

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 25 May 2011

BALCA No.: 2010-PER-00746
ETA No.: A-07201-58748

In the Matter of:

HORIZON COMPUTER SERVICES, INC,
Employer,

on behalf of

CHAKRADHAR NARAYANA,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Venkata Atluri, *Pro Se*
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Constantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: Malamphy, Bergstrom, 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 July 20, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Software Engineer.” (AF 19-29).¹

The CO denied the application on November 6, 2007. (AF 15-17). The CO gave two related reasons for denial. The first is that the alien did not meet the Employer’s minimum education, training, and experience requirements as listed in Section H of the ETA Form 9089 at the time of hire. The second reason is that the job requirements listed on the ETA Form 9089 do not represent the employer’s actual minimum requirements for the job opportunity. (AF 17).

On November 19, 2007, the Employer submitted a request for review. (AF 9-10). The Employer suggested the CO misread the requirements and argued that the alien did meet the minimum requirements for the job.

On August 27, 2007, the CO again denied certification, listing a different reason for denial. The listed reason was that neither the earliest date listed for the recruitment nor the date the application was filed is within the prevailing wage determination (PWD) validity period as required by 20 C.F.R. § 656.40(c). Specifically, the CO noted that the PWD validity period was 01/25/2007 to 06/30/2007. However, the earliest listed recruitment date was 01/22/2007 and the filing date of the application was 07/20/2007.

On October 5, 2009, the Employer submitted a request for review. (AF 2-5). The Employer argued that 20 C.F.R. § 656.40(c) requires that the employer “begin the recruitment” within the PWD validity period, which should be interpreted to mean that the employer must have conducted some type of valid recruitment during the validity period, not that it must begin its earliest recruitment within the period. (AF 2).

The CO notified the Employer on May 17, 2010 that it had not overcome the reason for denial and the case would be forwarded to BALCA for review. (AF 1).

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

The CO forwarded the case to BALCA on May 18, 2010, and BALCA issued a Notice of Docketing on June 25, 2010. The Employer filed a Statement of Intent to Proceed on July 2, 2010. The CO did not file a Statement of Position, but on August 9, 2010, requested the denial be affirmed for the reasons set forth in the decision.

DISCUSSION

PERM regulations require an employer obtain a PWD from the SWA having jurisdiction over the proposed area of intended employment. The regulation at 20 C.F.R. § 656.40(d) further provides:

The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by Sec. 656.17(e) or 656.21 within the validity period specified by the SWA.

In the instant case, the validity period of the PWD was January 25, 2007 to June 30, 2007. The Employer filed its application on July 20, 2007, clearly outside the validity period. It began its earliest recruitment, placement of a SWA job order, on January 22, 2007, two days before the start of the PWD validity period.² The CO argues that the regulation requires that the earliest recruitment step begin within the validity period. The Employer argues that the requirement is met if any recruitment occurs during the validity period.

In support of its position, the Employer cites to the Employment and Training Administration's notice of proposed rulemaking for the PERM regulations. The Employment and Training Administration (ETA) explained the reason the application needed to specify the validity period of the prevailing wage determination in the notice of proposed rulemaking for the PERM regulations:

We are proposing that the SWA must specify the validity period of PWD on the PWDR form, which in no event shall be less than 90 days or more than 1 year from the determination

² The remaining recruitment steps included placing a newspaper advertisement on February 4, 2007 and February 11, 2007; placing an ad on the Employer's web site from February 2, 2007 to March 4, 2007; listing the position with a job search web site from February 4, 2007 to March 6, 2007; and advertising with an employee referral program from January 31, 2007 to March 15, 2007.

date entered on the PWDR. Employers filing LCA's under the H-1B program must file their labor condition application within the validity period. Since employers filing applications for permanent labor certification can begin the required recruitment steps required under the regulations 180 days before filing their applications, they must initiate at least one of the recruitment steps required for a professional or nonprofessional occupation within the validity period of the PWD to rely on the determination issued by the SWA.

Employment and Training Administration, Proposed Rule, Implementation of New System, *Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 67 Fed. Reg. 30466, 30478 (May 6, 2002).³

The regulatory history of PERM indicates that ETA did not intend that the Employer's first recruitment step begin during the validity period, only that some recruitment step be initiated during that time. In the instant case, the Employer initiated every single recruitment step during the validity period with the exception of its first recruitment step, placement of the SWA job order, which occurred two days before the validity period. We find the timing of Employer's recruitment does comply with the regulations. The regulatory history and fundamental fairness preclude an interpretation of 20 C.F.R. § 656.40(a) to require that the Employer's first recruitment step be initiated during the PWD validity period. Accordingly, we vacate the denial of certification, and return this application to the CO to consider whether the Employer otherwise complied with the regulations and whether certification should be granted.

³ Additionally, we note that the Office of Foreign Labor Certification frequently asked questions released March 3, 2005 discusses recruitment prior to the issuance of a PWD and does not indicate there could be an issue with starting recruitment early.

Must the employer obtain a prevailing wage determination before the employer begins recruitment?

No, the employer does not need to wait until it receives a prevailing wage determination before beginning recruitment. However, the employer must be aware that in its recruiting process, which includes providing a notice of filing stating the rate of pay, the employer is not permitted to offer a wage rate lower than the prevailing wage rate. Similarly, during the recruitment process, the employer may not make an offer lower than the prevailing wage to a U.S. worker.

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.