

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 November 2012

BALCA Case No.: 2011-PER-01697
ETA Case No.: A-08326-08417

In the Matter of:

COGNIZANT TECHNOLOGY SOLUTIONS US CORP,
Employer

on behalf of

BANERJEE BISWARUP,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Shamima Bandukwala
Cognizant Technology Solutions US Corporation
Teaneck, NJ
For the Employer

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

DECISION AND ORDER
GRANTING 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 at 20 C.F.R. Part 656.

BACKGROUND

On November 21, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s ETA Form 9089 for the position of “Business Development Manager - IV.” (AF 88-98).¹ The Employer stated that the job opportunity requires a Master’s degree and twelve months of experience in the job offered (AF 89-90).

¹ Citations to the appeal file will be abbreviated “AF” followed by the page number.

On August 17, 2009, the CO issued an Audit Notification, instructing the Employer to submit copies of its recruitment documentation. (AF 85-87). The Employer submitted its audit response materials on September 2, 2009. (AF 37-84).

The Employer's audit response materials included a copy of the job order that the Employer placed with the New Jersey State Workforce Agency ("SWA"), administered through America's Job Exchange (AJE). The Experience section of the job order stated "Mid Career (2-15 years)." (AF 59).

On January 18, 2011, the CO denied the Employer's application. (AF 35-36). The CO found that the Employer's SWA job order contained an experience requirement of "2-15 years," which exceeded the twelve month experience requirement listed on the Employer's Form ETA 9089 in violation of 20 C.F.R. § 656.17(f)(6). (AF 36).

In its request for reconsideration, the Employer argued that it had entered twelve months as the experience requirement into the New Jersey job order, but that the AJE system automatically converted it into the "Mid Career (2-15 years)" value. (AF 4). The Employer included a printout from the AJE's table of contents which provides in pertinent part:

Experience

Number of months experience required of preferred for the job. You can specify a one-to four-digit number to indicate number of months. Experience, less than 12 months will convert to entry level, 12-179 months will convert to mid-career, and greater than 180 months will convert to senior level.

Id. The Employer argued that this system of automatic conversion made it impossible to enter an experience requirement that did not display as one of the AJE's pre-determined levels.

The CO denied the request for reconsideration on June 10, 2011 (AF 1). The CO stated that while AJE may convert the experience requirement into a pre-determined range, the job order submission form also included "a free form field in which the Employer had an opportunity to specify its actual minimum requirements." *Id.*

Neither side filed briefs with the Board.

DISCUSSION

The regulations at 20 C.F.R. § 656.10(c)(8) require that a job opportunity be clearly open to U.S. workers. We have interpreted this regulation as placing a burden on the Employer to conduct a good faith recruitment effort. *East Tennessee State University*, 2010-PER-38 slip op at 11 (Apr. 18, 2011) (*en banc*) (citing *Amger Corp.*, 1989-INA-545 (Oct. 15, 1987) (*en banc*)). Part of a good faith recruitment effort involves placing a job order with a State Workforce Agency. 20 C.F.R. § 656.17(e)(1)(i)(A). The SWA job order may not include requirements in excess of those listed on an Employer's Form 9089. *Xceed Technologies*, 2010-PER-80 (July 27, 2010). At the same time, the Board has expressed reluctance to penalize Employers for a

deficient form when the Employer is otherwise acting in good faith. *Federal Insurance Co.*, 2008-PER-37 (Feb. 20, 2009).

In the instant case, the preponderance of the evidence indicates that the Employer made a good faith effort to conduct its recruitment in accordance with the regulations and entered its actual minimum requirements of twelve months experience into the SWA job order form. The AJE's instructions indicate that it automatically converts an experience requirement of twelve months or more into "Mid Career (2-15 years)." The preponderance of the evidence also indicates there was no way for the Employer to avoid having its experience requirement automatically convert into the AJE's pre-determined range.

The CO speculates that the Employer could have entered experience requirement information into a free form field, but there is nothing in the record before us to support such speculation.

We have previously found that denying certification where a deficient form prevented an Employer from complying with the regulations offends fundamental due process. *Federal Insurance Co.*, 2008-PER-37 (Feb. 20, 2009). We decline to uphold the CO's denial because the evidences demonstrates that the Employer entered its actual minimum requirements into the job order form, but that a deficient form caused those requirements to be converted.

As such, we reverse the CO's determination.

ORDER

Accordingly, no other issues remaining to be resolved on appeal, **IT IS HEREBY ORDERED** that this matter is **REMANDED** to the Certifying Officer for the purpose of **GRANTING** certification.

For the Board:

WILLIAM S. COLWELL
Associate Chief 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 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.