections will help streamline the process is eminently reasonable. Under the previous regulatory scheme corrections were permissible, and the backlog of applications reached the hundreds of thousands.

appropriately will not permit such a scheme. Thus, under the regulations, HealthAmerica's application and its request for reconsideration were correctly denied.

B. The BALCA Could Reverse The Denial Of Reconsideration And Place The Application Back In The Status It Would Have Been In Had The CO Granted Reconsideration

In its Order Granting En Banc Review, the BALCA asked the parties to address what relief is available to HealthAmerica should the BALCA determine reconsideration should have been granted. The BALCA also directed the CO to explain whether the application could be granted immediately after a determination that reconsideration should have been granted, or whether the application required further review.

The answer to the latter question can be found in Section I, supra. An application rejected by the computer has not undergone the more thorough review of the CO. Therefore, HealthAmerica's application cannot be granted immediately. The CO must have the opportunity to review the application more closely.

Assuming the BALCA concludes that the CO should have granted reconsideration, the application should be placed in the same position as any other application for which reconsideration was granted – in queue awaiting the more searching review by the CO.[4] This is not a remand, as a remand simply instructs the CO to reassess its original decision but does not order the CO to reach the opposite conclusion. Here, the BALCA would not be requiring the CO to reexamine whether reconsideration was appropriate; instead, the BALCA would be telling the CO exactly what the decision on reconsideration should have been, and ordering the CO to act accordingly.

A similar situation occurs in temporary agricultural worker application cases. There, the CO will first determine if an application should be accepted for consideration.

[4] See FN 1 supra.

20 CFR § 655.101(c)(2). If the CO does not, the applicant can appeal directly to an ALJ. 20 CFR § 655.104(d). The ALJ, like the BALCA in the present case, has limited options. It cannot remand the case, but can only affirm, reverse or modify the CO's decision. 20 CFR § 655.112. A reversal, however, does not mean the application is granted, it just means it is accepted for review. In other words, the application is placed back in the process where it would have been had the CO made the correct decision. If the BALCA determines that the CO should have granted reconsideration – a position the CO obviously rejects - the same analysis should apply here.

III.

CONCLUSION

For the reasons discussed above, the CO asks BALCA to affirm the CO's decisions in the present cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 2006, I forwarded a copy of the foregoing "Certifying Officer's Brief" by mail, to the following:

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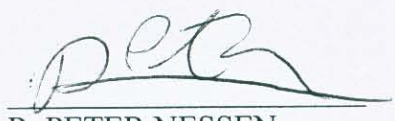

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