U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 01 December 2015

BALCA Case No.: **2013-PER-00424**
ETA Case No.: A-11353-25375

In the Matter of:

ETEAM, INC.,
Employer,

on behalf of

BENDIGANAVALE, AKSHATA KRISHNA,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Michael E. Piston, Esquire
TransNational Legal Service, P.C.
Rochester Mills, Michigan
For the Employer

Before: Stephen R. Henley, *Chief Administrative law Judge;* and Paul R. Almanza, and Morris D. Davis, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

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 at 20 C.F.R. Part 656.[1]

[1] "PERM" is an acronym for the "Program Electronic Review Management" system established by the regulations that went into effect on March 28, 2005.

BACKGROUND

The Employer is sponsoring the Alien for permanent employment in the United States for the professional position of "Programmer Analyst." (AF 220-230).[2] On the Form 9089 application, the Employer indicated that the position required applicants to have a Master's degree in Computer Science or Engineering, but no training or experience. (AF 221-222). In Section H-14 of the Form 9089, in which specific skills and requirements are listed, the Employer wrote:

> Master's degree in Computer Science or Engineering. Must have 1 graduate course in database management and network security and post secondary education must have included software development using UNIX and Perl.

(AF 222). The Certifying Officer ("CO") audited the application. With its audit response materials, the Employer supplied a copy of the Notice of Filing ("NOF") it posted in support of the application. The NOF described the job as follows, in pertinent part:

> **Job Description:** design and update the software that runs a computer and create custom applications tailored to client organization's tasks using principles of database management and network security a using a wide variety of specialized hardware, software, language and tools including UNIX and Perl.

(AF 29). The CO denied certification (AF 9-10), stating:

> The notice of filing for the Application for Permanent Employment Certification does not apprise the U.S. worker of the job opportunity. The job described in the notice does not match the job described on the ETA Form 9089 Section H. Specifically, the notice of filing does not list the specific skills or other requirements in H.14 but the 9089 states a Master's degree in computer science or Engineering. Must have 1 graduate course in database management and network security and post secondary education must have included software development using UNIX and Perl.
>
> AUTHORITY FOR DENIAL: Pursuant to the Department's regulations at 20 CFR § 656.10(d)(4), the notice must contain the information required for advertisements by Section 656.17(f), which requires in subparagraph (3) that advertisements must "[p]rovide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought."

(AF 9).

[2] In this Decision, "AF" is an abbreviation for "Appeal File."

The Employer requested reconsideration of the denial. (AF 3-8). The Employer argued that Section 656.17(f)(3) only requires "a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought" and that a FAQ posted on the Office of Foreign Labor Certification website states that the regulation "does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity."[3] (AF 3).

The CO reconsidered, but found that the ground for denial was valid. (AF 1-2). The CO reasoned:

> The Department's regulations at 20 CFR § 656.17(f)(3) are very clear that the employer's newspaper advertisements must "provide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought." The recruitment advertisements must provide a nexus to the job opportunity, however, the Notice of Filing is more specific to the job offer being made available to the foreign worker and therefore must indicate all duties and requirements as listed on the application so that viewers of the NOF would be fully apprised of the job opportunity being sought in the application to make an informed decision of whether or not there was any documentary evidence which needed to be provided to the Certifying Officer. In this instance, by not including the education and additional specific skills on the NOF, interested applicants were not apprised of the specific job opportunity and the Office of Foreign Labor Certification Certifying Officer has determined this reason for denial as valid per Departmental regulations at 20 CFR § 656.10(d)(4) and 20 CFR § 656.17(f).

(AF 1).

On appeal, the Employer argued in its June 29, 2013 appellate brief that the CO had created a requirement that the NOF list the specific skills or other requirement in Section H.14 of the Form 9089, without any basis in statutory, regulatory or caselaw authority. The Employer argued that its NOF included a description of vacancy specific enough to apprise U.S. workers of the job opportunity for which labor certification was sought. (Employer's brief at 2). On July 8, 2013, the Employer filed a Motion for Summary Reversal, arguing that BALCA had considered this identical issue in *Architectural Stone Accents, Inc.*, 2011-PER-2719 (July 3, 2013), and concluded that there is no requirement that any job requirements appear in the NOF. The Employer therefore requested summary reversal of the denial of certification.

The CO did not file an appellate brief or a response to the Employer's Motion for Summary Reversal.

[3] This FAQ is quoted in full in the Discussion section below.

DISCUSSION

In *Architectural Stone Accents, Inc.*, 2011-PER-2719 (July 3, 2013), the CO denied certification because the Employer's NOF did not mention a Spanish language requirement. The BALCA panel in that case observed that the regulations at 20 C.F.R. §§ 656.10(d) and 656.17(f)(1) (as incorporated by reference), provide in detail what a NOF must include. The panel then stated:

> Nonetheless, the regulation cited by the CO as grounds for the denial, 20 C.F.R. § 656.17(f)(3) as incorporated by Section 656.10(d)(4), does not affirmatively mandate that all job requirements be listed on an advertisement. The regulation only requires that an advertisement "[p]rovide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought." In [a] FAQ answer on its website, the Employment and Training Administration states:
>
> > 1. **What level of detail regarding the job offer must be included in the advertisement?**
> >
> > Employers need to apprise applicants of the job opportunity. The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity. An advertisement that includes a description of the vacancy, the name of the employer, the geographic area of employment, and the means to contact the employer to apply may be sufficient to apprise potentially qualified applicants of the job opportunity.
>
> www.foreignlaborcert.doleta.gov/faqsanswers.cfm#adcont1.
>
> Thus, the advertisement only must be "specific enough" to apprise the U.S. workers of the job opportunity. There is nothing in Section 656.10 or 656.17(f) that requires that the NOF list every job requirement. In the instant case, we have reviewed the Employer's NOF. We do not find that the omission of the Spanish language requirement violated Section 656.17(f)(3), as overall the text of the NOF was sufficient to apprise U.S. workers of the job opportunity.

We find the panel's decision in *Architectural Stone Accents, Inc.*, 2011-PER-2719 (July 3, 2013) persuasive.[4]

[4] We are aware that a different panel of the Board in *Architectural Stone Accents, Inc.*, 2011-PER-1751 (July 1, 2013), affirmed the CO's denial under a similar set of facts. We find, however, the panel decision in Case No. 2011-PER-2719 to have a more thorough and persuasive consideration of the issue.

The Notice of Filing regulation is an implementation of a statutory requirement imposed by the Immigration Act of 1990 ("IMMACT90"), Public Law 101-649, 104 Stat. 4978 (Nov. 29, 1990, eff. Oct. 1, 1991). In *Hawai'i Pacific University*, 2009-PER-127 (Mar. 2, 2010)(en banc), the Board found that NOF serves a dual purpose to both recruit U.S. workers and, primarily, to provide a method for employees and interested persons to provide information to the CO about an employer's application. The purpose of the NOF is largely to inform interested persons about the job opportunity so that they "may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet terms and conditions with respect to the employment of alien workers and co-workers)." Section 122(b) of IMMACT90. Thus, we can appreciate the CO's concern that the NOF contain sufficient information to enable an interested person to determine whether to submit information to the CO about an employer's employment of alien workers and co-workers. In the instant case, interested persons might have wanted to know, for example, that the Employer was requiring a Master's degree but no experience for the job. Nonetheless, the regulations only require the NOF to contain information specific enough to apprise the U.S. workers of the job opportunity. The Employment and Training Administration did not write a regulation that mandates that employer list specific job requirements in an NOF, or that sets a higher standard for specificity in NOFs as compared to mandatory print advertisements.

The Employer's NOF in this case was specific enough to apprise interested persons of the job opportunity for which labor certification is sought. Accordingly, we grant the Employer's motion for summary reversal of the denial of certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that labor certification is **GRANTED**. This matter will be returned to the CO to issue the certification.

Entered at the direction of the panel by:

Digitally signed by TODD R. SMYTH
DN: CN=TODD R. SMYTH, OU=LEGAL COUNSEL, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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
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 en banc 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.