U.S. Department of Labor

Board of Alien Labor Certification Appeals
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BALCA Case No.: 2011-PER-00040
ETA Case No.: A-08098-39657

In the Matter of:

KARL STORZ ENDOSCOPY-AMERICA,
Employer,

on behalf of

MIKE RUEBESAMEN,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Josie Gonzalez, Esquire
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For the Employer

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Washington, DC
For the Certifying Officer

Scott D. Pollock, Esquire
Chicago, Illinois
For Amicus Curiae, American Immigration Lawyers Association

Before: **Avery, Bergstrom, Colwell, Kennington, and Purcell**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief 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. *En banc* review was granted in this matter to resolve a conflict among panels of the Board in the interpretation of 20 C.F.R. § 656.40(c) and maintain uniformity of decisions.

STATEMENT OF THE CASE

On February 11, 2009, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification, ETA Form 9089, for the position of "International Quality Project Manager." (AF 59-79).[1] The Employer stated that it received a Prevailing Wage Determination ("PWD") of $78,399 per year from the State Workforce Agency ("SWA"), which was valid from September 11, 2008 to January 1, 2009. (AF 60). The Employer also indicated that it began its job order with the SWA on September 5, 2008 and began its website advertisement on September 5, 2008 as well. (AF 62).

On December 16, 2009, the CO denied certification on the ground that neither the earliest date listed for a recruitment step, September 5, 2008, nor the date the application was filed, February 11, 2009, fell within the PWD validity period of September 11, 2008 to January 1, 2009. (AF 56-57). The CO determined that the Employer did not comply with the requirement at 20 C.F.R. § 656.40(c) that an employer must file its application or begin recruitment within the PWD validity period specified by the SWA. (AF 57).

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

The Employer filed a request for BALCA review on January 14, 2010. (AF 1-55). The Employer noted that Section 656.40(c) provides that "[t]o 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." (AF 2). The Employer argued that because it was not seeking to re-file its application under Section 656.17(d) and its application was not selected for supervised recruitment under Section 656.21, Section 656.40(c) is not applicable. (AF 3). The Employer asserted that because Section 656.40(c) was facially inapplicable, it is likely that the published regulations contain an error regarding the relationship between the PWD validity period and the timing of an employer's pre-filing recruitment efforts. *Id.* The Employer argued that to find the actual policy in effect, Section 656.40(c) must be read in the context of the Notice of Proposed Rule Making ("NPRM") supplemental remarks and regulatory text. *Id.*

The Employer noted that the regulation proposed stated that "[t]o use a SWA PWD, employers must file their applications or begin the recruitment required by Secs. 656.17(c)[2] or 656.21 within the validity period specified by the SWA. ETA, Proposed Rule, *Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 67 Fed. Reg. 30466, 30503 (May 6, 2002). The supplementary information regarding this proposed regulation provided:

> Since employers filing applications for permanent labor certification can begin the required recruitment steps required under the regulations 180 days before filing their applications, <u>they must initiate at least one</u> of the recruitment steps required for a professional or non professional occupation within the validity period of the PWD to rely on the determination issued by the SWA.

67 Fed. Reg. at 30478. (emphasis added). The Employer noted that the preamble to the Final Rule stated that "no substantive changes [were made] with respect to the validity dates as proposed in the NPRM." 69 Fed. Reg. at 77365 (Dec. 27, 2004). The

[2] The reference to Section 656.17(c) appears to be a typographical error, as the regulation at 656.17(c) governs the filing date of an application. *See* 67 Fed. Reg. 30466, 30497 (May 6, 2002).

Employer argues that because no substantive changes were made, the reference to an employer beginning recruitment must be interpreted to mean beginning at least one of its recruitment steps within the validity period of the PWD. (AF 4). In other words, the Employer argues that an employer need only conduct one of its recruitment steps during the PWD validity period, rather than begin the recruitment process during the PWD validity period. *Id.*

The Employer also noted that in *Heung K. Choe d/b/a Sengyo*, 2008-PER-145 (Jan. 5, 2009), BALCA referenced the language in the proposed PWD validity period rule. The Employer argues that this reflects BALCA's acceptance of the language in the NRPM as the proper interpretation of Section 656.40(c). Additionally, the Employer submitted all of its recruitment documentation with its request for review. (AF 10-54). The Employer stated that all of the Employer's advertisements were placed within the 180 days immediately preceding the filing of its application and none of the Employer's advertisements contain a wage.

The CO forwarded the matter to the Board, and on December 6, 2010, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on December 21, 2010, and filed a petition for *en banc* review on January 19, 2011 in light of the Board's recent decisions in *Quadrille Wallpapers & Fabrics, Inc*., 2010-PER-68 (Dec. 15, 2010) and *Manhattan Jewish Experience*, 2009-PER-424 (Dec. 15, 2010). The Employer argued that the Board's holdings in these two cases conflict with the guidance provided by the Department of Labor in the preamble to the NPRM.

The Employer argued that an employer has legitimate reasons for beginning recruitment prior to receiving a PWD. The Employer explained that employers may be able to accurately surmise what the PWD will be based on DOL's prevailing wage guidance, which provides a formulistic approach to the calculation of prevailing wages. Additionally, the Employer noted that employers do not want to delay the filing of the application by waiting for a PWD in order to start recruitment, as the date of filing establishes the priority date for the sponsored worker.

The CO did not file a response to the Employer's petition for en banc review or an appellate brief. On August 11, 2011, the Board issued an Order Granting En Banc Review in order to resolve the conflict between *Quadrille Wallpapers & Fabrics, Inc.*, *Manhattan Jewish Experience*, and a subsequent decision, *Horizon Computer Services*, 2010-PER-746 (May 25, 2011). The Board invited the American Immigration Lawyers Association ("AILA") and the American Immigration Law Foundation to participate as *amici curiae* and required the parties and *amici* to file briefs within 45 days.

On September 9, 2011, AILA filed its Notice of Intent to Participate as amicus curiae, and on September 13, 2011, the American Immigration Council (formerly the American Immigration Law Foundation) declined to participate in the proceeding. The Employer filed its *en banc* brief on September 22, 2011, arguing that the panel decision in *Horizon Computer Services* properly interpreted the phrase, "begin the recruitment" in Section 656.40(c). The Employer reiterated its argument that the proper interpretation of this phrase can only be discerned by reference to the language in the supplemental remarks to the NPRM, which noted that an employer "must initiate at least one of the recruitment steps […] within the validity period of the PWD to rely on the determination issued by the SWA." Employer's Brief ("ER Br.") at 4.

Counsel for the CO submitted his en banc brief on October 3, 2011. The CO argues that the Employer failed to comply with Section 656.40(c)(2009) because it commenced its recruitment on September 5, 2008 and filed its application on February 11, 2009, but its PWD was only valid from September 11, 2008 to January 1, 2009. CO's Brief ("CO Br.") at 3. The CO also argues that the panel decision in *Horizon Computer Services* was wrongly decided because the panel disregarded the explicit language of the regulation. CO Br. at 4. The CO contends that the language in the preamble to the proposed PWD rule is inapplicable, because the language related to an earlier version of

Section 656.40(c), which referenced Section 656.17(d), rather than 656.17(e).[3] Additionally, the CO notes that the 2008 amendment to the PWD regulation was technical, and, the CO presumes, made to correct a typographical error in the original regulation. CO Br. at 7, n.6.

In addition, the CO argues that the current regulation is unambiguous, and the language in the preamble to the NPRM cannot be considered to create an ambiguity or overrule the explicit language of the regulation. Citing a panel's decision in *Ecosecurities*, 2010-PER-330 (June 15, 2011), the CO contends that the principle of "fundamental fairness," relied upon by the panel in *Horizon Computer Services*, was not applicable, because the Employer had clear notice of the explicit and strict regulations. CO Br. at 8-9. The CO notes that BALCA panels have applied the explicit requirements of Section 656.40(c) nine times under both the 2007 and 2009 versions of the Section 656.40(c). CO Br. at 11-12.

The CO also argues that an employer's recruitment of domestic workers must be structured so that a valid PWD is current and active when an employer begins its recruitment, and argues that an employer must disclose all relevant information about the job. CO Br. at 12. The CO contends that because the PWD was not valid when the Employer began its recruitment, the Employer "failed to advertise as required by the regulations." CO Br. at 12-13.

In its amicus brief, AILA argues that the CO's determination fails to acknowledge the clear intent of the rule's drafters, as the preamble to the NPRM stated that an employer may rely on a PWD if it initiates at least one of the recruitment steps during the validity period. AILA's Brief ("AILA Br.") at 1. AILA argues that the language in the regulation was given a particular meaning by DOL in the NPRM, a meaning that was

[3] As we explain *infra*, we find that Section 656.40(c)(2008) is the proper regulation under which to review the Employer's application, as the Employer is relying on a PWD that was properly obtained from the SWA prior to January 1, 2010.

relied upon, and no other interpretation was offered for review and comment throughout the final rulemaking and amendment processes.

AILA notes that on January 9, 2006, the Atlanta National Processing Center, Foreign Labor Certification, issued E-Gram #06-01, which noted that the reference to Section 656.17(d) in Section 656.40(c) was in error and should have been just Section 656.17. AILA Br. at 8. According to AILA, the E-Gram also stated that "[e]mployers may submit their PERM application after the validity period of the prevailing wage determination if they begin the recruitment process during the validity period." *Id.* AILA argues that based on this directive, the CO apparently began to apply Section 656.40(c) to regular pre-filing recruitment applications. AILA Br. at 8-9.

AILA argues that the meaning of the phrase "begin the recruitment" is ambiguous, and that in the past, DOL had indicated that recruitment begins with the placement of a job order. AILA Br. at 9, n.7. According to an AILA DOL-ETA Liaison Committee summary of a May 1, 2006 teleconference with DOL, "DOL first indicated that recruitment begins with placement of [a] job order, but they will verify this. However, they say the regulations are clear on what is required in terms of the validity of the prevailing wage determination – you must begin recruitment or file within the validity period of the prevailing wage determination." AILA Br. at 9, n.7. AILA states that DOL "did not seek to explain the change in its policy or harmonize its evolving understanding with the contrasting guidance in the NPRM that provided that an employer could utilize the prevailing wage so long as one of the recruitment steps took place during the validity period." *Id.*

AILA notes that three substantive changes were made to Section 656.40(c) in 2009: (1) the National Processing Center began processing PWDs, rather than the SWAs, (2) the word "recruitment" changed to the phrase "recruitment period," and (3) the reference to Section 656.17(d) was changed to Section 656.17(e). AILA Br. at 10. AILA argues that because ETA provided no explanation of these changes, other than referring

to them as "technical changes" to "reflect operational changes to this regulation," the interpretation provided in the NPRM is still the relevant interpretation of the current regulation. AILA Br. at 10-11.

With respect to the decisions in *Horizon Computer Services, Quadrille Wallpapers & Fabrics*, and *Manhattan Jewish Experience,* AILA argues that *Horizon Computer Services* is not in conflict with *Quadrille* or *Manhattan Jewish Experience*, because the former interprets the current version of the regulation, while the latter two decisions interpret the original version of the regulation. AILA Br. at 12. As a result, the *Quadrille Wallpapers & Fabrics* and *Manhattan Jewish Experience* decisions did not interpret the meaning of "begin the recruitment" under 656.40(c)(2009). AILA argues that only *Horizon Computer Services* interpreted the meaning of "begin the recruitment," and that the panel correctly interpreted its meaning. *Id*. AILA asserts that to the extent that there is an actual conflict among the cases, it is regarding which version of the regulations the panels should have applied, and not on any stated difference in the interpretation of the phrase "begin the recruitment" or "begin the recruitment period." *Id.* AILA argues that the 2009 regulation applies in this case because the Employer's application was filed on February 11, 2009, after the January 18, 2009 effective date of the amended regulation. AILA Br. at 13. Accordingly, AILA argues that the interpretation of "begin the recruitment period," as stated in *Horizon Computer Services*, governs the case before us.

Additionally, AILA questions the panels' approach in *Quadrille Wallpapers & Fabrics* and *Manhattan Jewish Experience* bifurcating the regulation and applying only the section requiring employers to file the application within the PWD validity period to employers filing under the basic process. AILA Br. at 14, n.10.

AILA argues that BALCA should interpret the regulation to be consistent with the language in the preamble to the NPRM to avoid challenges to the regulation for failure to comply with notice and comment rulemaking procedures. AILA argues that the language in the regulation is not explicit, and that BALCA should consider the language in the

NPRM, an Office of Foreign Labor Certification ("OFLC") FAQ response that employers need not wait for a PWD to begin recruitment, and the panel decisions in *Horizon Computer Services* and *Heung K. Cho*, and find that the term "begin the recruitment period" means "initiate at least one of the recruitment steps required" during the PWD validity period. AILA Br. at 18-19.

AILA disputes the CO's assertion that the Employer failed to advertise as required by initiating recruitment prior to obtaining a PWD. AILA contends that initiating recruitment prior to receiving a PWD does not harm U.S. workers or undermine the domestic recruitment process, as long as any wage stated in advertisements meets or exceeds the prevailing wage. *Id.* AILA questions why it matters whether an employer initiates one or more recruitment steps before the PWD validity period, given that employers must conduct all recruitment within 180 days prior to filing. AILA Br. at 20.

AILA also asserts that BALCA should review this case under the "fundamental fairness" analysis relied upon in the Board's en banc decision in *HealthAmerica*. AILA argues that BALCA should only uphold a DOL regulation requiring strict compliance where there has been adequate notice. AILA Br. at 21. Citing *Microsemi Corp.*, 2010-PER-675 (June 17, 2011), AILA asserts that the Board should apply a "fundamental fairness analysis" when faced with inconsistent agency interpretations. AILA contends that because the NPRM provides an interpretation of "begin recruitment" that conflicts with the interpretation the CO had implemented, fundamental fairness should guide the Board's decision.

DISCUSSION

Scope of Review

The PERM regulations restrict BALCA's review of a denial of labor certification to evidence that was part of the record upon which the CO's decision was made. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c); *Eleftheria Restaurant Corp.*, 2008-PER-143 (Jan. 9, 2009); *5th Avenue Landscaping, Inc.*, 2008-PER-27 (Feb. 11, 2009); *Tekkote*,

2008-PER-218 (Jan. 5, 2008). Accordingly, an employer cannot supplement the record on appeal. When an employer unambiguously requests BALCA review, it makes a tactical decision to have the Board rather than the CO review the denial of certification, and the employer is deemed to understand the consequence of that decision. *See Denzil Gunnels*, 2010-PER-628, slip op. at 14 (Nov. 16, 2010).

Here, the Employer unambiguously requested "BALCA Review" and cited 20 C.F.R. § 656.26, the regulation granting BALCA the authority to review of the CO's determination. (AF 1-54). Therefore, the Board cannot consider any of the evidence that the Employer submitted to document its recruitment efforts or the Employer's attorney's 2005 email to the CO requesting clarification of this regulation. Likewise, we cannot consider any AILA-DOL liaison documents that are available on AILA's website, but not on the DOL's. *See also Albert Einstein Medical Center*, 2009-PER-379, slip op. at 16-17 (Nov. 21, 2011)(en banc) (declining to take administrative notice of DOL/AILA Liaison meeting minutes).

Prevailing Wage Determination Validity Period

At the time the Employer obtained its PWD, the applicable regulation provided:

> (c) *Validity period*. The 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) (2008).

At the time the Employer filed its application, the regulation provided:

> (c) *Validity period*. The National Processing Center 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 prevailing wage rate provided by the NPC, employers must file their applications or begin the recruitment period required by §§ 656.17(e) or 656.21 of this part within the validity period specified by the NPC.

20 C.F.R. § 656.40(c) (2009).

Three regulatory changes occurred with the 2009 amendment to Section 656.40(c). The PWD functions transferred from the SWAs to the NPC, the cross-reference to re-filing an application under Section 656.17(d) was changed to the regulation governing pre-filing recruitment, Section 656.17(e), and the language changed from "begin the recruitment" to "begin the recruitment period." *See* Final Rule, 73 Fed. Reg. 78020, 78068-69 (Dec. 19, 2008)(effective Jan. 18, 2009); Proposed Rule, 73 Fed. Reg. 29942, 29946-47, 29974 (May 22, 2008). The CO and AILA argue that the 2009 version of the regulation governs the Employer's application, because the Employer filed its application on February 18, 2009 and the regulation became effective on January 18, 2009. However, the Employer is not relying on a PWD from the NPC, because, under Section 656.40(a)(2009), SWAs were still responsible for processing PWDs until January 1, 2010. Section 656.40(a)(2009) provides that SWAs "will continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009." The 2009 regulation only applies to PWDs provided by the NPC after January 1, 2010. As the Employer is not relying on a PWD from the NPC, we find that the 2008 regulation governs the Employer's application, and any application where an employer is relying on a PWD from a SWA.

The Board granted *en banc* review because of a conflict between the Board's decisions in *Quadrille Wallpapers & Fabrics*, 2010-PER-68 (Dec. 15, 2010), *Manhattan Jewish Experience*, 2009-PER-424 (Dec. 15, 2010), and *Horizon Computer Services*, 2010-PER-746 (May 25, 2011). In both *Quadrille Wallpapers & Fabrics* and *Manhattan Jewish Experience*, the employers filed their applications in 2007 and the 2007 version of Section 656.40(c) governed. The panel interpreted Section 656.40(c)(2007) as requiring an employer to either (1) file its application or (2) begin the recruitment required by Sections 656.17(d) or 656.21 during the validity of the PWD. *See Quadrille Wallpapers & Fabrics*, slip op. at 4. Accordingly, in *Quadrille Wallpapers & Fabrics*, the panel

found that because the employer was not engaged in supervised recruitment nor re-filing its application, it was required to file its application within the PWD validity period. *Id*. As such, the panel affirmed the CO's determination because the employer did not file its application within the PWD validity period, and did not reach the issue of the correct interpretation of "begin the recruitment."

In *Horizon Computer Services*, the employer filed its application in 2007, and so the 2007 version of Section 656.40(c) governed. However, the panel misquoted the regulation, and recited the regulation as "[t]o use a SWA PWD, employers must file their applications or begin the recruitment required by Sec. 656.17(e) or 656.21 within the validity period specified by the SWA." Slip op. at 3. As noted above, the 2007 version of the regulation actually provided, "[t]o use a SWA PWD, employers must file their applications or begin the recruitment required by Sec. 656.17**(d)** or 656.21 within the validity period specified by the SWA." 20 C.F.R. § 656.40(c)(2007) (emphasis added). Based on the misreading of the regulation, the panel found that an employer could either file its application or begin its pre-filing recruitment within the PWD validity period. *Id.* Therefore, the panel in *Horizon Computer Services* addressed the meaning of "begin the recruitment."

The employer in *Horizon Computer Services* began its first recruitment step before the start of the PWD validity period, and it filed its application after the PWD validity period. *Id.* Relying on language in the NPRM and a response to an OFLC FAQ, the BALCA panel found that ETA did not intend that an employer's first recruitment step must begin during the PWD validity period, but rather only that some recruitment step be conducted during that time. Slip op. at 4. The panel found that the regulatory history and fundamental fairness precluded an interpretation of Section 656.40(c)[4] that would require an employer's first recruitment step to be initiated during the PWD validity period. *Id.*

[4] Although the panel's decision cited Section 656.40(a), rather than 656.40(c), this appears to be a typographical error. Slip op. at 4.

The panel found that the employer initiated some of its recruitment steps during the PWD validity period, and therefore vacated the CO's denial of certification. *Id.*

The holdings in *Quadrille Wallpapers & Fabrics* and *Manhattan Jewish Experience* were based on the reference to Section 656.17(d) in Section 656.40(c)(2007). En banc, the CO concedes that the reference to Section 656.17(d) in the original regulation was a typographical error, and that the reference should have been to Section 656.17(e). CO Br. at 7, n.6. The Employer and Amicus also agree that the change from the re-filing regulation to the pre-filing regulation was made to correct this typographical error. Emp. Br. at 2; AILA Br. at 7, n.2. We recognize that this typographical error had a prejudicial effect on employers filing under the basic process, because it precluded them from availing themselves of one of the methods to establish a valid PWD, and instead required that they file their applications while the PWD was valid. As there is no dispute that the reference to Section 656.17(d) was a typographical error, we find that under Section 656.40(c)(2008), an employer filing under the basic process could either begin the recruitment or file its application within the PWD validity period.[5]

This brings us to the second part of our analysis, which is the meaning of "begin the recruitment." The panels in *Quadrille Wallpapers and Fabrics* and *Manhattan Jewish Experience* did not reach this issue, but the panel in *Horizon Computer Services* did. The CO argues that the meaning of "begin the recruitment" is unambiguous, and therefore we should not consider the language in the preamble to the NPRM where it would create an ambiguity. However, the reference to the re-filing regulation, Section 656.17(d), introduced ambiguity into this regulation, because there is no recruitment conducted in connection with Section 656.17(d).

[5] Moreover, we note that this is how the CO applied the regulation in this case. (AF 56-57). As a result of this finding, we decline to address AILA's critique of the panels' bifurcated approach to Section 656.40(c) in *Manhattan Jewish Experience* and *Quadrille Wallpapers & Fabrics*.

The PWD regulation proposed in 2002 stated that "[t]o use a SWA PWD, employers must file their applications or begin the recruitment required by Secs. 656.17(c)[6] or 656.21 within the validity period specified by the SWA. ETA, Proposed Rule, *Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 67 Fed. Reg. 30466, 30503 (May 6, 2002). The preamble to the Proposed Rule provided:

> We are proposing that the SWA must specify the validity period of PWD on the PWDR form, which in no event shall be less than 90 days or more than 1 year from the determination date entered on the PWDR. Employers filing LCA's under the H-1B program must file their labor condition application within the validity period. Since employers filing applications for permanent labor certification can begin the required recruitment steps required under the regulations 180 days before filing their applications, they must initiate at least one of the recruitment steps required for a professional or non professional occupation within the validity period of the PWD to rely on the determination issued by the SWA.

Employment and Training Administration, Proposed Rule, Implementation of New System, *Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 67 Fed. Reg. 30466, 30478 (May 6, 2002) (emphasis added). The Final Rule retained the same language as the proposed rule, but the reference to Section 656.17(c) changed to Section 656.17(d). The preamble to the Final Rule provides:

> This final rule makes no substantive changes with respect to validity dates as proposed in the NPRM. The SWA must specify the validity of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the date of the determination. Employers are required to file their applications or commence the required pre-filing recruitment within the validity period specified by the SWA.

ETA, Final Rule, *Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 69 Fed. Reg. 77326, 77365 (Dec. 24, 2004)(emphasis added).

[6] The reference to Section 656.17(c) appears to be another typographical error, as the regulation at 656.17(c) governs the filing date of an application. *See* 67 Fed. Reg. 30466, 30497 (May 6, 2002).

Based on the language in the preamble to the Proposed Rule, the Employer and AILA argue that that the phrase "begin the recruitment" that appears in the text of Section 656.40(c) refers not to the commencement of the entire recruitment process, *i.e.*, the first recruitment step, but rather refers to beginning an individual recruitment step. But this argument would require us to accept the premise that an employer does not "begin the recruitment" once; it "begins the recruitment" three times for a nonprofessional position and six times for a professional position. We find that the use of the definite article "the," combined with the reference to "recruitment" in the singular, precludes this interpretation. As there are multiple recruitment steps required under Section 656.17(e), "recruitment" is only a singular noun if the reference is to the recruitment process as a whole. The first recruitment step, whatever step that may be, initiates the recruitment process. An employer can only begin recruitment once. Accordingly, "begin the recruitment" means that an employer begins the recruitment process by conducting its first recruitment step.

While the Employer relies on the panel decision in *Heung K. Choe d/b/a Sengyo*, 2008-PER-145 (Jan. 5, 2009), that case is inapposite to the one at bench. In *Heung K. Choe*, the employer did not provide a PWD expiration date on its ETA Form 9089, and instead responded "N/A." Slip op. at 2. With its request for reconsideration, the employer stated that its PWD expired in "2004." *Id*. at 3. The CO again denied the application, finding that "2004" is an inadequate response, as the application requires an employer to provide the month, day, and year that the PWD will expire. *Id*. at 4. On appeal, the Board explained that the ETA Form 9089 instructions specifically require an employer to enter the PWD validity dates in *mm/dd/yyyy* format. *Id.* Although the panel in *Heung K. Choe d/b/a Sengyo* did not reference the regulatory basis cited by the CO for denial, as the CO's denial referenced an inadequate response on the application, we presume that the employer's application was denied under Section 656.17(a)(1) for being incomplete. The panel referenced the regulatory history[7] in explaining why it was

[7] The panel cited the language in the NPRM, and noted that the final rule made no substantive changes with respect to validity dates. Slip op. at 5.

necessary to respond in the *mm/dd/yyyy* format and determined that the Employer's "2004" response was too imprecise to permit the CO to assess whether the PWD was valid within the time parameters of the regulations. *Id*. at 5. The issue of whether the Employer complied with Section 656.40(c), however, was not presented before the Board, and therefore, the panel did not interpret the meaning of "begin the recruitment."

Additionally, the FAQ response cited in *Horizon Computer Services* and cited by AILA and the Employer does not provide any guidance to the contrary. OFLC provided the following response to the question, "Must the employer obtain a prevailing wage determination before the employer begins recruitment?"

> No, the employer does not need to wait until it receives a prevailing wage determination before beginning recruitment. However, the employer must be aware that in its recruiting process, which includes providing a notice of filing stating the rate of pay, the employer is not permitted to offer a wage rate lower than the prevailing wage rate. Similarly, during the recruitment process, the employer may not make an offer lower than the prevailing wage to a U.S. worker.

www.foreignlaborcert.doleta.gov/faqsanswers.cfm#prevwage6 (last visited Oct. 26, 2011). This FAQ response, however, does not undermine the requirement in Section 656.40(c) that an employer must either "begin the recruitment" *or* file its application within the PWD validity period. Section 656.40(c) does not require that an employer wait to receive a PWD before beginning its recruitment. If an employer begins its recruitment prior to receiving its PWD, however, it must file its application within the PWD validity period.

While AILA and the Employer urge the Board to harmonize the language in the preamble to the NPRM with the language in the Final Rule, we simply cannot reconcile the clear meaning of "begin the recruitment" with the language in the NPRM that an employer need only initiate one of the recruitment steps during the PWD validity period. AILA argues that the failure to give the language in the preamble to the NPRM meaning subjects the regulation to attack for failure to provide for notice and comment under the Administrative Procedure Act ("APA"). However, as a non-Article III court, BALCA

lacks both the inherent authority to rule on the validity of a regulation and the express authority to invalidate the regulation as written. *See Dearborn Public Schools*, 1991-INA-222, DOL/OALJ Reporter, slip op. at 4 (Dec. 7, 1993)(en banc).

Finally, while our review of this matter was based on the 2008 version of the regulations, which provided that an employer must "begin the recruitment required," we find that our decision would be no different if adjudicated under the 2009 version of Section 656.40(c). As explained earlier, "begin the recruitment" means to begin the recruitment process; similarly, "begin the recruitment period" references the commencement of that same recruitment process. The "recruitment period" under Section 566.17(e) refers to the six months prior to filing an application when the employer must conduct all of the domestic recruitment steps.[8] The regulations governing post-filing supervised recruitment, 20 C.F.R. § 656.21, do not specify a time period in which recruitment will be conducted; rather, the regulations state that the CO will provide guidance to the employer regarding the timing of the post-filing advertisements. 20 C.F.R. § 656.21(c). For the purposes of Section 656.17(e), therefore, the "recruitment period" refers to the six-month period prior to filing, during which all of an employer's recruitment must be conducted.

In the case before us, the SWA PWD was valid from September 11, 2008 to January 1, 2009. (AF 60). The Employer began recruitment on September 5, 2008, the day that it placed a job order with the SWA and placed an advertisement with a job search website. (AF 62-63). The Employer filed its application on February 11, 2009. (AF 56). Accordingly, the CO properly denied certification because the Employer neither began recruitment nor filed its application within the PWD validity period.

Based on the foregoing, we affirm the CO's denial of labor certification.

[8] The regulations governing the basic labor certification process, 20 C.F.R. § 656.17(e), require an employer to conduct the recruitment steps within six months, or 180 days, prior to filing an application for permanent labor certification. 20 C.F.R. §§ 656.17(e)(1); 656.17(e)(1)(i),(ii); 656.17(e)(2).

ORDER

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

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge