U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 February 2016

BALCA Case No.: 2012-PER-01147
ETA Case No.: A-10149-01287

In the Matter of:

BAHWAN CYBERTEK INC.,
Employer,

on behalf of

SAXENA, MANOJ,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Sowmiya Sikal, Esquire
Sikal & Associates, LLC
Alpharetta, Georgia
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Morris D. Davis and Larry S. Merck, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

PER CURIAM. This matter arises under the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the implementing "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 filed an *Application for Permanent Employment Certification* ("Form 9089") sponsoring the Alien for permanent employment in the United States for the professional position of "Project Manager," which was classified under the Occupational Title, Computer Systems Analyst, O*Net/SOC Code 15-1051.00.[2] (AF 175-189). On the Form 9089, the Employer indicated that the prevailing wage was $99,466.00 a year and that it was offering a wage of $99,500.00. (AF 176).

The Certifying Officer ("CO") issued an Audit Notification. (AF 171-174). One of the items the notification directed for submission was a copy of the job order placed with the State Workforce Agency ("SWA").

The SWA job order supplied with the Employer's audit response included a section on pay. It stated:

> Pay
>
> **Min Pay:** $1.00
>
> **Max Pay:** $1.00
>
> **Pay Unit:** Year
>
> **Pay Details:**
>
> Competitive Salary. Will be discussed with the candidate.

(AF 160).

After reviewing the audit response materials, the CO denied certification. (AF 10-11). The CO found that the SWA job order listed a wage rate lower than the prevailing wage in violation of 20 C.F.R. § 656.17(f)(5), and lower than the wage offer in violation of 20 C.F.R. §§ 656.10(c)(8) and 656.17(f)(7).

The Employer requested reconsideration. (AF 3-9). The Employer stated that it normally does not list wages when recruiting, and that the PERM regulations do not require the listing of wages on recruitment except in the case of the internal posting. The Employer stated that the Massachusetts SWA's online job order system asks for minimum and maximum pay for the advertised position, and that since the Employer's policy is not to list salary levels on advertisements, it entered the nominal amount of $1.00 so that the system would accept the posting. To clarify, the Employer added in the comments section of the job order that the position has a competitive salary and that the salary will be discussed with the candidate. The

[2] Citations to the appeal file are shown as "AF" followed by the page number.

Employer argued that this statement made it clear that $1.00 is not the actual salary. The Employer contended that the SWA system has since been updated to permit positions to be posted without mentioning pay, but that at the time this SWA job order was posted employers were forced to enter a dollar amount when positing the position. The Employer argued that the job posting was plainly for a senior level management position and therefore it was obvious that the salary was not $1.00. The Employer argued that because it had noted that there was a competitive salary, the wage offered was not below the prevailing wage and the wage was not less favorable than that offered to the beneficiary.

The CO reconsidered but found that the ground for denial was valid. The CO noted the Employer's arguments but stated:

> Despite the employer's internal policies, the employer maintains the burden to ensure the job order was posted in a manner consistent with the Department's regulations. Here, a $1 annual salary is less than the PWD and less than the offered wage. Assuming the employer's statements regarding the SWA Web site are accurate, the qualifications "Competitive Salary" and "Will be discussed with the candidate" are not demonstratively specific enough to overcome the potential chilling affect arising from advertising $1 as an annual salary. Thus, the employer's failure to ensure the $1 wage was adequately qualified in free form space on the job order may have resulted in an artificial exclusion of U.S. workers who minimally qualify for the position as listed on the ETA Form 9089. Since the salary identified on job order is less than the PWD and the offered wage and since the employer has not satisfactorily demonstrated no U.S. workers are available, willing, able, and qualified for the job opportunity, the Office of Foreign Labor Certification Certifying Officer has determined this reason for denial is valid in accordance with 20 CFR § 656.10 and 20 CFR §§ 656.17(f)(5) & (f)(7).

(AF 1).

On appeal, neither the Employer nor the CO filed an appellate brief or other statement of position.

DISCUSSION

The regulation at 20 C.F.R. § 656.17(f) provides that "[a]dvertisements placed in newspapers of general circulation or in professional journals before filing the Application for Permanent Employment Certification must … [n]ot contain wages or terms and conditions of employment that are less favorable than those offered to the alien." By its own terms, this regulation only applies to advertisements in newspapers or professional journals, and does not regulate the content of SWA job orders. *See Fidelus Technologies*, 2011-PER-1635 (June 11, 2015); *The China Press*, 2011-PER-2924 (Aug. 20, 2015), *vacated on other grounds* (Nov. 30, 2015); *see also Symantec Corp*., 2011-PER-1856 (July 30, 2014) (en banc) (advertisements placed to fulfill an additional recruitment step for a professional occupation need not comply

with the content requirements in § 656.17(f)). Thus, the CO's denial of certification based on 20 C.F.R. § 656.17(f)(5) and (f)(7) cannot be sustained.

The CO also cited as a ground for the denial the attestation required by 20 C.F.R. § 656.10(c)(8) that "[t]he job opportunity has been and is clearly open to any U.S. worker." Section 656.10(c)(8) requires consideration of whether the questioned information in the SWA job order actually resulted in the job opportunity not being clearly open to U.S. workers. *See The China Press, supra* at 6.

A job order that states a wage rate below the prevailing wage and/or the actual wage offer for the job for which labor certification is sought certainly calls into question whether the job opportunity is clearly open to U.S. workers. Even slight understatements of the wage rate may be enough to support a finding that the SWA job order violated § 656.10(c)(8). *See Id.* at 8-9 (rejecting employer's contention that a 2.89% differential in the wage was so de minimis that § 656.10(c)(8) should not apply). But here, we agree with the Employer that the $1.00 pay rate stated on the job order was obviously a placeholder based on a generic data field in the SWA job order, and was clearly not intended to reflect the actual wage rate. We find that no reasonable job seeker would have been discouraged from applying for the job, especially since it was clarified that the Employer is offering a competitive salary and that the salary was subject to discussion.

The CO did not challenge the Employer's contention that the SWA job order system forced it to enter pay rates in order to place the job order. We agree with the Employer that the regulations do not compel an employer to state the wage offer in a SWA job order. Although the Employer might have chosen to forego its policy not to state wage information in recruitment advertisements, or have used, as the CO wanted, more "demonstratively specific" qualifying language in the comments portion of the pay box on the job order, we are not convinced that the way the Employer chose to resolve its dilemma caused the job not to be clearly open to U.S. workers.

ORDER

Based on the foregoing, we **REVERSE** the CO's denial of certification and return the matter to the CO with a direction to **GRANT** certification. 20 C.F.R. § 656.27(c)(2).

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
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.