U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 October 2010

BALCA No.: **2010-PER-00103**
ETA No.: A-07261-76549

In the Matter of:

CREDIT SUISSE SECURITIES (USA) LLC,
Employer,

on behalf of

ARUN KUMAR PONNUSAMY,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Janet L. Henner, Esquire
Fragomen, Del Rey, Bernsen & Loewy, LLP
New York, New York
For the Employer

Gary M. Buff, Associate Solicitor
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Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

ROBERT B. RAE
Administrative Law Judge

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

BACKGROUND

On October 3, 2007, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Computer Software Engineers, Applications" located in Research Triangle Park, North Carolina. (AF 123-137).[1] The Employer listed the minimum education and experience requirements as a Master's degree and a computer science, MIS, CIS, or Engineering major, or a Bachelor's degree with five years of experience. (AF 24-25). The Employer stated that two years of experience as a software engineer would be acceptable alternate experience. (AF 25). Additionally, the Employer listed the prevailing wage determination ("PWD") as $75,088.00 per year, and noted that the offered wage was $77,000.00 per year. (AF 124). As the application was for a professional position, the Employer listed three additional types of recruitment, one of which was posting an advertisement on the Employer's website from July 10, 2007 to August 17, 2007. (AF 127).

On November 16, 2007, the CO issued an Audit Notification. (AF 119-122). In explaining the reason for the audit, the CO explained that "The employer's stated minimum requirements exceed the SVP [Specific Vocational Preparation] level assigned by O*NET to the SOC code for the occupation identified in F-2 of ETA Form 9089, and the employer must, therefore, document its requirements as arising from business necessity." (AF 121). The CO stated that under 20 C.F.R. § 656.17(h)(1), "In order to establish business necessity, an employer must demonstrate the job duties and

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

requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner." *Id.* Additionally, the CO directed the Employer to submit its recruitment documentation. (AF 119-120).

On December 14, 2007, the Employer responded to the Audit Notification and attached a copy of the ETA Form 9089; a letter explaining the business necessity of the position's requirements; a copy of the Employer's Notice of Filing; a recruitment report; a copy of the prevailing wage determination; a copy of the job order; a copy of two Sunday newspaper advertisements; a copy of the advertisement placed on www.jobsync.com; a copy of the Employer's employee referral program; and a copy of a printout from the Employer's website indicating that the Employer had current openings at its Center of Excellence in Research Triangle Park, North Carolina, in the areas of information technology, financial accounting, operations, product control, and accounts payable. (AF 34-117).

The CO denied certification on September 9, 2009. (AF 28-30). The CO denied certification because the Employer's Notice of Filing listed the offered wage as $75,088-$77,000 and the wage offered on the ETA Form 9089 was $77,000. (AF 29). The CO also found that the Employer failed to provide adequate documentation that the second Sunday newspaper advertisement was published in The Herald-Sun on July 22, 2007, as indicated in the Employer's ETA Form 9089. (AF 29). Additionally, the CO determined that the Employer did not provide adequate documentation that it complied with the additional recruitment step of advertising the position on the Employer's website, because the printout from the Employer's website did not contain the text of the advertisement. Therefore, the CO found that the Employer did not demonstrate that the job opportunity was clearly open to any U.S. worker in accordance with the attestation requirements under 20 C.F.R. § 656.10(c) and did not demonstrate that the recruitment conducted apprised U.S. workers of the job opportunity per 20 C.F.R. § 656.17(f)(3). (AF 29-30).

On October 8, 2009, the Employer filed a request for review with BALCA. (AF 1-11). In the request, the Employer argues that the Notice of Filing permissibly stated a wage range that included the prevailing wage determination as the bottom of the wage range and the salary offered as the top end of the wage range. (AF 4). Secondly, the Employer asserts that the copies of the tearsheets of its newspaper advertisements in The Sun-Herald were substantially compliant with the terms of the regulations, and that the dateless photocopy of the second newspaper advertisement is a minor flaw. (AF 8). The Employer also submitted another copy of the newspaper advertisement.[2] (AF 19-20).

Regarding the CO's third ground for denial, the Employer contends that the website advertisement was specific enough to apprise U.S. workers of the job opportunity for which certification was sought. (AF 9). The Employer asserts that the evidence submitted displays the date that the pages were posted on the Employer's website and includes the job location in Research Triangle Park, North Carolina. (AF 9). The Employer also notes that the website includes a statement that the Employer is committed to staffing qualified information technology professionals at this location. (AF 9). Further, the Employer argues that the advertisement content requirements at 20 C.F.R. § 656.17(f)(3) do not apply to website advertisements, and therefore that the Employer's documentation of its website advertisement fully complies with the regulatory requirements.

The CO forwarded the case to BALCA on November 17, 2009, and BALCA issued a Notice of Docketing on December 7, 2009. The Employer filed a Statement of Intent to Proceed on December 16, 2009. The CO filed a Statement of Position on January 25, 2010, contending that in addition to being inadmissible, the documents submitted by the Employer with its request for review do not show the date on which the advertisements were published and therefore do not substantially comply with the

[2] The Employer indicated in its Request for Review that it was enclosing "a complete original version of the advertisement posted on Sunday, July 22, 2007." (AF 8, 19-20). The copies in the Appeal File that appear behind the Request for Review, however, do not show the date of the newspaper advertisement. (AF 19-20).

regulatory requirements.[3] Secondly, the CO asserts that the Employer's documentation of its website advertisement is insufficient because it did not provide a description of the vacancy that was specific enough to apprise U.S. workers of the job opportunity for which certification is sought. The CO notes that the Employer's website printout does not list any specific position, skills, or qualifications, but rather only generally states "We currently offer career opportunities in the following areas: Information Technology; Financial Accounting; Operations; Product Control; Accounts Payable." (AF 98). The CO argues that a webpage printout that does not even mention the types of positions available cannot be found to apprise workers of the job opportunity for which certification is sought.

The Employer submitted an appellate brief on February 12, 2010. The Employer states that when it submitted its request for review, it submitted the original, dated, tearsheet of the newspaper advertisement. The Employer asserts that if the copy in the Appeal File did not show the date, it was a result of the CO's error, and not the Employer's. The Employer submitted dated copies of its newspaper advertisements in The Herald-Sun and contends that it is not new evidence because it always existed and was readily available upon request. Second, the Employer contends that the website advertisement contains sufficient information to apprise U.S. workers of the occupation, if not the job, in the application. The Employer maintains that the advertising content requirements in 20 C.F.R. § 656.17(f) only apply to newspapers of general circulation or in professional journals, and therefore the website advertisement need not comport with those content requirements. Additionally, the Employer asserts that its website documentation satisfies the Office of Foreign Labor Certification ("OFLC") FAQ response regarding requirements of advertising content.

DISCUSSION

PERM is an attestation based program. 20 C.F.R. § 656.10(c). Among other attestations, an employer must attest that the job opportunity in the permanent labor

[3] The CO did not mention and presumably has dropped the wage range issue in the Employer's Notice of Filing.

application has been and is clearly open to any U.S. workers. 20 C.F.R. § 656.10(c)(8). Accordingly, the regulations require an employer to conduct mandatory recruitment steps and make a good-faith effort to recruit U.S. workers prior to filing an application for permanent alien labor certification. *See* 20 C.F.R. § 656.17; 69 Fed. Reg. 77326, 77348 (Dec. 27, 2004). When the position involved in the labor application is for a professional position, the employer must conduct at least three additional recruitment steps as well. 20 C.F.R. § 656.17(e)(1)(ii).

One of the additional recruitment steps an employer can utilize to advertise a professional position is to advertise the occupation involved in the application on the employer's own website. 20 C.F.R. § 656.17(e)(1)(ii)(B). This recruitment step can be documented by providing dated copies of pages from the site that advertises the occupation involved in the application. 20 C.F.R. § 656.17(e)(1)(ii)(B). While several of the additional recruitment steps permit an employer to advertise the job opportunity in mediums other than newspapers or journals, the regulations do not specifically list the content that must be included in such advertisements placed in order to fulfill the additional recruitment steps. However, § 656.17(f) lists the content requirements for advertisements placed in newspapers of general circulation or in professional journals. The regulation at § 656.17(f) requires that advertisements placed in newspapers of general circulation or in professional journals must:

> (1) Name the employer;
> (2) Direct applications to report or send resumes, as appropriate for the occupation, to the employer;
> (3) Provide a description of the vacancy specific enough to apprise the U.S. worker of the job opportunity for which certification is sought;
> (4) Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity;
> (5) Not contain a wage rate lower than the prevailing wage rate;
> (6) Not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089; and
> (7) Not contain wages or terms and conditions of employment that are less favorable than those offered to the alien.

20 C.F.R. § 656.17(f). The CO argues that the advertising content requirements listed in § 656.17(f) also apply to website advertisements, and contends that the CO

properly denied certification because the Employer's website advertisement did not contain the information required under § 656.17(f). The Employer argues that the advertising content requirements at § 656.17(f) only apply to advertisements in newspapers and professional journals and do not apply to advertisements placed in relation additional recruitment steps. (AF 9).

While the content requirements listed in § 656.17(f) only explicitly apply to advertisements in journals and newspapers of general circulation, the additional recruitment steps must be interpreted in light of the other PERM regulations and the policy considerations embedded in the permanent labor certification program. The CO cannot grant certification unless there are no U.S. workers who are able, willing, qualified, and available. 20 C.F.R. § 656.1(a)(1). Therefore, an employer must make a good-faith effort to recruit U.S. workers for the position and the position involved in the labor application must be clearly open to U.S. workers. 20 C.F.R. § 656.10(c)(8); 69 Fed. Reg. at 77348.

The Employer suggests that the content requirements for advertisements placed on websites as additional recruitment are less demanding than what is required for advertisements placed in newspapers or journals as mandatory recruitment, based on regulatory history noting that the additional recruitment steps require employers to advertise for the occupation in the application, rather than the job opportunity. 69 Fed. Reg. at 77345. We disagree with the Employer's characterization of the purpose behind the additional recruitment steps.[4] The additional recruitment steps were not intended to be some sort of watered-down or cursory method of advertisement, but rather were intended "to ensure that the greatest number of able, willing, qualified, and available U.S. workers is apprised of the job opportunity."[5] The Employment and Training Administration ("ETA") explained in the preamble to the Final Rule that these additional recruitment steps were intended to replicate the usual methods used by the majority of

[4] It is worth noting that both the "mandatory steps" and the "additional recruitment steps" are in fact mandatory for an employer filing a PERM application for a professional position. 20 C.F.R. § 656.17(e)(1)(ii).

[5] http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#adcont6 (last visited June 23, 2010).

employers that were seriously recruiting workers. 69 Fed. Reg. at 77345. The distinction between "occupation" and "job" is one that was only noted in the context of diffusing concerns that the additional recruitment steps would be cost-prohibitive because they would require an employer to tailor each advertisement to the specifics of the job. 69 Fed. Reg. at 77345 ("Allowing employers to recruit for the occupation involved in the application should also work to minimize employer costs to conduct special recruitment efforts solely to satisfy the alternative recruitment steps. In sum, we do not believe the cost to employers of the additional recruitment steps will be significant."). Therefore, the distinction, if any, between the content required for an advertisement for an "occupation" rather than a "job," is not one that negates the employer's duty to seriously recruit for the position in the labor application.

The requirements that the position in the labor application must clearly be open to U.S. workers,[6] that the employer must recruit U.S. workers in good faith, and that the CO can only certify the application if there are no available U.S. workers to perform the position implicitly require that all advertisements placed by an employer must have the purpose and effect of apprising U.S. workers of the job opportunity. In order for U.S. workers to know about the job opportunity, the advertisements placed to fulfill the additional recruitment steps must contain sufficient information about the position. We hold that all advertisements placed by employers in fulfillment of the additional recruitment steps must comply with the advertisement content requirements listed in § 656.17(f).[7] To hold otherwise would undermine the very purpose of the additional

[6] This is not the first occasion that we have considered the applicability of the advertisement content requirements in § 656.17(f) in light of the attestation requirement that the position be clearly open to U.S. workers. In *Jesus Covenant Church*, 2008-PER-200 (Sept. 14, 2009), we accepted the CO's argument that the attestation requirement that the job opportunity be clearly open to any U.S. worker required the employer to comply with the advertisement content requirement at § 656.17(f)(5) and not list a wage on the SWA job order that was less than the wage offered to the alien. In *Jesus Covenant Church*, the employer listed a wage in the SWA job order that was the same as the prevailing wage determination, but 28 cents less than the wage offered to the alien, and the majority found that this was a harmless typographical error that did not lead us to conclude that the job was not clearly open to any U.S. worker.

[7] We make no determination about the content required for additional recruitment steps other than those that are "advertisements" placed by an employer. *See* §§ 656.17(e)(1)(ii)(A),(D),(F), and (H) (permitting an employer to recruit at job fairs, to conduct on-campus recruiting, to use private employment firms, and to use a campus placement office).

recruitment steps and prevent the CO from verifying that there are not sufficient U.S. workers who are able, willing, qualified, and available to work in the position.

Employers have been on notice of the agency's interpretation of the regulation. The OFLC website includes a response to a Frequently Asked Question ("FAQ") describing the general requirements of any advertisement.[8] The FAQ response states that:

> The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity. An advertisement that includes a description of the vacancy, the name of the employer, the geographic area of employment, and the means to contact the employer to apply may be sufficient to apprise potentially qualified applicants of the job opportunity.

While this OFLC FAQ response is not a regulation, it is "a very powerful method of disseminating information and undoubtedly provide[s] helpful guidance to applicants and their representative." *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), slip op. at 12. Additionally, we note that these content requirements are consistent with the interpretation of the PERM regulations offered by notable members of the immigration bar. *See* Edward R. Litwin & Marcine A. Seid, *Filing Labor Certification Applications Under the PERM Regulations*, *in* NAVIGATING THE FUNDAMENTALS OF IMMIGRATION LAW, 110 (Betsy Lawrence ed. 2010) (noting that while the regulations do not specify the advertisement content requirements for advertisements placed as additional recruitment steps, "[a]t a minimum, the information required for newspaper advertisements should also be communicated in each additional recruitment step: the name of the employer; directions on how to contact the employer; a description of the job, specific enough to apprise U.S. workers of the job opportunity; and the geographic area of employment.").

In this case, the Employer indicated on its Form 9089 that it placed an advertisement on its own website from July 10, 2007 to August 17, 2007. (AF 127). In

[8] http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#adcont1 (last visited June 23, 2010).

response to an audit, the Employer submitted copies of the advertisement on its website. On the page titled, "Career Opportunities," the Employer states that it has employment opportunities in the following areas: Alternative Investments; Equities; Finance, Administration & Operations; Fixed Income; Information Technology; Investment Banking; and Private Banking USA. (AF 96, 100).[9] On the same page, under the heading "Center of Excellence Opportunities," the Employer stated that it was seeking employees in the areas of applications development, information technology, and operations, for its Raleigh-Durham, North Carolina location. (AF 97, 101). The website also instructed potential applicants to visit the "Center of Excellence" section of its website. (AF 97, 101). The "Center of Excellence" section of the Employer's website states that it has career opportunities in the following areas: Information Technology; Financial Accounting; Operations; Product Control; and Accounts Payable at its location in Research Triangle Park, North Carolina. (AF 98, 102).

The Employer argues that the advertisements placed on the Employer's website were specific enough to apprise U.S. workers of the occupation involved in the application because the webpage shows the date of posting, the location of the job opportunities, a list of several areas of employment that it has openings in, and a statement that the employer is committed to staffing qualified information technology professionals at this location. (AF 9). We disagree. The occupation involved in this labor certification is "Computer Software Engineer, Applications." (AF 124). The Employer's website advertisement did not direct applicants to send resumes to the employer or provide a description of the vacancy. The website advertisement is merely a generalized list of several broad and vague areas of employment and does not contain the information required under the regulations to apprise U.S. workers of the job opportunity in the labor application.

The CO properly denied certification because the Computer Software Engineer position was not clearly open to U.S. workers. As we find that the CO properly denied

[9] AF 96 corresponds to the Employer's Career Opportunities webpage dated July 10, 2007, and AF 100 corresponds to the Employer's Career Opportunities webpage dated August 17, 2007.

certification on this ground, it is unnecessary to address the other ground the CO asserted for denying the application.

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

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the panel:

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ROBERT B. RAE
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.