U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 April 2011

BALCA Case No.: 2010-PER-00907
ETA Case No.: A-07290-86622

In the Matter of

TAKE SOLUTIONS, INC.,
Employer,

on behalf of

SANDESH NIVRUTTI PAWAR,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Sanjay Chaubey, Esquire
New York, New York
For the Employer

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, 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 LABOR CERTIFICATION

PER CURIAM. This matter involves an appeal of the denial of permanent alien labor certification 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.

BACKGROUND

On October 17, 2007, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Programmer Analyst." (AF 51-66).[1] The Employer stated that the minimum requirements for the position were a Bachelor's degree in Computer Science and five years of experience in the position offered, or in the alternative, a Master's degree and one year of experience in the job offered. (AF 52-53). In its application, the Employer indicated that the prevailing wage for the position was $34.67 per hour and stated that the prevailing wage tracking number was B 200709180023. (AF 52). On November 21, 2007, the CO issued an Audit Notification, instructing the Employer to submit, among other documentation, a copy of the Prevailing Wage Determination ("PWD") from the State Workforce Agency ("SWA"). (AF 46-50).

The Employer submitted its audit response materials to the CO on December 17, 2007. (AF 10-45). The Employer's PWD from the SWA for the position of Programmer Analyst reflect a wage of $46.16 per hour corresponding to the position requirements of a Bachelor's degree in Computer Science and five years of experience in the position offered. (AF 42). The determination date for this position was September 18, 2007 and the PWD tracking number was B 200709180021. (AF 42). On September 29, 2009, the CO denied the Employer's application because the prevailing wage listed on the Employer's application did not match the prevailing wage on the PWD submitted by the Employer with its audit response materials. (AF 7-8). The Employer filed a request for reconsideration of the denial on October 22, 2009 and provided a copy of a different PWD for the position of Programmer Analyst with a prevailing wage of $34.67 corresponding to the Employer's alternative position requirements of a Master's degree in Computer Science and one year of experience. (AF 2-5). The determination date for

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

this position was September 18, 2007 and the PWD tracking number was B 200709180023. (AF 2-5).

The CO denied reconsideration on June 4, 2010, stating that the Employer's request did not overcome the deficiency explained in the September 29, 2009 determination letter. (AF 1). The CO found that the documentation submitted by the Employer was new evidence that was not admissible under the reconsideration regulation at 20 C.F.R. § 656.24(g)(2). *Id*. The CO continued, finding that the wage in the PWD submitted with the Employer's audit response materials was based on the Employer's primary job opportunity requirements of a Bachelor's degree in Computer Science and five years of experience, while the wage in the PWD submitted on reconsideration was based on the Employer's alternate job opportunity requirements of a Master's degree and one year of experience. *Id*. The CO determined that because the PWD submitted with the Employer's audit response materials did not match the prevailing wage entered on the ETA Form 9089, denial of certification was proper under 20 C.F.R. § 656.40. *Id.*

The CO forwarded the case to BALCA, and a Notice of Docketing was issued on July 23, 2010. The Employer filed a Statement of Intent to Proceed on August 3, 2010, but did not file an appellate brief. The CO filed a brief Statement of Position on September 10, 2010, arguing that denial was appropriate.

DISCUSSION

Although the CO noted in its June 4, 2010 denial letter that the PWD that the Employer submitted on reconsideration was not admissible under 20 C.F.R. § 656.24(g)(2), the CO proceeded to consider this evidence. Therefore, because it was part of the record upon which the CO based its denial, it is within BALCA's scope of review. 20 C.F.R. § 656.27(c). Thus, the issue before us on appeal is where an employer receives two different PWDs based on its primary and its alternative minimum requirements, which PWD must the employer use?

At the time this application was filed, the applicable regulation governing prevailing wage determinations provided that:

> The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

20 C.F.R. § 656.40(a) (2007). Under Section 656.41(a), an employer desiring review of a PWD must make such request within 30 days of the date that the PWD was issued.

In this case, the Employer received two separate PWDs for the same job opportunity: one based on its primary job requirements of a Bachelor's degree with five years of experience and one based on its alternative job requirements of a Master's degree with one year of experience. (AF 5, 42). The SWA determined that a Bachelor's degree with five years of experience in the position warranted a skill level of 4 and a wage of $46.16 per hour, while a Master's degree with one year of experience in the position corresponded to a skill level of 2 and a wage of $34.67 per hour. *Id.*

In the June 4, 2010 denial, the CO found that because the Employer's PWD submitted on reconsideration corresponded to the Employer's alternative minimum requirements, it was not the proper PWD. We disagree with this analysis. Denial of the application would have been just as appropriate if the Employer had listed its "primary" job requirements on its application as a Master's degree with one year of experience. Because an employer can easily manipulate whether job requirements are "primary" or "alternative," it would be arbitrary to simply find that the PWD listed on the employer's application must correspond to the Employer's "primary" job requirements. The proper PWD in such a situation is not the PWD that matches the "primary" or "alternative" job requirements; rather, the proper PWD is the higher of the two PWDs.[2]

[2] We note that when an employer receives two different PWDs, it can appeal the determination with which it disagrees according to the procedure established at Section 656.41(a). Where the employer declines to do so, however, we find that the employer must pay the higher of the two prevailing wages where there is any variance in the prevailing wage based on an employer's primary or alternative job requirements.

This rule is consistent with CO's authority to grant certification only if the employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. 20 C.F.R. § 656.1(a)(2). The PERM regulations specifically provide that the prevailing wage in the area of intended employment is one of the factors considered in determining if employment of the foreign worker would have an adverse effect on wages of U.S. workers who are similarly employed. 20 C.F.R § 656.24(b)(3). The facts of this case present a clear example of how certification of the foreign worker could have an adverse effect on the wages of U.S. workers. In this case, the Alien has a Bachelor's degree in Computer Science and five years of experience, and therefore, ought to be paid the amount that similarly situated U.S. employees earn in this position in the same area of intended employment - $46.16 per hour. Here, employment of the foreign worker could have an adverse effect on the wages of U.S. workers employed as Programmer Analysts that have a Bachelor's degree in Computer Science and five years of experience, since the Employer is only offering $34.67 per hour for this position.

Additionally, our holding is compelled by the requirement that the job opportunity in the application be held clearly open to the broadest possible minimally qualified applicant pool so that the CO can make the determination that there are not sufficient able, willing, qualified, and available U.S. workers to perform the work. 8 U.S.C. § 1182(a)(5)A)(i)(I); 20 C.F.R. § 656.1(a)(1). In this case, there is a strong possibility that potential applicants who have a Bachelor's degree in Computer Science and five years of experience would have been discouraged from applying for this position, given that the wage is less than the prevailing wage for the corresponding qualifications.

Accordingly, we find that in order to ensure that employment of a foreign worker would not have an adverse effect on the wages of similarly employed U.S. workers and that no qualified U.S. workers are discouraged from applying for the position, an employer that receives more than one PWD based on variations of its minimum job requirements must abide by the higher wage.

In this case, the Employer received two PWDs based on its primary and its alternative minimum requirements for the job opportunity. It did not appeal either of these PWDs. Because the Employer's application includes the lower of the two PWDs, the CO properly denied 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.