

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 July 2011

BALCA Case No.: 2010-PER-00997
ETA Case No.: A-07271-80150

In the Matter of:

BLUE RIDGE ERECTORS, INC.,
Employer

on behalf of

FABIAN RAMIREZ,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Dustin W. Dyer, Esquire
Dyer Immigration Law Group
Henrico, Virginia
For the Employer

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

Before: Krantz, Sarno, Malamphy
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 November 12, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Welder-Fitter.” (AF 45-54)¹ On December 10, 2007, the CO sent Employer an Audit Notification Letter requesting that Employer provide certain information in accordance with 20 C.F.R. §656.20. (AF 41-44) Employer responded on December 31, 2007. (AF 9-40)

On December 2, 2009, the CO denied the application on the ground that the newspaper advertisements did not apprise U.S. workers of the job opportunity, because they did not include the fact that the job opportunity included the option to live on the premises. Further, the ad contained terms and conditions less favorable than those offered to the foreign worker, in violation of 20 C.F.R. §§ 656.17(f)(3) and (7). (AF 7-8)

Employer requested reconsideration by the CO on December 31, 2009, stating that the alien was not required to live on premises, but was allowed to do so for his convenience, as a private contractual matter between Employer and Alien. Employer argued that this is not related to the job opportunity, nor is it a term or condition of employment. (AF 2-6)

The CO forwarded the case to BALCA on June 17, 2010, stating that the CO had reconsidered the denial and found the request did not overcome the deficiency listed in the denial determination letter. (AF 1) BALCA issued a Notice of Docketing on August 6, 2010. The Employer filed a Statement of Intent to Proceed on August 23, 2010, but did not file an appellate brief. The CO did not file a Statement of Position.

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

DISCUSSION

The regulations require an employer to conduct mandatory recruitment steps and make a good-faith effort to recruit U.S. workers to prior to filing an application for permanent alien labor certification. *See* 20 C.F.R. § 656.17; 69 Fed. Reg. 77326, 77348 (Dec. 27, 2004). The CO may only certify permanent labor applications if there are not sufficient United States workers who are able, willing, qualified, and available at the time of the application. *See* 20 C.F.R. § 656.1(a)(1). Therefore, the CO must determine whether the Employer conducted the mandatory recruitment steps designed to apprise U.S. workers of the job opportunity in the labor application.

One of the mandatory recruitment steps is to place two newspaper advertisements as part of Employer's effort to recruit U.S. workers for the job opportunity in the application. 20 C.F.R. § 656.17(e)(2). The regulations require that a newspaper advertisement must "[n]ot contain wages or terms and conditions of employment that are less favorable than those offered to the alien." § 656.17(f)(7). Employer stated that housing is offered to Alien as a convenience, and that "[t]his arrangement would have been offered to any qualified U.S. worker assuming one had applied for the position." (AF 9) However, the advertisements made no mention of the option to live on premises, so a U.S. worker could not have known that the arrangement was offered. (AF 39-40) As a result, the CO denied the application, finding that the terms and conditions of employment offered to Alien were more favorable than those offered to U.S. workers.

The option to live on Employer's premises is a term and condition of employment that creates a more favorable job opportunity for which the labor market was not tested by the Employer's recruitment effort. U.S. workers who might have responded to an ad if on-premises housing was an option were not given the opportunity to do so. Accordingly, Employer failed to demonstrate that there are insufficient able, willing, and qualified U.S. workers available as required by 20 C.F.R. § 656.1(a)(1). We affirm the CO's denial.

ORDER

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

For the Panel:

A

KENNETH A. KRANTZ
Administrative Law Judge

KAK/lec/mrc

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.