

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 April 2011

BALCA No.: 2010-PER-00427
ETA No.: A-07193-55815

In the Matter of:

QUICK PURCHASE FOOD,
Employer,

on behalf of

BHARATKUMAR BORAD,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Philip M. Zyne, P.A.
Heathrow, FL
For the Employer

Before: Sarno, Malamphy, Krantz
Administrative Law Judges

DECISION AND ORDER
VACATING 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 July 12, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Manager.” (AF 146-155).¹ The ETA Form 9089 listed the primary worksite for the position as “548 Howard Street, Spartanburg, SC, 29303.” On November 1, 2007, the CO issued an Audit Notification. (AF 143-145). In the Audit Notification, among other documentation, the CO required the Employer to submit recruitment documentation. (AF 143).

On December 4, 2007, the Employer responded to the Audit Notification. (AF 43-142). Included in the response were its Notice of Posting and its advertisement in the Spartanburg Herald. (AF 63, 84).

On October 9, 2008, the CO sent the Employer a request for additional information. (AF 39-42). Specifically, the CO requested a copy of a certified letter and mail receipt, resumes, and copies of the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper. (AF 41).

On September 1, 2009, the CO sent the Employer another request for additional information. (AF 37-38). Specifically, the CO requested a copy of the complete, original response as submitted on December 4, 2007. (AF 38).

On October 1, 2009, the Employer responded to the CO’s September 1, 2009 request. (AF 30-36). In a cover letter, the Employer stated that included in its response was a copy of the complete, original file, as well as additional documents to clarify its previous response to the Audit Notification. (AF 30).²

The CO denied certification on November 18, 2009 (AF 27-29). The CO stated three reasons for denial. The first reason was that the geographic area of employment contained in the job order does not match the geographic area of employment described in ETA Form 9089, Section H. Specifically, the job order identifies the job location as Inman [SC], but the ETA

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

² Neither a copy of the original file nor the two exhibits the Employer stated were included are contained within the Appeal File as received by BALCA.

Form 9089 lists the primary worksite address as Spartanburg, SC. The second reason was that the Notice of Filing does not contain the location of the job opportunity. Specifically, the primary worksite listed in item H.2 on the EA Form 9089, "Spartanburg, SC" does not appear on the Notice of Filing submitted in response to the Audit Notification letter.³ The third reason for denial is that the employer's advertisement does not contain the geographic area of employment for the job opportunity described in ETA Form 9089 Section H. Specifically, the primary worksite listed in item H.2 on the ETA Form 9089, "Spartanburg, SC," does not appear in the advertisements placed in the Spartanburg Herald-Journal and resumes are directed to an address in Inman, SC.

On March 16, 2009, the Employer submitted a request for review. (AF 3-26). The Employer noted that the CO denied the application for labor certification because the job order, Notice of Filing, and newspaper advertisements did not 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." (AF 7). The Employer points out that the regulations do not require the listing of the location of the actual job opportunity and that both Inman, SC and Spartanburg, SC are in the same geographic area as they are located just 7.4 miles and 15 minutes driving distance from each other. (AF 7).

On March 10, 2010, the CO notified the Employer that it had not overcome the deficiencies upon which the denial of certification was based and that the case would be forwarded to BALCA for review. (AF 1). The CO reiterated that the job order, Notice of Filing, and advertisements listed Inman, SC instead of Spartanburg, SC and thus did not indicate the geographic area with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity as required by 20 C.F.R. § 656.17(f)(4) and 20 C.F.R. § 656.10(d)(4). (AF 1).

The CO forwarded the case to BALCA on March 10, 2010, and BALCA issued a Notice of Docketing on April 6, 2010. The Employer filed a Statement of Intent to Proceed on April 16, 2010. The Employer also filed an appellate brief on May 19, 2010 arguing that Inman, SC and

³ The Notice of Filing does list an Inman, SC address under the contact information.

Spartanburg, SC are within the same geographic area and that the Employer followed the regulation on its face. The CO did not file a Statement of Position.

DISCUSSION

An employer that files an application for permanent alien labor certification must take certain recruitment steps to advertise the job opportunity to U.S. workers. Those steps including placing a job order with the state workforce agency, placing Sunday newspaper advertisements, and posting a Notice of Filing. The regulation at 20 CFR 656.17(f)(4) requires that advertisements “[i]ndicate 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.” The regulation applies to notices of filing as well under 20 C.F.R. § 656.10(d)(4) and has been construed to include job orders as a method of recruitment.

In the instant case, ETA Form 9089 listed the primary worksite for the position as “548 Howard Street, Spartanburg, SC, 29303,” which is the store address. However, the job order, Notice of Filing, and newspaper advertisements all listed 131 Hickory Hill Drive, Inman, South Carolina, which is the address for the Employer’s corporate office. The undersigned has consulted a map to verify that the driving distance between the two addresses is approximately 7.5 miles, a drive estimated to take 15 minutes.

Although the CO correctly states the standard that advertisements must “[i]ndicate 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,” he provides no explanation as to why Inman, SC and Spartanburg, SC are distinct geographic areas given their proximity to each other.

Notably, the regulations do not require that advertisements, notices of filing, or job orders contain the specific address of the job opportunity, only that they indicate the geographic area of employment. Section 656.17(f)(4) does not specify any distance or commuting time requirement as criteria for determining whether two locations are within the same geographic area, so we turn to another section of the regulations for guidance in clarifying the definition of “geographic area.” According to 20 CFR 656.3, “area of intended employment” means:

...the area within normal commuting distance of the place (address) of intended employment. There is no rigid measure of distance which constitutes a normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.*, normal commuting distances might be 20, 30, or 50 miles). If the place of the intended employment is within a Metropolitan Statistical Area (MSA)...any place within the MSA...is deemed to be within normal commuting distance of the place of intended employment.

The phrase “area of intended employment” is substantially similar to “geographic area of employment” and thus this definition will guide our analysis. Inman, SC is a suburb of Spartanburg and located within the Spartanburg metropolitan area. (AF 17). All of Spartanburg County is within the same Metropolitan Statistical Area, thus, by definition, placing Inman within the “normal commuting distance of the place of intended employment.” (AF 18). Notably, Inman and Spartanburg are less than ten miles from each other, which is significantly less distance than the “20, 30, or 50 miles” the regulations listed as normal commuting distances.

The specific facts of this case lend further support to the assertion that Inman and Spartanburg are within the same geographical area. It is important to note that the approximately 7.5 miles separating Inman and Spartanburg equates to approximately 15 minutes driving distance. Both commuting distance and driving time are relevant factors when determining geographic area. Another factor is that Inman is a small town and thus it is likely that potential employees willing to work in Inman would also be willing to travel to nearby Spartanburg for an employment opportunity. Furthermore, the Employer had no intention of deceiving applicants by listing Inman, SC on its job advertisements; rather, the Employer wanted all resumes sent to its corporate office to avoid confusion among its individual stores. All of the facts unique to this case are relevant in making our decision.

We recognize the goal of the regulations in allowing a potential applicant to identify the location of the job opportunity during the application process. We believe in the instant case this goal was met. The regulations require that the advertisement contain certain information, including geographic area of the job opportunity. The regulations make no such requirement that an employer list the precise address of the job opportunity. In the instant case, an employee searching for a manager position near Inman, South Carolina would be unlikely to pass by an

opportunity in nearby Spartanburg. Moreover, the Employer provided specific contact information including a phone number in which the potential employee could have made further inquiry if location were a stringent requirement in his or her job search.

We find that in these precise circumstances upholding the denial of certification is not warranted. Therefore, in the interest of fundamental fairness we vacate the denial of certification, and return this application to the CO to consider whether the job order, Notice of Filing, and newspaper advertisements otherwise complied with the regulations, and whether certification should be granted. We stress that this is a narrow decision premised on the specific facts put forth in this case. This decision should not be construed as support for requiring the CO to reconsider a case where the Employer does not list a location in the text of the job order, Notice of Filing, or newspaper advertisement.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **VACATED** and that this matter is returned to the CO for completion of processing.

For the Panel:

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

DAS,JR/AMC/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.