

U.S. Department of Labor

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

BALCA No.: 2010-PER-01101
ETA No.: A-07354-06926

In the Matter of:

EMMA WILLARD SCHOOL,
Employer,

on behalf of

EFRAIN PONTAZA ISLAS,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Dan H. Berger, Esq.
Curran & Berger LLP
Northampton, MA
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, Sarno, 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 May 14, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Spanish Instructor.” (AF 101-110).¹ On September 11, 2008, the CO issued an Audit Notification. (AF 95-99). The CO specifically requested information relating to employer-provided housing. (AF 98). The Employer responded to the Audit Notification on October 10, 2008. (AF 11-94)

The CO denied the application on May 17, 2010. (AF 8-10). The CO gave six reasons for denial. All six reasons for denial were related to the Employer’s failure to indicate the availability of employer-subsidized housing in its recruitment advertisements and Notice of Filing. The CO concluded that the Employer had not complied with 656.17(f) stating that advertisements may “not contain wages or terms and conditions of employment that are less favorable than those offered to the alien” and that as a result could not certify that “the job opportunity has been and is clearly open to any U.S. worker.” (AF 9).

On June 15, 2010, the Employer submitted a request for reconsideration. (AF 1-3). The Employer argued that the regulations “do not specifically state advertisements placed in the employer’s website or job search websites or local or ethnic newspapers” must not contain wages or terms and conditions of employment less favorable than those offered the alien. (AF 1). The Employer also argued that benefits are not required to be listed in advertisements. (AF 2).

The CO forwarded the case to BALCA on July 7, 2010, and BALCA issued a Notice of Docketing on August 11, 2010. The Employer filed a Statement of Intent to Proceed on August 26, 2010 and a brief on September 20, 2010. In its brief, the Employer reiterated the arguments made in its request for reconsideration and noted many jobs contain benefits including health insurance and vacation that are not listed in advertisements. The CO filed a letter asking that the

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

denial of certification be upheld on September 29, 2010. We consider the letter although it was filed late, but note its limited usefulness as the argument revolves around whether the employer has demonstrated that the housing benefits should be considered to make up the gap between the true wage and the prevailing wage, which is not an issue in this case.

DISCUSSION

In the Audit Notification, the CO requested that the Employer submit “a detailed explanation indicating the reason the foreign worker currently resides with the employer.” (AF 98). In response, the Employer submitted a document titled “Philosophy of School-Owned Housing: Board Approved, May 2007,” a document titled “Housing Guidelines for Resident Employees 2006-2007,” and a list of U.S. employees who live in school-owned housing. (AF 28-40). The school’s philosophy states that the school “offers housing as a resource that benefits the faculty, staff, and program” and that a “significant majority” of teachers and key administrators live in school-owned housing. (AF 28). The housing guidelines state that the school “provides on-campus housing, off-campus housing, and dormitory apartments to selected faculty and staff as a benefit of employment” and notes that “in return, the employee tends to specific responsibilities and duties as required.” (AF 29). In a letter included in its audit response, the Employer stated that the worker is not required to live with the Employer to perform the duties of the job, but residing with the Employer is an optional benefit to the job offered. (AF 21).

Four of the reasons for denial given by the CO are for various recruitment methods not complying with 20 C.F.R. 656.17(f)(7), which states that advertisements must “not contain wages or terms and conditions of employment that are less favorable than those offered the alien.” The CO concludes that because the advertisements placed in the newspaper of general circulation, the Employer’s website, the job search websites, and in the local or ethnic newspaper of general circulation did not list that the Employer offered subsidized housing, the advertisements did not comply with 20 C.F.R. 656.17(f). All of the advertisements contained the following text: “Teach all levels of Spanish language classes. Perform additional duties and responsibilities typical of boarding school faculty appointments.” The advertisements concluded by listing an address to send applications to. The regulations do not require that advertisements list the wage rate or other benefits. The Employer in this case chose not to include that

information. Simply because the advertisements did not list any information about housing in addition to not listing any information about any wages or benefits does not mean that the advertisements contain wages, terms, or conditions that are less favorable than those offered the alien. A reader of the advertisement would not assume that the Employer is offering no wage at all simply because one isn't listed, nor would he assume there are no other benefits, terms, or conditions involved in the position.

Similarly, with regards to the Notice of Filing, 20 C.F.R. 656.10(d)(4) requires that the notice contain the information required for advertisements by 20 C.F.R. § 656.17(f). The notice must also state the rate of pay. 20 C.F.R. 656.10(d)(4). The Employer's notice complied with listing the rate of pay, but like the advertisements, did not list any information regarding provided housing. The CO contends the notice thus does not comply with 20 C.F.R. § 656.17(f)(7). Again, the question is whether a failure to list what the CO contends is a term or condition of employment constitutes a notice that contains "wages or terms and conditions of employment that are less favorable than those offered the alien." We find it does not. There is no obligation for an employer to list every term or condition of employment and listing none does not create an automatic assumption that none exist. Thus, we find denial reasons two through six given by the CO are not valid reasons for denial and reverse the CO with regards to those reasons.

The one remaining reason for denial given by the CO is also related to the five reasons already discussed. The CO explained that: "No recruitment advertisement may contain an offer of wages or terms and conditions of employment less favorable than that offered the foreign worker. Offering the foreign worker an incentive greater than that offered the U.S. worker disaffirms the employer's attestation that the job opportunity is clearly open to any U.S. worker." The regulation at 20 C.F.R. § 656.10(c)(8) requires an employer to attest that "the job opportunity has been and is clearly open to any U.S. worker." As we have found the Employer's recruitment advertisements did not contain terms or conditions less favorable than those offered the alien simply because the Employer opted not to list any wage or benefit information in them, we also cannot uphold denial of certification on this ground.

The CO preserved no other grounds for denial, therefore we return this application to the CO with instructions to certify the application. This decision should not be construed as support for an employer never having to offer or disclose a housing benefit to U.S. workers. However, in these precise circumstances, given only the reasons for denial cited by the CO, we vacate the CO's denial of certification.

ORDER

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

For the Panel:

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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.