

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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Washington, DC 20001-8002

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**Issue Date: 28 October 2011**

**BALCA No.:** 2010-PER-01311  
**ETA No.:** A-08246-83350

*In the Matter of:*

**GARDEN STATE PRECAST,**  
*Employer,*

*on behalf of*

**VICTOR BURY,**  
*Alien.*

**Certifying Officer:** William Carlson  
Atlanta Processing Center

**Appearances:** Stephen A. Traylor, Esq.  
Law Offices of Traylor & Traylor  
Princeton, NJ  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Vincent C. Costantino, Senior Trial 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**  
**REVERSING 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 June 2, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Maintenance Worker.” (AF 040-61).<sup>1</sup> On February 12, 2009, the CO issued an Audit Notification. (AF 37-39). On April 15, 2009, Employer responded to the Audit Notification. (AF 8-32).<sup>2</sup>

The CO denied certification on June 7, 2010. (AF 6-7). The CO explained that the newspaper advertisements contained a job requirement not listed on the Employer’s ETA Form 9089 in violation of 20 C.F.R. 656.17(f)(6). Specifically, the CO stated that the advertisements requested applicants to send a “Letter of exp.” (AF 7).

On July 12, 2010, the Employer filed a request for review. (AF 1-4). The Employer argued that a letter of experience is not an additional “requirement or duty.” (AF 3).

The CO forwarded the case to BALCA on July 28, 2010, and BALCA issued a Notice of Docketing on October 12, 2010. The Employer filed a Statement of Intent to Proceed on November 1, 2010 and a brief on November 22, 2010. The CO filed a letter requesting that BALCA affirm the CO’s decision on November 19, 2010

## **DISCUSSION**

PERM is an attestation based program. 20 C.F.R. § 656.10(c). Among other attestations, an employer must attest that the job opportunity in the permanent labor application has been and is clearly open to any U.S. workers. 20 C.F.R. § 656.10(c)(8). Accordingly, the regulations

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

<sup>2</sup> The Employer asked for and was granted an extension of time to file its audit response.

require an employer to conduct mandatory recruitment steps and make a good-faith effort to recruit U.S. workers 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). Included in those mandatory steps is the placement of two print advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity. 20 CFR 656.17(e)(1)(i)(B). The regulations at § 656.17(f) state that advertisements may “not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089.” 20 C.F.R. § 656.17(f)(6).

The purpose of the recruitment requirements is to test the labor market so that the Department of Labor may fulfill its statutory obligation under 8 U.S.C. § 1182(a)(5)(A) that the Secretary of Labor certify that “there are not sufficient United States workers who are able, willing, qualified, and available” to perform the work the employer requires. If the test of the labor market is not accurate, the Secretary cannot certify that there are no qualified workers willing and available to take the position. Listing additional job requirements or duties not required of the alien could prevent U.S. workers who might otherwise apply for the position from doing so. Understandably, the Secretary cannot then certify that there are no qualified workers willing and available to take the position.

In the instant case, on its ETA Form 9089 Employer listed that 12 months of experience was required for the job and an ability to perform the following duties was required: “Disassemble machinery and equipment to remove parts and make repairs. Repair and replace broken or malfunctioning components of machinery and equipment. Repair and maintain the operating condition of industrial production and processing machinery and equipment. Examine parts for defects such as breakage and excessive wear.” (AF 42). The ads placed by the Employer stated: “MAINTENANCE WORKER. Farmingdale. Reassembles machines. Start machines, observe mechanical operation to determine efficiency & detect problems. Exp. req’d. Letter of exp. to Garden State Precast...” (AF 27-28).

We find the request that applicants send a letter of experience to apply for the position is not an additional requirement in and of itself. The Employer listed specific experience requirements on the ETA Form 9089 and in the advertisement. The request for a letter of

experience is simply the means by which the employer seeks to verify that an applicant has that required experience. It is equivalent to an employer verbally asking about an applicant's experience, reading an applicant's resume, or having an applicant fill out a job application. Accordingly, we find the Employer's request of a letter of experience does comply with 20 C.F.R. § 656.17(f)(6) in these particular circumstances and 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 labor certification be **GRANTED**.

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.