U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 23 August 2012

BALCA Case No.: 2011-PER-01256
ETA Case No.: A-08249-84725

In the Matter of:

M-I L.L.C. (A/K/A M-I SWACO),
Employer

on behalf of

ALBA RODRIGUEZ, ANDREA,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Nestor A. Rosin, Esquire
Foster Quan, LLP
Houston, TX
For the Employer

Before: Sarno, Bergstrom, Krantz
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

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 September 25, 2009, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Performance Evaluation Engineer" (AF 87).[1] On April 23, 2009, the CO sent Employer an Audit Notification Letter requesting that Employer provide certain information in accordance with 20 C.F.R. § 656.20. (AF 83). Employer responded on May 22, 2009. (AF 13-82).

On November 1, 2010, the CO denied the application. (AF 11-12). The CO listed two reasons for denial. Reason #1: The Employer's print advertisements do not sufficiently indicate the geographic area of employment for the job opportunity described in ETA Form 9089 Section H. Reason #2: The information listed in ETA Form 9089 for Section H does not match the information contained on the Prevailing Wage Determination (PWD) submitted by the Employer. Both denials are referencing the requirement of "35% to 40%" international travel listed on Section H of the ETA Form 9089. (AF 12).

On December 1, 2010, the Employer requested reconsideration or BALCA review arguing the regulations does not require every job requirement and condition of employment to be enumerated in the advertisements. (AF 2-10). On April 29, 2011 the CO accepted the Employer's information regarding its Prevailing Wage Determination, but found the Employer's request did not overcome the deficiency regarding the newspaper advertisements. (AF 1).

The CO forwarded the case to BALCA on May 5, 2011, and BALCA issued a Notice of Docketing on July 22, 2011. The Employer filed a Statement of Intent to Proceed on July 28, 2011, but did not file an appellate brief. The CO did not file a Statement of Position.

DISCUSSION

20 C.F.R. § 656.17(f)(4) states, "Advertisements placed in newspapers of general circulation or in professional journals before filing the Application for Permanent Employment Certification must . . . 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

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

perform the job opportunity." In the instant case the Employer's ETA Form 9089 indicated the position requires international travel between 35% to 45% of the time. (AF 88). The Employer's newspaper advertisements, however, do not include the travel requirement. (AF 60-62).

The Employer's Request for Review cites the *PERM Regulation Preamble & Department of Labor (DOL) FAQ* which states, "The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment…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…"[2] In this case, the Employer specifically argues the regulations do not require inclusion of the international travel requirement. The Employer argues the ads are compliant because they are not more restrictive or less favorable than the requirements stated in its ETA Form 9089. The job description in the ads offered a more favorable condition to the public. It reached a broader pool of potential applicants than if it had included the travel requirement. Including the travel requirement could likely have reduced the number of applicants. (AF 2-3).

In addition to citing the *DOL FAQ* to support its arguments, the Employer states "the meaning of 'travel requirement' under 20 CFR § 656.17(f)(4) refers to where the applicant would have to move for the job and to travel to interview for the position, but not the requirement of travel related to performing the duties of the job once an applicant is hired and moved to the worksite location." (AF 2-3).

The CO argues that newspaper advertisements are used to test the labor market and must comply with the provisions of § 656.17(f)(4). Since the ads did not include a travel requirement listed in ETA Form 9089, the ads are not compliant and denial is valid. (AF 1).

The Employer's ads included a description of the vacancy, the name of the employer, the means to contact the employer, and the geographic area of Houston, Texas. The Employer argues this information follows the requirements stated in the *DOL FAQ*. This argument is not convincing; first, the *DOL FAQ* states inclusion of this information "***may*** be sufficient to apprise potentially qualified applicants of the job opportunity." (Emphasis added) Secondly, just two

[2] http://www.foreignlaborcert.doleta.gov/perm.cfm - United States Department of Labor, Employment and Training Administration, Permanent Labor Certification - "FAQs – Round 1", perm_faqs_3-3-05.pdf (page 10).

questions later, the *DOL FAQ* states, verbatim, the advertisement requirements of § 656.17(f)(4), "***must*** 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." (Emphasis added). This answer in the *DOL FAQ* continues, "Employers are not required to specify the job site, unless the job site is unclear, for example, if applicants must respond to a location other than the job site (e.g., company headquarters in another state) or if the employer has multiple job sites." *Id.*

A careful analysis of the language in both the *DOL FAQ* and § 656.17(f)(4) confirms the CO's denial is correct. In this case, the information that "***may*** be sufficient" wasn't, and the Employer's interpretation for the meaning of "travel requirement" is inconsistent with the regulation. The Employer claims the phrase "refers to where the applicant would have to move for the job and to travel to interview for the position, but not to the requirement of travel related to performing the duties of the job once an applicant is hired and moved to the worksite location." (AF 3). This interpretation is incorrect for the following reasons. The Employer does not distinguish between indicating a geographic area for an *interview* and *employment*. The regulation at issue, 656.17(f)(4), applies to the geographic area of employment. A separate regulation, § 656.17(f)(2), dictates informing an applicant where to interview for a position. Since the ads only informed applicants about traveling to Houston, and not that 35-40% of the area of employment will be abroad, the ad failed to "apprise applicants of any travel requirements." *See VF Imagewear* 2011-PER-00281 (March 26, 2012).

In summation, the Employer's newspaper advertisements did not comply with the provisions of § 656.17(f)(4). The ads did not sufficiently indicate the geographic area of employment for the job opportunity described in ETA Form 9089 Section H. Accordingly, we affirm the CO's denial of certification.

ORDER

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

For the Panel:

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DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR/AMJ/jcb
Newport News, Virginia

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.