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: 19 January 2011

BALCA Case No.: 2010-PER-00697
ETA Case No.: C-08046-24659

In the Matter of:

SANMINA-SCI CORPORATION,
Employer,

on behalf of

JAIN, SANKALP,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Grace Hoppin, Esquire
Jackson & Hertogs LLP
San Francisco, California
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

PAUL C. JOHNSON, JR.
Administrative Law Judge

DECISION AND ORDER VACATING DENIAL OF CERTIFICATION AND REMANDING APPLICATION FOR FURTHER PROCESSING

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 20 C.F.R. Part 656.

BACKGROUND

The Employer filed an Application for Permanent Employment Certification on behalf of the Alien for the position of "Software Applications Engineer." (AF 118-128).[1] Following an audit, the Certifying Officer ("CO") denied certification on the grounds that (1) the Employer's Notice of Filing was only posted for nine consecutive business days because one of the posting days was Columbus Day, and (2) the Employer failed to provide adequate documentation of its employee referral program with incentives. (AF 48-50).

DISCUSSION

(1) The Notice of Filing

In *Il Cortile Restaurant*, 2010-PER-683 (Oct. 12, 2010), a panel of the Board held that for the purposes of the notice of filing requirement under 20 C.F.R. §656.10(d)(1)(ii), a "business day" is any day that employees are working on the premises and can see the Notice of Filing. In the instant case, the Employer had no opportunity before the CO to present documentation to establish that Columbus Day was a business day for the Employer. Therefore, we vacate the denial on this ground and remand this case to permit the Employer the opportunity to present evidence on this issue.

(2) The Employee Referral Program

(a) Positions of the parties

In regard to the employee referral program, the CO wrote:

[1] In this decision, "AF" denotes a citation to the Appeal File.

> The employer failed to provide adequate documentation of the employee referral program with incentives. Specifically, the employer provided a flyer titled "Employee Referral Program" dated July 10, 2000 announcing the incentives and an Employee Referral Form dated "Rev. 10/31/03." These dates do not fall within the recruitment period of 30 to 180 days prior to the filing of the ETA Form 9089 on February 15, 2008.

(AF 49). The CO then cited the regulation at 20 C.F.R. § 656.17(e)(1)(ii) for the proposition that only one of the additional recruitment steps may consist solely of activity within 30 days of the filing of the application, and none of the steps may have taken place more than 180 days prior to the filing.

In its request for review and appellate brief, the Employer argued that its documentation was adequate under 20 C.F.R. § 656.17(e)(4)(ii)(G) because it clearly specified the incentives and the dates of the program, and its recruitment report had confirmed that this employee referral program was in effect as of the date of the recruitment report, even if the individual program documents were published before that date. The Employer also noted that the regulations do not require that the sponsored position be individually promoted under an employee referral program, and even if this is a regulatory requirement, it advertised the job on its career web page and therefore employees would have been aware of both the referral program, the instant job opening, and the opportunity to refer candidates for that job. The Employer argued that the facts of the instant case appear to be exactly like those in *Clearstream Banking, S.A.*, 2009-PER-15 (Mar. 30, 2010). The Employer also argued that as contemplated by the regulations, it is permissible for an employer to document an employee referral program with incentives as a passive form of recruitment. The Employer contended that "[a]s long as the employee referral documents clearly specify the incentives, and the employer affirms that the employee referral program is in effect during the recruitment period, this should be sufficient to document an employee referral program under the regulations." (AF 4).

In its request for review, which was dated April 14, 2010, the Employer noted that the Department of Labor had not provided any guidance or posted any "FAQs" on what can be considered acceptable documentation of an employee referral program. In its

appellate brief, the Employer noted that the Department had posted an FAQ on August 3, 2010,[2] and argued that this advice posted more than five years after the PERM regulation went into effect, illustrated the Department's failure to provide timely guidance on the issue.[3]

The CO's appellate brief reiterates that the Employer's documentation was dated outside the recruitment period of 30 to 180 days prior the filing of the application, but did not address the Employer's argument that the regulations do not mandate that the dates printed on the documentation of the employee referral program be within the recruitment time period as long as the documentation clearly specifies the incentives, and the employer affirms that the employee referral program was in effect during the recruitment period.

(b) Discussion

We find that the precise ground cited by the CO for rejecting the Employer's documentation of its employee referral program – that the dates on the documentation was not within the timing window specified in 20 C.F.R. § 656.17(e)(1)(ii) – is not a tenable ground for denial of certification. The regulation only states that an employer can document this step "by providing dated copies of the employer notices or memoranda advertising the program and specifying the incentives offered." 20 C.F.R. § 656.17(e)(1)(ii)(G) (emphasis added). The regulation thus only appears to require dates

---

[2] This FAQ states:

> **What documentation can an employer provide to evidence its use of an employee referral program with incentives as one of the mandatory three additional recruitment steps for a professional occupation?**
>
> Pursuant to 20 CFR 656.17(e)(4)(ii)(G), an employer can document its use of an employee referral program with incentives by providing dated copies of its notices or memoranda advertising the program and specifying the incentives offered as well as other appropriate documentation. In addition to establishing the existence of a referral program, employers must document that its employees were aware of the vacancy for which certification is being sought through means such as a posting on the employer's internal web site. The Notice of Filing provided to satisfy § 656.10(d) shall not be sufficient for this purpose.

www.foreignlaborcert.doleta.gov/faqsanswers.cfm#profno5 (visited Dec. 22, 2010).

[3] The Employer noted that it was not conceding that the FAQ provided a correct or reasonable interpretation of the regulations. (Employer's appellate brief at n.2).

establishing that the program was in existence at the time of the recruitment for the position that is the subject of the labor certification application. The regulation cannot be reasonably interpreted as requiring that the dates on the program fall within the window of time specified in 20 C.F.R. § 656.17(e)(1)(ii). Thus, the precise ground cited by the CO for denial is not supported by the regulations.

In *Clearstream Banking, S.A.*, the panel noted that the regulatory history associated with the professional recruitment step of an employee incentive program suggests that it is permissible for "this recruitment option to be a passive form of recruitment that requires little or no active solicitation of applications by the employer." *Clearstream*, *supra*, slip op. at n.3. The CO did not address this issue, and as in *Clearstream*, we decline to rule on it given that it was not briefed by the parties.

The Employer in this case, however, does not argue that the CO cannot require proof of a link between the incentive program and the job at issue but rather argues that its documentation provided the necessary link.

We find that, in order to make the employee referral program recruitment step meaningful, an employer must minimally be able to document that (1) its employee referral program offers incentives to employees for referral of candidates, (2) that the employee referral program was in effect during the recruitment effort the employer is relying on to support its labor certification application, and (3) that the Employer's employees were on notice of the job opening at issue.[4]

[4] With this finding, we have at least partially adopted the logic of the CO's August 3, 2010 FAQ. In *HealthAmerica*, 2006-PER-1 (July 18, 2006)(en banc), the Board observed that while FAQ postings are a very powerful method of disseminating information and provide helpful guidance, they are not a method by which an agency can impose substantive rules that have the force of law. The Board also considered in *HealthAmerica*, however, whether "*Chevron*" deference should be afforded a "FAQ" posted on ETA's web site. The Board concluded that whether a FAQ should be entitled to deference as persuasive authority depended on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. In regard to the CO's August 3, 2010 FAQ, we find that without proof that an employer's employee referral program was in effect during the recruitment relied upon in support of the PERM application, and proof that the employees were on notice of job opening, the CO could not be assured that the recruitment step had any connection to the employer's specific efforts to fill the position for which labor certification is sought. Thus, we find that requiring an employer to link the existence of the employee referral program with the PERM recruitment is necessarily implicit when an employer chooses to rely on this option for proof of an additional professional recruitment step. But see n.5, *infra* (declining to fully adopt the August 3, 2010 FAQ without full briefing).

In the instant case, we find that the Employer's documentation was adequate to fulfill the elements we described in the prior paragraph.[5] The Employer established that it had an employee referral program with incentives that pre-dated the recruitment, (AF 109-110) that the program was ongoing during the recruitment for the position at issue (AF 67, 86-87), and that the job opening was advertised within the company (AF 95 – internal web posting; AF 96 – notice of filing).[6]

Thus, we reverse the CO's finding that the Employer had not adequately documented its use of an employee referral program with incentives.

ORDER

Based on the foregoing, **IT IS ORDERED** that the CO's denial of labor certification is **VACATED** and this matter **REMANDED** to the CO to permit the Employer to present documentation to establish that Columbus Day was a business day for the Employer.

For the panel:

A

PAUL C. JOHNSON, JR.
Administrative Law Judge

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

---

[5] We note that the fact that the Employer had an ongoing employee referral program and that its employees were made aware of the job opening during the PERM recruitment was not as clearly delineated in the audit response as it was in the Employer's later request for review and appellate brief. We have taken into consideration, however, that at the time of the recruitment in this matter, there was very little information available from the Department of Labor on how this recruitment step could be adequately documented.

[6] The CO's August 3, 2010 FAQ states that the Employer's § 656.10(d) notice of filing cannot be used to satisfy the documentation requirement of awareness of the job vacancy by employees, but does not explain why it does not serve this purpose. In the instant case, however, there was an internal web posting so we do not reach the question of whether the notice of filing, standing alone, could provide adequate proof that employees were on notice of the opening for the position for which the labor certification was filed.

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.