

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 23 March 2012

BALCA No.: 2010-PER-01117
ETA No.: C-08109-43918

In the Matter of:

WORLD AGAPE MISSION CHURCH,
Employer,

on behalf of

YONG HO KIM,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: David Y. Kim, Esq.
Los Angeles, CA
For the Employer

Gary M. Buff, Associate Solicitor
Clarette H. Yen, 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 April 18, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Pastor (Associate)” (AF -80-89).¹ On April 29, 2008, the CO issued an Audit Notification requesting, among other documentation, recruitment documentation as outlines in 20 C.F.R. 656.7(e). (AF 76-79). On May 28, 2008, the Employer responded to the Audit Notification. (AF 18-74). The Employer submitted documentation, including a copy of its job order request to the State Workforce Agency (AF 40), a letter from a private employment firm certifying it advertised the position (AF 42), and a copy of the job listing placed by the private employment firm (AF 43).

The CO denied the application on Mat 10, 2010, giving two reasons for denial. (AF 16-17). The first reason given was that the Employer did not provide proof of publication of the job order from the State Workforce Agency (“SWA”) containing the content of the job order. The CO cited 20 C.F.R. § 656.20(b) providing that “a substantial failure by the employer to provide required documentation will result in that application being denied.” (AF 17). The second reason given was that the Employer’s recruitment conducted through a private employment firm failed to identify the name of the employer. (AF 17). The CO noted that the regulations require the Employer to certify that a job opportunity “has been and is clearly open to any U.S. worker.” 20 C.F.R. 656.10. The CO also cited to 20 C.F.R. 656.17(f) specifying that advertisements in newspapers or professional journals must “name the employer.”

On June 7, 2010, the Employer submitted a request for review. (AF 1-13). The Employer argued that the regulations do not require an employer to submit any documentation from the SWA showing publication of a job order. (AF 8). With regards to the second reason for denial, the Employer argued that the regulations only require the name of the employer to be included in

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

newspaper advertisements and that it is common for private employment firms not to include the name of the employer in advertisements so interested applicants don't contact the employer directly. (AF 8-10).

The CO forwarded the case to BALCA on July 7, 2010, and BALCA issued a Notice of Docketing on August 16, 2010. The Employer filed a Statement of Intent to Proceed on August 24, 2010. The CO filed a letter asking that the CO's denial of certification be affirmed on September 30, 2010.

DISCUSSION

Job Order

The first reason for denial given by the CO is that the Employer failed to provide proof of publication of the SWA job order containing the content of the job order as requested by the Audit Notification.² The PERM regulations require an employer filing for permanent labor certification to place a job order with the SWA serving the area of intended employment. 20 C.F.R. § 656.17(e)(2). Specifically, the PERM regulations require:

Placing a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application serve as documentation of this step.

20 C.F.R. § 656.17(e)(2)(i). The regulations also require that all documentation supporting the permanent employment certification application be retained for five years after filing the application. 20 C.F.R. § 656.10(f). An employer must furnish "required supporting documentation" to the CO if its application is audited. 20 C.F.R. § 656.17(a)(3).

The CO correctly notes that audit regulations provide that a substantial failure by the employer to provide the required documentation will result in denial of the application. 20 C.F.R. § 656.20(b). Thus, the issue before us is whether proof of publication of the job order containing the content of the job order is "required supporting documentation." In an en banc ruling,

² The Employer did submit a completed copy of the SWA's Employer Job Listing Fax listing the employer and job listing information (job title, duties and required education and experience) and authorization that the job order be placed in the public system for access by job seekers. (AF 40).

BALCA recently held that it is not. *A Cut Above Ceramic Tile*, 2010-PER-224 (Mar. 8, 2012) (en banc). Because the regulations do not require an employer to maintain proof of publication of the job order to document compliance with this recruitment step, it is not required documentation and the CO may not deny certification based on a failure to produce it.

In the instant case, the Employer did list the start date (01/11/2008) and end date (02/10/2008) for the SWA job order on the ETA Form 9089 as required by 20 C.F.R. § 656.17(e)(2)(i) to document the recruitment step. (AF 83). Its failure to submit proof of publication of the job order is not a valid reason for denial.

Advertisement

The second reason for denial given by the CO is that the recruitment conducted through the private employment firm did not identify the Employer. The PERM regulations provide that an employer seeking to hire a foreign worker for a professional position must conduct three additional recruitment steps to advertise the occupation. 20 C.F.R. § 656.17(e)(1)(ii). One of the options for the additional recruitment steps is to use the services of a private employment firm or placement agency. The regulation states:

The use of private employment firms or placement agencies can be documented by providing documentation sufficient to demonstrate that recruitment has been conducted by a private firm for the occupation for which certification is sought. For example, documentation might consist of copies of contracts between the employer and the private employment firm and copies of advertisements placed by the private employment firm for the occupation involved in the application.

20 C.F.R. § 656.17(e)(1)(ii)(F).

In the instant case, the Employer submitted a letter from Placement Services USA, Inc. certifying that the company had checked its database for any qualified applicants and posted the job posting online. (AF 42). A copy of the job posting reads:

Title	Pastor (Associate)
Department:	Pastoral
Job Number	379077
Salary	SALARY = MARKET RATE; BENEFITS = N/A

Description WILL ASSIST SENIOR PASTOR WITH WORSHIP SERVICES, DELIVERING SERMONS, TEACHING BIBLE STUDY, AND RELIGIOUS COUNSELING AND PASTORAL VISITATIONS.

Experience qualifications KOREAN LANGUAGE ABILITY REQUIRED.

Educational requirements MASTER'S DEGREE IN DIVINITY REQUIRED.

Examination This is a full-time position

(AF 43). Notably, the posting does not include the Employer's name.

The CO notes that 20 C.F.R. 656.10 requires that an employer certify that the job opportunity "has been and is clearly open to any U.S. worker." The CO contends that an employer's name must be included in an advertisement placed by a private employment firm to ensure that the results of an employer's test of the labor market are legitimate. Further, the CO cites to 20 C.F.R. § 656.17(f)(1), requiring that advertisements placed in newspapers of general circulation "name the employer."

The Employer correctly notes that the requirements listed at 20 C.F.R. § 656.17(f), including naming the employer, explicitly pertain to newspapers of general circulation, and the regulation governing the use of a private employment firm puts no such requirements on advertisements placed by such a firm. However, we note that BALCA panels have held that other types of advertisements placed by an employer in addition to newspaper advertisements must also comply with the content requirements of 20 C.F.R. § 656.17(f) so as to apprise U.S. workers of the job opportunity. *See, e.g. Credit Suisse Securities*, 2010-PER-103 (Oct. 19, 2010). Notably however, an advertisement placed by a private employment agency as part of its recruitment is different than one placed directly by the Employer to fulfill a recruitment step. This distinction has been recognized by another BALCA panel that found that the requirements of 20 C.F.R. § 656.17(f) do not apply to advertisements placed by private employment firms. *HSB Solomon*, 2011-PER-2599 (Oct. 25, 2011). We agree.

The Employer notes that if a private employment firm were to list an employer's name in its advertising, potential employees could bypass the private employment firm. The normal practice of the private employment firm industry, therefore, is to not list an employer's name.

(AF 10). The nature of this type of recruitment is different than an advertisement placed directly by the Employer. However, as the BALCA panel in *HSB Solomon* recognized, even advertisements placed by private employment firms must comply with the Employer's duty to recruit in good faith and make the job opportunity clearly open to U.S. workers.

In the instant case, the advertisement lists the job title, a description of the job duties, the experience and educational requirements, and the fact that it is a full-time position. It also lists a job number, which matches the job number listed in the letter from the employment firm certifying its recruitment efforts, allowing the CO to match the listing to the firm's recruitment for the job opportunity even without the inclusion of the Employer's name in the advertisement. Thus, based on the whole of the documentation submitted, we find that the Employer has shown its use of a private employment firm to recruit for the job opportunity. Further, the advertised position was clearly open to U.S. workers.

As we have found neither reason for denial given by the CO is valid, we accordingly reverse the CO's denial of certification and remand the matter for the CO to grant certification.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **REVERSED** and the matter is **REMANDED** to the CO to grant labor certification.

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.