

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 30 March 2010

BALCA No.: 2009-PER-00258
ETA No.: A-07137-37990

In the Matter of:

**TOTAL SYSTEM SERVICES INC.
(TSYS, INC.),**

Employer,

on behalf of

YING JIANG,

Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Robert E. Banta, Esquire
Banta Immigration Law Ltd.
Atlanta, Georgia
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
GRANTING 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 governing permanent alien labor certification found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).

BACKGROUND

The Employer filed a labor certification application for the position of computer “Project Manager.” (AF 73-85).¹ The Certifying Officer (“CO”) accepted the application for processing on May 21, 2007. The Employer indicated that the job was a professional occupation, (AF 76) and that one of the types of recruitment it used for the position was an advertisement with its employee referral program from March 8, 2007 to March 22, 2007. (AF 77).

On June 22, 2007, the CO issued an Audit Notification. (AF 17-20). The audit was initiated because of a foreign language requirement for the position. (AF 20). The Employer was required to submit for the audit response, among other documents, the recruitment documentation outlined in the regulation at 20 C.F.R. § 656.17(e) – in other words, the Employer’s documentation of its required pre-filing recruitment.

Under cover letter dated July 20, 2007, the Employer submitted its audit response. (AF 14-72). As documentation of the use of its employee referral program to advertise the position, the Employer submitted an undated memorandum which stated in pertinent part:

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

TSYS Referral Program

For the Project Manager position, you may refer a friend by submitting resume to Kerri Alexander, Human Resource Manager, 1600 1st Ave Columbus, GA 31902.

(AF 72). No other details about the program were provided. The Employer's audit response also included a two page, dated copy of its Notice of Filing. (AF 60-61). In the Appeal File the Employer's audit response appears to be in the same sequence as when originally submitted. The Notice of Filing and the memo on the employee referral program are separated by several pages.

On September 11, 2007, the CO issued a denial determination letter. (AF 4-6). The CO found that the Employer's documentation of the use of an employee referral program was inadequate because "the employer failed to provide dated copies of employer notices or memoranda advertising the program and specifying the incentives offered." (AF 6).²

Under cover letter dated October 10, 2007, the Employer requested reconsideration of the denial. (AF 2-13). The Employer's attorney averred that "[t]he Employee Referral Notice provided to the CO with the audit documentation was posted with the internal posting notice, and the employer's statement regarding the posting of the internal notice applies as well to the employee referral program notice." (AF 3). Attached to the request for reconsideration was a copy of the Employer's internal posting for the job with a verification by the Employer's HR manager that it had been posted from March 8, 2007 to March 22, 2007 (AF 9-10); a copy of the above-quoted memorandum announcing that the Project Manager position was eligible for the Employer's referral program; (AF 11) an undated memorandum describing the Employer's "TEAMBUILDERS" program indicating that monetary payouts ranging from \$200 to \$4,000 depending on the job-grade level would be made for eligible referrals under the program; (AF 12) and a web page printout of a search results page for

² The CO also denied the application on another ground which is no longer at issue on appeal.

the web address “teamworks.tsys.com,” with a search result entitled “Employer Referral Program Draft” circled by hand. (AF 13). The search result displays an excerpt from relevant search result which suggests that it was the source of the “TEAMBUILDERS” memorandum. (AF 13). The last line of the search results states:

<http://teamworks.tsys.com/team/careers/TeamBuilders/TeamBuilders>
Guideline 3.27.06 .doc - 35KB – Carla D Short – 8/22/2007

(AF 13). The date 8/22/2007 is circled by hand.

On March 16, 2009, the CO issued a letter of reconsideration. (AF 1). The CO found that the documentation supplied with the “request for review”³ and the audit response was inadequate. Specifically, the CO ruled: “[T]he employer provided a copy of the document used in the additional recruitment effort. However, the copy is not dated and does not provide information about referral incentives.” Thus, the CO found that the denial of certification had been valid.

BALCA issued a Notice of Docketing on April 6, 2009. The Employer filed an appellate brief arguing that its documentation was adequate under the regulations. First, the Employer’s attorney asserted that the notice that had been posted of the job opening had been accompanied by the notice of eligibility of the job announcement for the employee referral program. That three page posting included the date of the posting. The Employer noted that all three pages had been included with the audit response at AF 60, 61 and 72. The Employer noted that it had clarified in the motion for reconsideration that the notice of posting was a multi-paged document that included its employee referral program notice. The Employer noted that its motion for reconsideration also included a document providing the details of its TEAMBUILDER Guidelines, which were provided to employees via the Employers’ intranet. The Employer noted that this document specified monetary incentives. The Employer argued that the regulation at 20 C.F.R. § 656.24(g)(2)(ii) permitted it to present such documentation on reconsideration.

³ The CO was evidently referring to the Employer’s request for reconsideration.

The CO filed a letter brief urging affirmance of the denial on the ground that the Employer's documentation of its employee referral program is undated, and therefore it had failed to demonstrate compliance with section 656.17(e)(1)(ii)(G) of the regulations.

DISCUSSION

Most employers sponsoring an alien for permanent employment certification under the basic certification process of the PERM regulations, such as the Employer in the instant case, are required to attest to having conducted recruitment prior to filing the application. Where the application involves a professional occupation, the sponsoring employer is required to attest to having placed a job order with the SWA, and to having run print advertisements under the regulatory criteria found at 20 C.F.R. § 0656.17(e)(1)(i). The regulations also require that the employer conduct three additional recruitment steps from a list of ten options (job fairs, an employer web site, a job search web site other than the employer's, on-campus recruitment, a trade or professional organization, a private employment firm, an employee referral program with incentives, a campus placement office, a local ethnic newspaper, or radio and television advertisements). 20 C.F.R. § 656.17(e)(1)(i). If an employee referral program is used as one of the additional recruitment steps, the regulations state that this step "can be documented by providing dated copies of employer notices or memoranda advertising the program and specifying the incentives offered." 20 C.F.R. § 656.24(g)(2)(ii).

In the instant case, it is understandable why the CO found, prior to the motion for reconsideration, that the Employer's audit response was inadequate to document use of the employee referral program. Nothing in the Employer's audit response made it clear that the employee referral eligibility notice was appended to the internal job posting. The documents apparently were separated by several pages. Moreover, the audit response did not include any documentation specifying the incentives offered.

The Employer's motion for reconsideration, however, cleared up both of these deficiencies. The Employer clarified that the internal job posting was three pages in length and included the notice of the job's eligibility for the employee referral program. The Employer included a signed verification of when this notice was posted. Accordingly, in context, the dates of the announcement of the availability of the employee referral program for the position were provided, albeit on page 2 of the 3 page posting.

Moreover, the Employer's motion for reconsideration included documentation that specified the monetary incentives that the Employer's employee referral program offered for eligible job announcements. The CO evidently overlooked this part of documentation when ruling on the motion for reconsideration.⁴

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

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **REVERSED**, and that this matter is hereby returned to the Certifying Officer for issuance of a labor certification.

For the panel:

A

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

⁴ Because the CO explicitly considered the documentation submitted by the Employer with its motion for reconsideration, (AF 1) we do not reach the question of whether the Employer was entitled to submit the additional documentation pursuant to 20 C.F.R. § 656.24(g)(2)(ii), as argued in the Employer's motion for reconsideration and appellate brief. That particular subsection of section 656.24(g) is an amendment to the regulation governing requests for reconsideration which is applicable only to applications filed after July 16, 2007. Since this application was accepted for processing on May 21, 2007, the prior rule was still applicable to the Employer's application. Regardless of which rule applied, the CO exercised his discretion to review the additional documentation, and therefore that 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).

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.