

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 March 2010

BALCA Case No.: 2009-PER-00015

ETA Case No.: A-06293-71942

In the Matter of:

CLEARSTREAM BANKING S.A.,

Employer,

on behalf of

ACELINA SANTA ROSA,

Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Jane L. Hanson
Milbank, Tweed, Hadley & McCloy LLP
New York, New York
For the Employer

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

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

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
REVERSING CO'S 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.

BACKGROUND

The Employer filed an Application for Permanent Employment Certification on behalf of the Alien for a position entitled "Key Accountant Manager/ICSD." (AF 101).¹ The prevailing wage determination categorized the job as "Sales Agent, Financial Services." (AF 101). The Employer indicated that this was a professional position, (AF 103) and that one of its professional recruitment steps was to advertise with its employee referral program from July 26, 2006 to September 30, 2006. (AF 104).

On December 14, 2006, the Certifying Officer ("CO") issued an audit notification letter. (AF 96-99). The CO indicated that the reason prompting the audit was a foreign language requirement. (AF 99). However, the audit letter directed the Employer to submit, among other items, its recruitment documentation "as outlined in 656.17(e)." (AF 96-97). The Employer filed a package of materials in response under a cover letter dated January 10, 2007. (AF 28-114).

On January 30, 2007, the CO denied certification. (AF 7-9). The sole ground for denial of certification was that the Employer had failed to provide documentation of its use of an employee referral program consistent with the regulation at 20 C.F.R. § 656.17(e)(1)(ii)(G). (AF 9).

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

On February 22, 2007, the Employer requested reconsideration and/or review of the denial. (AF 3-95).² Noting that the audit notification had not been directed at the employee referral system, the Employer's attorney stated that she inadvertently omitted a copy of a document explaining the Clearstream Employee Referral System as an attachment to the Recruitment Report: "We had intended to include the program document with Clearstream's intranet job posting to which the employee referral program applied." (AF 3). The attorney stated that the audit response Exhibit 5 had included the intranet posting (with the date certified on the reverse side at Tab C), but that the copy of the Clearstream Employee Referral System page was omitted. The Employer essentially conceded that it omitted the documentation with the audit response, but argued that it was not an omission in recruitment, which had all been completed and reported on a timely basis. The Employer stated that the Recruitment Report, which had been signed by a Senior Manager, and notarized, attested "that the position was available for employee incentives and provides the dates the position was posted for employees who wished to participate in the program." (AF 5). Thus, the employee referral program form of recruitment had been duly noted and the mandated PERM recruiting obligations satisfied.

The CO issued a letter of reconsideration on October 2, 2008. (AF 1-2). The CO found that the Employer had "failed to provide evidence of an Employee Referral Program that provided dated copies of the employer notice or memoranda advertising the program; specifically, documenting the incentives that would be offered to the employees" as required by 20 C.F.R. § 656.17(e)(1)(ii)(G).

BALCA issued a Notice of Docketing on October 17, 2008. The Employer filed a Statement of Intent to Proceed on October 28, 2008, and an appellate brief on November 26, 2008. In its appellate brief, the Employer reiterated the arguments made in the

² The CO's index to the Appeal File indicates that the Employer's appeal request is found at AF 3-9. However, it appears that the actual package of materials included with the appeal request was much larger, including copies of the documents issued by the CO, the Employer's audit response, and other documentation. In fact, it appears that when the CO assembled the Appeal File, he used the appeal request materials as the basic Appeal File, and did not include copies of the original documents in chronological order. While this is perhaps understandable as many of the documents would be duplicative, it causes a problem on appeal tracing what was in the record at given stages of the processing of the application. Based on the "Index of Tabs" included with the Employer's appeal, we conclude that the appeal package is actually represented by the pages AF 3-95. *See also* Employer's brief at 4-5.

request for reconsideration and/or review, and specifically disputed the CO's conclusion in the letter of reconsideration that it had failed to specifically document the incentives that would be offered to the employees. The Employer quoted language from Clearstream's Employee Referral System, which had been included in the materials accompanying the request for reconsideration and/or review, found at pages 93-95 of the Appeal File, which states:

If a candidate is hired upon your referral, you will be granted the amount of €2.500 on top of your gross salary. This amount is subject to the applicable withholdings (tax and social security contribution). The premium will be paid after the candidate has successfully passed the trial period.

Employer's brief at 3, quoting AF 93. The Employer stated that additionally, a Senior Manager had attested that the Clearstream Employee Referral System could be found on the Human Resources page of the company intranet, and that the program had been in existence from at least 1998. The Senior Manager also attested that the position was posted on the intranet from July 26, 2006 to September 30, 2006. Thus, the Employer argued, the incentives that would be provided upon successful placement of a candidate were clear. The Employer argued that under the circumstances, the error in failing to include the document describing the Employer's employee referral system was excusable. The mistake did not go to the sufficiency of its substantial PERM recruiting efforts.

The CO filed a letter brief urging affirmance of the denial. The brief is a bit ambiguous, but it appears that the CO is arguing that because the Employer did not provide the requested documentation "when requested by the Certifying Officer" it was proper for the CO to deny reconsideration. In other words, the CO has not addressed whether the documentation describing the Employer's employee referral system provided with the motion for reconsideration/review meets the documentation requirements of § 656.17(e)(1)(ii)(G), but rather is contending that it is too late to supply documentation with a motion for reconsideration/review when it should have been submitted at the time of the audit response.

DISCUSSION

When an employer files an application for permanent alien labor certification under the basic process for a professional position, the regulations require it to have conducted certain recruitment steps prior to the filing and be prepared to document those steps. One type of recruitment that may be used to support an application is use of an employee referral program with incentives. The way an employer can document this type of recruitment is “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).

In the instant case, the Employer’s attorney admitted that it inadvertently omitted from the audit response the documentation describing the Employer’s employee referral system. Thus, it is indisputable that the audit response, although substantial, was missing a document necessary to show compliance with the regulation governing recruitment through an employee referral program with incentives. 20 C.F.R. § 656.17(e)(1)(ii)(G).

We have carefully reviewed the CO’s letter of reconsideration, affirming the denial on reconsideration. It is simply not clear whether the CO was simply affirming the earlier denial based on the Employer’s incomplete audit response, or on the basis that the documentation provided by the Employer with its motion for reconsideration was inadequate under the criteria at 20 C.F.R. § 656.17(e)(1)(ii)(G). In the instant case, a reasonable interpretation of the CO’s letter of reconsideration suggests that he actually reviewed the documentation supplied by the Employer on reconsideration, and still found it insufficient. Specifically, the CO stated, “In its request for review, the employer stated the attachment of the Employee Referral Incentive information was inadvertently omitted from the Recruitment Report, but felt that it did not reflect an omission in recruiting.” (AF 1). Thus, we find the documentation was within the record upon which certification was denied, and is therefore within the record that the Board must consider on appeal. *See* 20 C.F.R. § 656.27(c).

As noted above, an employer which chooses to use an employee referral program with incentives as one its professional recruitment steps, 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). The CO’s decision on reconsideration did not identify the precise deficiency he found with the Employer’s documentation. Instead, he merely stated that, “the employer failed to provide evidenced documentation as required.” (AF 1).

As we understand the Employer’s position, it advertised the job on its intranet as a part of its employee referral program, which has been in existence since 1998. The memorandum the Employer submitted with its request for review describes this program and the incentives involved. Current employees, therefore, would know that they would be eligible for remuneration under the employee referral program if they referred a successful candidate for the job for which labor certification was being sought. Employees were made aware of the existing job by the internal posting.

In other words, a generic employee referral program with incentives, the description of which is available to employees may be sufficient to be a step under section 656.17(e)(1)(ii)(G), even if the particular job for which labor certification is being sought is not individually promoted under the program.³ Based on the record and arguments presented, we find that the Employer was in compliance with the requirements for an employee referral program, and has met all of the required steps in the PERM process. Accordingly, we reverse the CO’s decision to deny this application.

³ The regulations do not provide a detailed explanation of what is sufficient to constitute adequate documentation for the employee referral program and there has been very little case law on this point. The regulatory language seems to permit this recruitment option to be a passive form of recruitment that requires little to no active solicitation of applications by the employer. However, since neither the merits of the Employer’s submission nor the requirements of this form of recruitment were briefed by the parties, we will reserve discussion on this point.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **REVERSED**, and that labor certification is hereby **GRANTED**.

For the panel:

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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.