



**Issue Date: 30 October 2009**

**BALCA Case No.: 2009-PER-00197**  
ETA Case No.: A-07045-10515

*In the Matter of*

**DR. HAIG RICKERBY DENTAL OFFICE,**  
*Employer,*

*on behalf of*

**MAGALY MARTINEZ,**  
*Alien.*

Certifying Officer: William Carlson  
Atlanta Processing Center

Appearances: Dr. Haig Rickerby<sup>1</sup>  
*Pro Se*

Gary M. Buff, Associate Solicitor  
Harry Sheinfeld, Counsel for Litigation  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **Chapman, Colwell and Johnson**  
Administrative Law Judges

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<sup>1</sup> Dr. Rickerby was represented before the Certifying Officer by the American Immigrant Federation (“AIF”). However, an AIF representative did not appear before the Board.

## **DECISION AND ORDER**

**PER CURIAM.** This matter involves an appeal of the denial by an Employment and Training Administration, Office of Foreign Labor Certification, 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 Employer, Dr. Haig Rickerby Dental Office, is sponsoring the Alien for a position as a Dental Assistant. (AF 50-59). The application was accepted for processing by the CO on January 16, 2007. (AF 1, 50). On its Form 9089 application, the Employer stated that the job required a high school education and 24 months of experience in the job offered. On September 13, 2007, the CO issued an Audit Notification letter. (AF 10-14). The CO indicated that the O\*Net indicates that one year of experience is normal for the occupation. Thus, among other items, the CO specifically directed the Employer to establish business necessity for its two year experience requirement.

The Employer filed its audit response under cover letter dated October 11, 2007. (AF 10-49). Neither the cover letter (AF 48-49) nor the accompanying documents addressed the business necessity issue.

On October 31, 2007, the CO issued a letter denying certification on the ground that the audit response failed to provide any documentation to establish that its two year experience requirement arose from business necessity. (AF 6-8).<sup>2</sup>

By letter received by the CO on November 23, 2007, the Employer requested reconsideration. (AF 3-9). Included with the request was a November 19, 2007 letter

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<sup>2</sup> The CO also denied the Employer’s request for retention of a priority date based on an earlier application. Given that we are affirming the denial of certification, we do not reach the priority date issue.

from Dr. Rickerby in which he stated that he “would not hire or be able to trust with my practice anyone with less than 2 years of experience due to the sensitive, high risk nature of this business.” (AF 4). Dr. Rickerby attached a job description of the duties of a Dental Assistant from the American Dental Association. (AF 5).

On January 30, 2009, the CO issued a letter of reconsideration. (AF 1-2). The CO found that Dr. Rickerby’s letter constituted new evidence that was not in the record at the time that the application was filed and on which the denial was based.

The CO then forwarded an Appeal File to BALCA. On March 2, 2009, the Board issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed with the appeal, but did not file a brief. The CO filed a letter brief, which was received by the Board on April 14, 2009. The CO argued that an employer should not be permitted to submit new evidence under 20 C.F.R. § 656.21(g)(2) where the information in question was explicitly requested in an audit letter but not supplied with the audit response.

## **DISCUSSION**

When an application is audited, the audit procedure specifies that “[a] substantial failure by the employer to provide required documentation will result in that application being denied.” 20 C.F.R. § 656.20(b). In the instant case, the CO’s Audit Notification specifically directed that the Employer document the business necessity of its two year experience requirement. The failure to address the business necessity was clearly a substantial failure to provide documentation required by the audit notification. Thus, the CO correctly denied certification pursuant to section 656.20(b).

The Employer’s request for reconsideration belatedly supplied a letter in which the business necessity issue is addressed. The regulation governing motions for reconsideration in effect when the Employer filed its application provided that “[t]he request for reconsideration may not include evidence not previously submitted.” 20

C.F.R. § 656.21(g)(2) (2006).<sup>3</sup> Thus, the CO was not required to review the Employer's untimely submission of the business necessity argument, and therefore we affirm the denial of labor certification.<sup>4</sup>

## **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

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

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<sup>3</sup> This regulation has been amended to describe in more detail what evidence may be used to support a motion for reconsideration. *See* 72 Fed. Reg. 28903 (May 17, 2007). The amendments, however, would not change the result in this matter even if they applied. *See* 20 C.F.R. § 656.24(g)(2) and (3) (2009).

<sup>4</sup> *See Mildred Schwartz*, 2008-PER-115 (Oct. 28, 2008) (once panel determined that the employer failed to timely submit a recruitment report as directed in the Audit Notification letter, pursuant to 20 C.F.R. § 656.20(a)(3), it had no authority to further review the denial).

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.