U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue Date: 21 December 2015

In the Matter of:

NEW YORK CITY DEPARTMENT OF EDUCATION,
Employer,

on behalf of

LEON ANTONIO JARAZA GAMBOA,
Alien.

BALCA Case No.: 2012-PER-03049
ETA Case No.: A-11024-48198

Certifying Officer: William Carlson, Ph.D.
Atlanta National Processing Center

Appearance: Helen L. Konrad, Esq.
McCandlish Holton
Richmond, Virginia
For the Employer

Gary M. Buff, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **Geraghty, Calianos, McGrath**
Administrative Law Judges

COLLEEN A. GERAGHTY
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 ("C.F.R."). For the reasons set forth below, we affirm the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On February 15, 2011, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Chemistry Teacher." (AF 857, 864).[1] The job requirements for the position as indicated on the ETA Form 9089 were a Bachelor's Degree in Education, Chemistry, Science, or related field, and "New York State Certification." (AF 857-58). On March 11, 2011, the CO issued an Audit Notification Letter, requiring the Employer to submit documentation pursuant to 20 C.F.R. § 656.20, including a recruitment report outlining the U.S. applicants for the job opportunity and the reasons for their rejection, copies of the resumes/applications of the U.S. applicants, and documentation of communications with the applicants. (AF 853-55). On April 1, 2011, the Employer provided documentation in response to the audit. (AF 125-852).

On August 25, 2011, the CO denied certification because the Employer unlawfully rejected two U.S. workers, Catia Wolff and Bruce Jennings, who were minimally qualified for the position, in violation of 20 C.F.R. § 656.10(c). (AF 112-13). The CO's denial letter appeared to be referring to another application for labor certification filed by Employer, as he incorrectly stated that the two applicants were minimally qualified for the "Biology & General Science Teacher" position, not the Chemistry teacher position identified in the ETA Form 9089.

On September 23, 2011, the Employer requested reconsideration of the denial. (AF 89-111). The Employer argued that the denial letter erroneously referred to the wrong job position and job requirements, and made reference to statements that were not made in its recruitment report submitted on audit. (AF 90, 91 n.1). The Employer further asserted that neither Ms. Wolff nor Mr. Jennings had the required certification in Chemistry from the state of New York. (AF 91-92). Employer explained that New York does not provide a general certification for teachers, and there are distinct certifications for each subject that is taught, including separate certifications for chemistry and biology. (AF 91). Employer argued because neither Ms. Wolff nor Mr. Jennings had a certificate in Chemistry, it lawfully rejected the applicants as being unqualified for the position. (AF 91-92).

The CO did not rule on the motion for reconsideration, but instead issued a second denial letter on June 27, 2012. (AF 87-88). He concluded the Employer unlawfully rejected two U.S. applicants, Mr. Gregory Buchmann and Mr. Meir Friedman, for the (correct) Chemistry teacher position on the ETA Form 9089 because they did not have the required Chemistry certification from the state of New York. The CO stated that the Employer's ETA Form 9089 only required "New York State Certification" and not "New York State Certification in Chemistry." (AF 88). The CO concluded: "Because the employer failed to apprise U.S. workers of the specific type of New York State Certification required, two (2) applicants, even though they were minimally qualified, were rejected for not having a New York State Certification in Chemistry." (AF 88). The CO found Mr. Bachmann and Mr. Friedman both had New York certifications and were minimally qualified for the position and therefore the Employer unlawfully rejected them in violation of Section 656.10(c)(9). (AF 88).

[1] The appeal file will be cited as "AF," followed by the page number.

The Employer filed a second motion for reconsideration on July 24, 2012. (AF 2-86). The Employer argued by failing to rule on the first motion to reconsider, the CO accepted Employer's arguments made in the motion and conceded the issues in the first denial. (AF 3). Employer further argues because the CO's second denial is based on the same reasoning as the first – the rejection of applicants who lacked New York certification in Chemistry – the second denial must be reversed. (AF 3, 4). Employer additionally claimed that it did not need to specify on its ETA Form 9089 that the required New York Certification was in Chemistry because the offered position is to teach Chemistry and any differing interpretation would be "illogical." (AF 6-7). Because neither Mr. Buchmann nor Mr. Friedman possessed a certification in Chemistry, the Employer argued they were properly rejected for the position. (AF 8).

On July 31, 2012, the CO denied reconsideration and forwarded the matter to the Board of Alien Labor Certification Appeals ("BALCA") for administrative review. (AF 1). In response to the Employer's arguments that the requirement of a Chemistry certification should be implied, the CO stated that the PERM process was designed to allow labor certification to be granted solely on the basis of the information contained in the ETA Form 9089, and the Employer is required to present a complete application accurately identifying the necessary requirements for the job. (AF 1). The CO stated that if the Employer required certification specifically in Chemistry, it should have stated that in the requirements section of the ETA Form 9089. (AF 1).

On January 25, 2013, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on January 29, 2013, and filed a Statement of Position ("Er. Br.") on March 7, 2013. The CO did not file a Statement of Position. In its brief, the Employer reiterated and expanded upon its arguments made in its second motion to reconsider. The Employer made an additional argument that the regulation relied on by the CO in his second denial letter, Section 656.10(c)(9), does not provide authority for his denial. Er. Br. 7-8.

On January 7, 2015, in response to a letter from this Panel, the Employer indicated that the job identified on the PERM application is still open and available and that the alien identified in the application remains ready, willing, and able to fill the position.

DISCUSSION

An important goal of the Immigration and Nationality Act is to prevent foreign workers from obtaining permanent employment in the United States unless there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work. *See* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.1(a)(1). Accordingly, when an employer files an application for permanent employment certification, it must certify that "[t]he job opportunity has been and is clearly open to any U.S. worker" and "the U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons." 20 C.F.R. §§ 656.10(c)(8), (9).

The PERM regulations require an employer to conduct mandatory recruitment steps in a good faith effort to recruit U.S. workers prior to filing an application for permanent alien labor

certification. *See* 20 C.F.R. § 656.17(e). At the end of the recruitment period, the employer must prepare a recruitment report stating the number of U.S. applicants rejected, "categorized by the lawful job-related reasons for such rejections." 20 C.F.R. § 656.17(g)(1). The CO, in determining whether labor certification should be granted, must consider whether there is an able, willing, qualified and available U.S. worker for the job opportunity. 20 C.F.R. § 656.24(b)(2).

The Employer's job opportunity as listed in the ETA Form 9089 requires a Bachelor's degree in Education, Chemistry, Science, or related field, as well as "New York State Certification." (AF 857-58). The Employer's recruitment report stated that 183 resumes were received in response to advertisements for several different teaching positions, and 182 of the 183 applicants did not have the necessary certification to teach Chemistry. (AF 142). The Employer stated "[o]nly one candidate applied to teach Chemistry and had certification to teach Chemistry, but he was rejected because he had been terminated for cause from his last job with the New York City Department of Education." (AF 142). Two of the applicants identified as not having the required Chemistry certification were Mr. Buchmann and Mr. Friedman. Mr. Buchmann's application materials provided on audit show he has a Bachelor's degree in Civil and Environmental Engineering and a New York Certification in Physics. (AF 249-52). Mr. Friedman's application shows that he has a Bachelor's degree in Speech and Language, with a minor in Education, and New York Certifications in Early Childhood Education, Speech and Language Disabilities, Childhood Education, and Students with Disabilities. (AF 353-57). Neither applicant has certification in Chemistry.

The Employer's ETA Form 9089 only required that an applicant for the job opportunity have a "New York State Certification." (AF 858). It did not specify that the applicant must have a certification <u>in chemistry</u>. Employer argues that the specific certification in Chemistry should be implied because is obvious in the context of the application and required by New York law, citing to *Veterans Admin. Med. Ctr.*, 1988-INA-70 (Dec. 21, 1988) (en banc), and *Norfolk v. Public Sch. Sys.*, 1999-INA-00124 (Aug. 18, 1999) for support.

The *Norfolk* decision does not aid the Employer, as the panel specifically stated that it <u>was not addressing</u> the issue of whether it was proper for an employer to reject a U.S. applicant for lacking a teacher's license, when the application did specify the requirement, because it was implicit under state law. 1999-INA-00124 at 3. In the second case cited by Employer, *Veterans Admin.*, the Board stated that "cases may arise where certain job requirements may be implied . . . on the theory that the requirements . . . are obvious and likely to be met by anyone who would apply for the job."[2] 1988-INA-70. However, the Board stated that the general rule is "a job applicant may not be rejected for failure to satisfy job requirements which were not listed on the application form," and found that the general rule applied to the case at hand. *Id.* The *Veterans Admin.* decision was issued prior to the PERM program and is not binding on us. We are not convinced that any requirements may be implied under the strict PERM process. However, for purposes of this decision, even under the *Veterans Admin.* analysis, we find it should not be implied that the job opportunity required certification in the specific subject of Chemistry as we do not find this requirement to be "obvious" and "likely to be met by anyone who applied for the job."

[2] The Board provided as an example, the requirement of proficiency in the English language.

As stated by the CO, the purpose of the PERM system is to allow the CO to review applications based solely on the record as submitted. Even though certification in specific subjects may be obvious in the context of the Employer's business, it is not administratively feasible for the CO to investigate the circumstances of each employer's business. Because the ETA Form only indicated that "certification" was required, and not certification in chemistry, we find the CO properly denied Employer's application because it rejected U.S. workers for failure to satisfy a requirement not listed on the application. [3]

The Employer alternatively asserts that reversal is mandatory on procedural grounds. Employer claims because the CO failed to rule on the Employer's first motion to reconsider, he accepted all of Employer's arguments made in that motion, and conceded that the Employer properly rejected applicants who lacked a New York certification in Chemistry. Er. Br. 4-5. Generally, when a CO does not address his first denial reason in a subsequent second denial letter, we treat his silence as meaning the original ground for denial is no longer at issue. *See Ornelas, Inc., d/b/a La Carreta Mexican Rest.*, 2009-PER00246, PDF at 2 n.1 (Nov. 30, 2009). Accordingly, we find the CO is no longer relying on the unlawful rejection of Catia Wolff and Bruce Jennings as grounds for his denial. However, we do not interpret the CO's silence as to his first reason for denial to be a complete concession to all arguments made by the employer in its first motion for reconsideration.

In Employer's first denial letter, the CO was apparently referring to another application for labor certification filed by the Employer, for a position as a Biology Teacher. The Employer raised the CO's factual errors in its first motion for reconsideration. Consequently, the Employer's additional arguments in its motion for reconsideration that a certification in Chemistry in required for the position was not the only basis for the CO to decide not to follow through with his first denial reason. It is more likely that the CO realized that he referred to the wrong certification application, and therefore issued a second denial letter based on the correct job opportunity as a Chemistry Teacher. Based on the CO's conclusion in his second denial letter that the ETA Form 9089 does not require a specific certification in Chemistry, we find that it was not his intent to concede to Employer's arguments about the New York certification. [4]

[3] In its second motion to reconsideration, the Employer argued that the CO should have asked for more information or clarification on the New York certification process prior to issuing a denial, and that his failure to do so violates due process and fundamental fairness. (AF 3-4). The CO is not required to give the Employer an opportunity to clarify information that should have been contained in the ETA Form 9089. As indicated by the CO in his transmittal letter, the PERM process is designed to allow a CO to make a ruling based on the face of the application. The Employer should have indicated on its ETA Form 9089 that it required a New York certification in chemistry, and is not entitled to an opportunity to make further clarification on audit.

[4] The Employer alternatively alleges that Section 656.10(c)(9) cited by the CO does not provide authority for his denial. (Er. Br. 7-8). Section 656.10(c)(9) requires an Employer to attest that "[t]he U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons." Employer asserts because this regulation only requires an attestation, which the Employer provided on its ETA Form 9089, this regulation does not support the CO's denial. However, the preamble to the PERM regulations states that upon request of the CO, an employer must "furnish documentation to support its answers, attestations and other information provided on the [ETA 9089] form." ETA Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77327 (Dec. 27, 2004) (emphasis added). In this matter, the

For the foregoing reasons, we find that the Employer has failed to meet its burden of establishing it lawfully rejected two U.S. applicants, Mr. Buchmann and Mr. Friedman, and we affirm the CO's denial of certification.

ORDER

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

For the Panel:

Digitally signed by Colleen Geraghty
DN: CN=Colleen Geraghty, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

COLLEEN A. GERAGHTY
Administrative Law Judge

Employer's documentation does not support its attestation that there is no qualified U.S. workers for the position, and therefore denial under Section 656.10(c)(9) is appropriate.

NOTICE OF OPPORTUNITY TO PETITION FOR EN BANC 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 the Board's 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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.