U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 May 2011

BALCA Case No.: 2010-PER-00894
ETA Case No.: A-07235-68661

In the Matter of:

QUANTIFI, INC.,
Employer,

on behalf of

DEHUA ZHANG,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Jina X. Shaw, Esquire
Xu & Iacona, P.C.
Metuchen, New Jersey
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 Vittone**
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 governing

permanent alien labor certification found at Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").

STATEMENT OF THE CASE

On September 18, 2007, Quantifi, Inc. (Employer) filed an Application for Alien Employment Certification on behalf of Dehua Zhang (Alien) for the position of Software Engineer. (AF 112-125).[1] The Employer indicated that the position requires a Master's degree in Computer Science and 24 months experience in the job offered, or any suitable combination of education, training, or experience. (AF 113-114). The Employer listed the job duties of the position as "Responsible for Windows GUI, C++/Java Interop, and Web Services (XML/SOAP) development. [I]nvolve[d] in whole development lifecycle, i.e. requirement elicitation, object-oriented design and analysis, coding, debugging, and deployment." (AF 114).

On October 19, 2007, the Certifying Officer (CO) issued an Audit Notification, directing the Employer to submit all recruitment documentation, including a recruitment report, as outlined in 20 C.F.R. §656.17(g)(1). (AF 109-111). The Employer submitted a response to the audit on November 19, 2007. (AF 68-108). The Employer's recruitment report provided, in relevant part:

> [Two] candidates responded and were evaluated for the position. Upon reviewing the CVs it was discovered that these candidates either lacked experience in developing or designing GUI on Windows platforms, lacked skills in designing new software or enhancements using C++/Java, or had little experience in the web-service applications, or currently doesn't have legal work authority. We had to reject these candidates on these grounds. The evaluation of the resumes indicated a serious gap in the skill sets required to meet the goals and objectives of the company.

(AF 93). On June 18, 2009, the CO requested additional information from the Employer, including "a copy of the complete, original response as submitted on November 19,

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

2007." (AF 66-67). The Employer responded to this request on June 29, 2009. (AF 22-65).

On September 15, 2009, the CO denied certification on five grounds: 1) "[t]he employer's recruitment report made only generalized statement that U.S. workers did not meet the employer's minimum requirements;" 2) "[t]he notice of filing does not list the wage offered;" 3) "[t]he geographic area of employment contained in the job order does not match the geographic area of employment described in ETA Form 9089;" 4) "[t]he information listed in Section H of the ETA Form 9089 does not match the information contained on the Prevailing Wage Determination;" and 5) "the employer failed to submit an unaltered copy of the notice of fil[ing], prevailing wage determination (PWD), and the employer's website advertisement." (AF 18-21).

The Employer made a request for reconsideration on October 14, 2009. (AF 3-17). With its request for reconsideration, the Employer attached an amended recruitment report to explain why the two candidates were rejected. (AF 10-12). The Employer also explained that it did list the wage offered on an internal post, that its office changed locations, and that other inconsistencies were due to the fact that the Employer has "filed multiple Prevailing Wages with different drafts of job duties," (AF 4), and that "there are multiple version[s] for each document." (AF 5).

The CO issued a determination on reconsideration on June 2, 2010. (AF 1-2). On reconsideration, the CO accepted the Employer's information concerning the notice of filing, job order, prevailing wage determination, and information provided in response to its additional audit information request. (AF 1). However, the CO still found the Employer's recruitment report deficient. Per 20 C.F.R. §656.24(g)(2), the CO did not consider the Employer's amended recruitment report attached to the request for reconsideration.

The CO forwarded the case to BALCA, and a Notice of Docketing was issued on July 22, 2010. The Employer filed an appellate brief on September 3, 2010, arguing that its first recruitment report met the requirements of 20 C.F.R. § 656.17(g)(1), and that the

recruitment report submitted on reconsideration only clarified the content of the previously submitted recruitment report. Additionally, the Employer argues that the two applicants "were not U.S. worker[s] (Permanent resident or U.S. citizen)." (Emp. Br. at 4). Accordingly, the Employer argues that because neither of the applicants are U.S. workers, the Employer did not unlawfully reject U.S. workers. (Emp. Br. at 5). The CO filed a brief Statement of Position on September 7, 2010, arguing that denial was appropriate because the recruitment report that the Employer submitted with its audit response materials did not categorize the lawful-job related reasons for each rejection of U.S. workers. Specifically, the CO argues that it is unclear from the recruitment report what the particular reason was for rejecting each worker.

DISCUSSION

The Employer attached new documentation to its request for reconsideration. Under 20 C.F.R. § 656.24(g)(2), a request for reconsideration may include only:

> (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
>
> (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of § 656.10(f).

BALCA has explained this regulation as only requiring the CO to consider additional documentation submitted with an employer's request for reconsideration if the employer did not have the opportunity to submit it previously. *See Denzil Gunnels d/b/a Gunnels Arabians*, 2010-PER-628 (Nov. 16, 2010).

The Employer states in its brief that the documentation is not new documentation, but is "just an attempt to state the same reasoning in a different wording to avoid

misinterpretation." Emp. Br. at 6. The Employer then contends that this clarifying document is actually a response to the audit request, and thus is documentation which was in existence at the time the application was filed. *Id*. at 7. However, the Employer already had the opportunity to present its reasons for rejecting the two applicants when it filed its audit response materials. As the Board has explained, PERM is an exacting process, designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *HealthAmerica*, 2006-PER-1, slip op. at 19 (July 18, 2006)(en banc). That the Employer failed to present its reasons in a clear and cogent manner with its audit response materials does not mean that it lacked the opportunity to present this evidence. Accordingly, the CO did not err by refusing to consider this documentation on reconsideration, and BALCA cannot consider this documentation on appeal. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c); *Eleftheria Restaurant Corp.*, 2008-PER-143 (Jan. 9, 2009); *5th Avenue Landscaping, Inc.*, 2008-PER-27 (Feb. 11, 2009); *Tekkote*, 2008-PER-218 (Jan. 5, 2008).

When an employer files an application for permanent alien labor certification under the process for a professional position, the employer must conduct certain recruitment steps and be prepared to submit documentation of the recruitment steps in the event of an audit. 20 C.F.R. §656.17(e)(1). The PERM regulations at 20 C.F.R. § 656.17(g) provide, in relevant part:

> *Recruitment report*. (1) The employer must prepare a recruitment report signed by the employer or the employer's representative noted in § 656.10(b)(2)(ii) describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections. The Certifying Officer, after reviewing the employer's recruitment report, may request the U.S. workers' resumes or applications, sorted by the reasons the workers were rejected.

Recruitment reports are required, in part, so that the CO can determine whether U.S. workers were rejected for lawful job related reasons. *See Marlenny's Haircutters*, 2009-PER-13 (Jan. 29, 2009). Here, the Employer's recruitment report stated that two

candidates were evaluated and rejected. (AF 93). The Employer's recruitment report merged the reasons for rejecting the two applicants, stating that they "either lacked experience […] or currently doesn't have legal work authority." *Id*. While these grounds may very well have been lawful, they are not specific as to which grounds apply to which candidate. Consequently, the Employer's recruitment report does not comply with the requirements at Section 656.17(g), and the CO is unable to determine whether U.S. workers were rejected for lawful job related reasons.

In its appellate brief, the Employer argues that neither candidate was a U.S. worker; therefore, it need not categorize the lawful job related reasons for rejecting the applicants. The Employer's circular argument is unpersuasive. While the regulation requires an employer to categorize the lawful job related reasons for rejecting U.S. workers, it is axiomatic that in order for the CO to determine whether a U.S. worker was rejected for a lawful job related reason, the candidates must be categorized in such a way as to discern who is and who is not a U.S. worker. In the instant case, without categorization, the CO was unable to determine if the candidates were U.S. workers.[2] This led to the "misinterpretation" cited by the Employer. Emp. Br. at 5-6.

Because the Employer failed to categorize the lawful job related reasons for rejecting two applicants, the CO properly denied certification.

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

[2] Moreover, contrary to the definition of "U.S. worker" offered by the Employer, (Emp. Br. at 4), the PERM regulations define a U.S. worker as a worker who is either (1) a U.S. citizen; (2) a U.S. national; (3) lawfully admitted for permanent residence; (4) granted status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1); (5) admitted as a refugee under 8 U.S.C. 1157; or (6) granted asylum under 8 U.S.C. 1158. 20 C.F.R. § 656.3.

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.