



Issue Date: 25 May 2011

BALCA No.: 2010-PER-00732
ETA No.: A-07241-70837

In the Matter of:
STUDIO MAESTRO,
Employer,
on behalf of
NOEMI EDOSMA CAYA,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Barry Silberzweig
New York, NY
For the Employer

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

Before: Malamphy, Krantz, Sarno
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 September 27, 2007, the CO accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Accounting Consultant." (AF 236-247). On October 24, 2007, the CO issued an Audit Notification. (AF 233-235). On November 21, 2007, the Employer filed a response to the Audit Notification. (AF 93-232). Included in the Audit Response was an undated description of the Employer's employee referral program and an undated letter from the Employer's executive director confirming that the Accounting Consultant position was advertised through the employee referral program. (AF 196-198).

On September 3, 2009, the CO denied certification. (AF 90-91). The CO gave one reason for denial: The Employer failed to provide adequate documentation of the professional recruitment steps. Specifically, the CO explained that the Employer indicated that it used an employee referral program as an additional recruitment step, but did not provide dated copies of notices advertising the program to employees. (AF 91).

On October 5, 2009, the Employer submitted a request for reconsideration. (AF 2-89). The Employer argued that it had advertised the position through the company's employee referral program from May 1, 2007 through August 29, 2007, but mistakenly omitted a copy of the page specifying those dates. (AF 3). Employer then enclosed a copy of the notice advertising the program and the position listing those dates. (AF 83). The Employer also included an affidavit by the company's executive director attesting to the fact that the notice was posted during the stated time period. (AF 88).

On May 11, 2010, the CO informed the Employer in a letter that it had not overcome the deficiencies indicated in the denial letter and that the case would be forwarded to BALCA. Specifically, the CO stated that the submitted document does not establish when the employee referral program was established and made available to employees. (AF 1).

On May 13, 2010, the CO forwarded the case to BALCA, and BALCA issued a Notice of Docketing on June 25, 2010. On July 6, 2010, the Employer submitted a Statement of Intent to Proceed. The CO did not file a Statement of Position, but did file a letter on August 13, 2010, requesting that BALCA affirm the CO's decision.

DISCUSSION

An employer can satisfy one of its recruitment requirements for a professional position by using an employee referral program. 20 C.F.R. § 656.17(e)(4)(ii)(G). The regulation states that “the use of an employee referral program can be documented by providing dated copies of the employer notices or memoranda advertising the program and specifying the services offered.” 20 C.F.R. § 656.17(e)(4)(ii)(G). Clearly, the regulations provide that submitting dated copies of employer notices or memoranda is one, but not the only, method of documenting an employee referral program. In *Sanmina-Sci Corp.*, a BALCA panel articulated a three step process for determining if the employee referral program was properly documented. 2010-PER-00697 (Jan. 19, 2011). The panel ruled the Employer must demonstrate three things:

- (1) its employee referral program offers incentives to employees for referral of candidates, (2) that the employee referral program was in effect during the recruitment effort the employer is relying on to support its labor certification application, and (3) that the Employer's employees were on notice of the job opening at issue.

A substantial failure by an employer to provide the documentation required by the audit will result in the application for permanent labor certification being denied. 20 C.F.R. § 656.20(b).

In the instant case, in its response to the Audit Notification, the Employer did not supply dated copies of employer notices or memorandum as suggested by 20 C.F.R. § 656.17(e)(4)(ii)(G). The Employer did submit an undated letter signed by Rose Caiola, the company's executive director, and an undated description of the employee referral program. (AF 196-198). Ms. Caiola's letter confirms the existence of the employee referral program and explains the incentives. She further states in the letter:

Our company posted a Notice of Job Opportunity conspicuously in several places throughout the offices of the company for the open position of Accounting Consultant. The notices identified the subject position as being eligible for an employee referral bonus. A copy of the Notice of Job Opportunity posted by our company is enclosed herewith.

(AF 196). She then stated that no responses were received.

The attached description of the employee referral program explains the incentive system, including the amount and requirements for receiving a monetary referral bonus. (AF 197-198).

The submitted Notice of Job Opportunity, posted to comply with Notice of Filing requirements, lists the job title, duties, requirements, salary, hours, contact, and date of posting of the notice. At the top of the notice it states: "This position is eligible for an employee referral bonus." (AF 129).

The Employer also included copies of the ad for the position placed on the company's webpage. The printouts are date stamped at the bottom of each page and correspond to each day between July 15, 2007 and August 15, 2007. (AF 131-162).

Considering all of the documents submitted in response to the Audit Notification, we find the Employer has provided evidence documenting all three requirements outlined in *Sanmina-Sci Corp.* By submitting the document explaining the employee referral program and the letter from Ms. Caiola, the Employer met the first step of demonstrating that the Employer has a referral program with incentives to employees. By submitting a copy of the posted Notice of Filing and copies of the daily printouts of the ad on the company's webpage, the Employer demonstrated that its employees were on notice of the job opening. Finally, the fact that the dated Notice of Filing states that the position is eligible for an employee referral bonus, indicates that the employee referral program was in effect during the recruitment effort the employer is relying on to support its labor certification application. For the position to be eligible for the employee referral bonus, the program must have been in effect when the Notice of Filing was posted. Further, the existence of the program during the applicable time period is supported by Ms. Caiola's letter in which she states that the position was advertised and eligible for the employee referral program.

Although certainly the notice submitted by the Employer in its request for reconsideration that clearly advertises the position as being part of the employee referral program and states that the position is open from May 1, 2007 to August 29, 2007 is better evidence to meet all of the requirements of proof in one document, we find the documents in Employer's audit response when examined as a whole independently meet the requirements. Notably, a request for reconsideration may only include documentation that the employer did not have an opportunity

to present previously to the Certifying Officer, but that existed at the time the Application was filed. 20 C.F.R. § 656.24(g)(2)(ii). Therefore, we do not consider the new evidence, including the notice, submitted by the Employer in its request for reconsideration and base our decision on the documentation in the audit response. Based on the foregoing, we reverse the CO's finding that the Employer had not adequately documented its use of an employee referral program with incentives.

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

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/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.