U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 October 2010

BALCA Case No.: 2010-PER-00093
ETA Case No.: A-07256-74998

In the Matter of:

TALENT IT SERVICES, INC.,
Employer,

on behalf of

RATHNAKAR CHANDUPATLA,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: R.V. Reedy, Esquire
Reedy & Neumann, PC
Houston, Texas
For the Employer

Gary M. Buff, Associate Solicitor
Clarette H. Yen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER
AFFIRMING DENIAL 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 found at Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").

BACKGROUND

On October 12, 2007, the Certifying Officer ("CO") accepted for filing the Employer's ETA Form 9089Application for Permanent Employment Certification for the position of "Software Engineer." (AF 110-122).[1] The Employer's application listed a Master's degree in Computer Science or Engineering as the education requirement. (AF 111). The Employer indicated on the Form 9089 there was not an alternative combination of education and experience that was acceptable. (AF 112). Additionally, the Form 9089 listed an experience requirement of twelve months in the job offered, or twelve months in the alternative occupations of Assistant Consultant or Assistant Systems Engineer, or any suitable combination of education, experience and training. (AF 111-12).

The CO issued an Audit Notification on September 4, 2007, finding that, "[t]he employer's stated minimum requirements exceed the SVP level assigned by O*NET to the SOC code for the occupation identified in F-2 of ETA Form 9089, and the employer must, therefore, document its requirements as arising from business necessity." (AF 106-8). The CO stated that under 20 C.F.R. § 656.17(h)(1), "In order to establish business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner." *Id.* Additionally, the CO

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

required the Employer to submit a copy of its Notice of Filing documentation and its recruitment documentation. (AF 106-8).

On December 31, 2007, the Employer responded to the Audit, attaching, among other documentation, a letter from the Employer's Resource Manager, explaining the business necessity for the experience requirement; a copy of the Employer's Notice of Filing; a copy of the newspaper advertisements; and a copy of the website advertisements. (AF 36-105). The Notice of Filing supplied by the Employer in response to the CO's audit notification stated that the job requires a "Masters in Computer Science or Engineering & 1 year of experience or Bachelors in Computer Science or Engineering & 5 years of experience." (AF 48). The newspaper tear sheets supplied in the audit response stated: "Req. M.S. in Comp. Sci. or Engg. & 1 yr of exp. or B.S. in Comp. Sci. or Engg. & 5 yrs. of exp." (AF 53-54). Similarly, an in-house web site advertisement supplied with the audit response stated: "Req. M.S. in Comp. Sci. or Engg. 1 yr of exp. or B.S. in Comp. Sci. or Engg. 5 yrs. of exp." (AF 59).

On August 27, 2009, the CO denied certification. (AF 33-35). The CO denied the application because the job requirements stated on the Notice of Filing, the newspaper advertisements, and the web site advertisement did not match the job described on the Form 9089. (AF 33-35). In regard to the Notice of Filing, the CO cited 20 C.F.R. § 656.17(f)(6)[2] and 20 C.F.R. § 656.10(d)(4). Regarding the newspaper advertisement, the CO cited the requirement in § 656.17(f)(6) that the advertisement not contain any job requirements or duties that exceed the job requirements or duties listed on the ETA Form 9089. (AF 34). Additionally, the CO found that the Employer's website advertisement was insufficient to apprise U.S. workers of the job opportunity in violation of § 656.17(f)(3). (AF 34-35).

On September 21, 2009, the Employer filed a request for review, arguing that the information in the advertisements and Notice of Filing was specific enough to apprise

[2] We note that while the CO cited to § 656.17(f)(6), the CO quoted § 656.17(f)(3), which requires the 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." (AF 34).

U.S. workers of the job opportunity and that the job requirements listed in the advertisements and Notice of Filing did not exceed the job requirements or duties listed on the ETA Form 9089. (AF 1-32). The CO forwarded the case to BALCA on November 13, 2009, and BALCA issued a Notice of Docketing on December 1, 2009. The Employer filed a Statement of Intent to Proceed on December 9, 2009 but did not file an appellate brief. The CO filed a Statement of Position on January 20, 2010, arguing that the fact that the Employer did not include the acceptable alternative education and experience requirements prevented the CO from certifying that the interests of U.S. workers had been adequately addressed.

DISCUSSION

The regulation at 20 C.F.R. § 656.10(d) requires an employer to post a Notice of the Filing of the permanent labor certification application. The Notice of Filing is required to contain the information required for advertisements in newspapers of general circulation or in professional journals by § 656.17(f). 20 C.F.R. § 656.10(d)(4). The regulation at § 656.17(f) requires that advertisement must:

> (1) Name the employer;
> (2) Direct applications to report or send resumes, as appropriate for the occupation, to the employer;
> (3) Provide a description of the vacancy specific enough to apprise the U.S. worker of the job opportunity for which certification is sought;
> (4) Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity;
> (5) Not contain a wage rate lower than the prevailing wage rate;
> (6) Not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089; and
> (7) Not contain wages or terms and conditions of employment that are less favorable than those offered to the alien.

20 C.F.R. § 656.17(f). Additionally, the PERM regulations require an employer filing an application for permanent labor certification to attest that the job opportunity listed in the application has been and is clearly open to any U.S. worker. 20 C.F.R. § 656.10(c)(8). The CO may not grant permanent labor certification unless there are not

sufficient U.S. workers who are able, willing, qualified and available at the time of application for the job opportunity. 20 C.F.R. § 656.1(a)(1).

The Employer's ETA Form 9089 listed the education and experience requirements for the Software Engineer position as a Master's degree in Computer Science or Engineering and one year of experience. (AF 111-12). In response to the question on the ETA Form 9089, "Is there an alternate combination of education and experience that is acceptable," the Employer checked "No." (AF 112). The Employer also noted on the ETA Form 9089 that "[e]mployer will accept any suitable combination of Education, Experience and Training consistent with H4 through H10 of this ETA 9089 Form." (AF 112). The Employer's Notice of Filing, newspaper advertisements and website advertisements all indicate that the minimum requirements for the job was a Master's degree in Computer Science or Engineering and one year of experience, or a Bachelor's degree in Computer Science or Engineering and five years of experience. (AF 48, 53-54, 59).

The Employer failed to list its alternative education and experience requirements on its ETA Form 9089. The alternative requirements listed in the advertisements contain a less restrictive education requirement, but a more restrictive experience requirement. The Employer argues that its Notice of Filing and advertisements did not list requirements that exceed the requirements listed in the Employer's ETA Form 9089 because the alternative requirements are equivalent, inasmuch as they have the same Specific Vocational Preparation ("SVP") level of 8. (AF 3). The fact that the Employer included a more restrictive experience requirement clouds the determination of whether the Employer's advertisements and Notice of Filing included job requirements that exceed the job requirements listed on the ETA Form 9089.

The burden of proof to establish eligibility for a labor certification is on the employer. 20 C.F.R. § 656.2(b). The regulations define SVP as "the amount of lapsed time required by a type of worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation."

20 C.F.R. § 656.3. The regulations also provide that SVP level 8 corresponds to over 4 years up to and including 10 years of time. 20 C.F.R. § 656.3. There is a variation of six SVP years within SVP level 8. Thus, focusing solely on the SVP level in determining whether the alternative requirements for a position were substantially equivalent to the primary requirements is too imprecise a measure in the present context.

For the purposes of the PERM program, a Bachelor's degree is the equivalent of two years of experience, while a Master's degree is the equivalent of four years of experience. 69 Fed. Reg. 77332 (Dec. 27, 2004). Therefore, the total lapsed time for the Master's degree and one year of experience listed on the Employer's ETA Form 9089 is five years. (AF 108). However, the alternative requirements listed in the Employer's Notice of Filing and advertisements of a Bachelor's degree and five years of experience corresponds to a total lapsed time of seven years of education, training, and experience. The two year difference in number of SVP years shows that contrary to the Employer's contention, the alternative requirements listed in the Employer's Notice of Filing and advertisements exceed the job requirements listed on the ETA Form 9089 in violation of § 656.17(f)(6), and therefore the position cannot be said to be clearly open to U.S. workers in violation of § 656.10(c)(8).

While it is quite possible that in this case the Employer simply forgot to list the accepted alternative education and experience requirements on its ETA Form 9089, or possibly believed that including "*Kellogg*"[3] language on its ETA Form 9089 would suffice, the outcome in this case only underscores the need for employers to thoroughly and completely fill out the applications for labor certification as is required by 20 C.F.R. § 656.17(a); *see also Alpine Store*, 2007-PER-40 (June 27, 2007). Here, because the Employer listed alternative education and experience requirements in its Notice of Filing and advertisements that were not listed on its ETA Form 9089 and that exceed the requirements listed on the ETA Form 9089, the CO's denial of labor certification was proper under 20 C.F.R. §§ 656.17(f)(6) and 656.10(c)(8).

[3] *See Federal Insurance Co.,* 2008-PER-00037 (Feb. 20, 2009) (discussion of relationship between 20 C.F.R. § 656.17(h)(4)(ii) and *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc)).

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

ORDER

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