

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 July 2015

BALCA Case No.: 2011-PER-02621
ETA Case No.: A-08338-10928

In the Matter of:

MICROSOFT CORPORATION,
Employer

on behalf of

BAJAJ, VISHAL,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Jennifer A. Salomon, Esquire
Global Migration Legal and Corporation Affairs
Microsoft Corporation
For the Employer

Camilia Chow, Esquire¹
Berry Appleman & Leiden LLP
San Francisco, California
For the Employer

Before: Paul R. Almanza, *Administrative Law Judge*; Stephen R.
Henley, *Acting Chief Administrative Law Judge*; and Larry S.
Merck, *Administrative Law Judge*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

¹ Due to the delay in adjudication of this appeal, the Board issued an order requiring the Employer to verify that the appeal is still active. Ms. Salomon replied with verification on behalf of Microsoft Corporation. In her reply, she stated that Berry Appleman & Leiden LLP no longer represents Microsoft in this matter.

PER CURIAM. 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 at 20 C.F.R. Part 656.²

BACKGROUND

The Employer filed a Form 9089 *Application for Permanent Employment Certification* for the position of “Support Engineer.” (AF 93-104).³ Following an audit, the Certifying Officer (“CO”) denied certification on two grounds.

I. Denial Reason 1: Notice of Filing Travel Requirement

The Employer stated on the Form 9089 that the job opportunity requires a Bachelor’s degree in Computer Science, Engineering, Physics, Math, Information Systems, Business, or a related subject. (AF 94). The Employer listed the following job duties for the position:

Providing technical support to independent software vendors, corporate customers, internal staff, and/or others regarding developer tools/products such as programming languages, database development, networking, working on a team. Utilizes C, C++ and/or other high-level programming languages. Works on complex problems under limited supervision. May be assigned to various projects that utilize the required skills.

(AF 95). The Employer also listed the following specific skills or other requirements for the job opportunity:

Employer will accept six months of work experience or minimum of semester long or equivalent school project experience in designing, implementing and/or testing software; C/C++ or a high level programming language; and providing technical support. Experience may be gained concurrently. Any suitable combination of education, training, or experience is acceptable.

Id. The Employer’s application does not mention any type of travel requirement for the position.

On September 25, 2009, the CO issued an Audit Notification, instructing the Employer to submit copies of its recruitment documentation. (AF 90-92). The Employer submitted its audit response materials on October 21, 2009. (AF 21-89). The Employer’s Notice of Filing (“NOF”) provides, in pertinent part:

² “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

³ Citations to the appeal file will be abbreviated “AF” followed by the page number.

Support Professionals (Support Engineers, Technical Account Managers, Support Managers, Support Analysts)

Job Description:

Responsible for providing technical support to independent software vendors, corporate customers, internal staff, and/or others regarding developer tools/products such as programming languages, database development, networking and email systems. May be responsible for technical account management. Team Manager positions are available.

Job Requirements:

Requires a BA/BS or MA/MS degree in Computer Science, Engineering, Math, Information Systems, Business or a related field and experience in designing, implementing and/or testing computer software, C/C++, or a high-level programming language; providing computer and technical support; and/or people management. May require employer-reimbursed travel. Will accept any suitable combination of education, training, or experience. Must have proof of legal authority to work in the United States.

Job Location: Charlotte, North Carolina; Salary: \$82,618-\$150,000/year.

(AF 44-45).

On January 20, 2011, the CO denied the Employer's application. (AF 19-20). The CO found that the Employer's NOF stated, "May require employer-reimbursed travel," which does not appear on the ETA Form 9089. (AF 19-20). The CO found that this additional language was a job requirement that exceeds the job requirements provided on the ETA Form 9089 in violation of 20 C.F.R. § 656.17(f)(6).

On appeal, the Employer filed an appellate brief in which it argued that none of the mandatory recruitment steps conducted for this PERM labor certification stated that travel was a requirement for the job opportunity being sponsored on the ETA Form 9089. Rather, the phrase "may require employer-reimbursed travel" was meant to explain that, among the many job openings listed in the same advertisement, some positions may require travel. The Employer further argued that there is no material difference between the phrase "some positions may require travel" and the phrase "may require employer-reimbursed travel."

II. Denial Reason 2: State Workforce Agency Job Order

The Employer stated in the Form 9089 application that the job opportunity requires six months of experience in the job offered or a computer related occupation or school project. (AF 94-95). The Employer's Form 9089 indicated a State Workforce Agency ("SWA") job order ran from July 10, 2008 to August 11, 2008. (AF 96). In the Employer's October 21, 2009 audit

response, it included documentation from that SWA job order, which listed an experience requirement of “5 Years.” (AF 60-61).

The Employer argued in both its request for reconsideration and its brief that the audit response contained an incorrect job order due to a clerical error. The Employer stated it submitted correct copies of the job order on November 4, 2010 upon finding the clerical error.

On January 20, 2011, the CO denied the Employer’s application. (AF 19-20). The CO found that the Employer’s SWA job order states the applicant must have five years of experience. The CO found this to be a job requirement in excess of those on the Employer’s ETA Form 9089 and a violation of 20 C.F.R. § 656.17(f)(6). The denial response did not reference any supplemental submissions from the Employer.

The Employer asserted in its February 14, 2011 request for reconsideration that it properly placed a SWA job order for the dates listed on its ETA Form 9089, but submitted documentation from a different job order due to a clerical error. The Employer also argued that it submitted a correct copy of the SWA job order on November 4, 2010. To support this assertion, the Employer referred to Exhibits 1 and 2 in its request for reconsideration, though no exhibits appear in the appeal file.

The Employer argued it had no obligation to provide documentation of the SWA job order beyond listing the dates of the order on ETA Form 9089. *Mandy Donuts Corp.*, 2009-PER-481 (Jan. 7, 2011). Furthermore, the Employer argued it was in *de facto* compliance with the PERM regulations because it actually ran a correct job order for the position during the dates listed on the ETA Form 9089. The Employer argued *Denzil Gunnels*, 2010-PER-628 (Nov. 16, 2010) requires a CO to consider the November 4, 2010 documentation as evidence of a non-frivolous argument that it was in *de facto* compliance with the regulations.

The CO denied the Employer’s request for reconsideration on August 23, 2011 on the basis that “DOL has no record of receiving any supplemental documentation from the employer...[and] the employer also failed to include any documentation in its appeal request which substantiates its claim of Job Order resubmission.” (AF 1).

In its brief before BALCA, the Employer contested the CO’s finding that “DOL has no record of receiving any supplemental documentation from the employer.” The Employer included the following three exhibits to support its assertion that DOL received the supplemental materials:

Exhibit 1: A letter from the Employer to the Certifying Officer at the Atlanta National Processing Center dated November 4, 2010. The letter states in pertinent part, “In reviewing our file, it has come to our attention that due to a clerical error at our law firm, the audit response may have been missing certain documents. Please find enclosed the following additional information and documentation:... 1. The audit response that was previously submitted included the incorrect State Workforce Agency (SWA) documentation. Please find enclosed the correct SWA documentation.” The letter also contains a handwritten tracking code at the top.

Exhibit 2: Print outs from a North Carolina SWA job order for a support engineer position requiring six months of experience that ran from July 10, 2008 to August 11, 2008.

Exhibit 3: A FedEx delivery confirmation receipt indicating that a package with a reference code of “BAJAJ, VISHAL” was shipped on November 4, 2010, successfully delivered to Atlanta, Georgia, and signed for on November 5, 2010. The tracking number on the confirmation sheet matches the number on the letter in Exhibit 1.

The Employer argued the supplemental information dated November 4, 2010 along with the completed ETA Form 9089 demonstrated compliance with the regulations.

DISCUSSION

I. Denial Reason 1: Notice of Filing Travel Requirement

The facts relating to the Notice of Filing are analogous to those of *Microsoft Corp.*, 2011-PER-324 (Feb. 29, 2012) (“lead decision”).⁴ In the lead decision, the panel found that the Employer’s advertisement for multiple positions with varying job requirements did not violate the applicable regulations, and reversed the Certifying Officer’s denial of certification.

The lead decision involved a NOF, newspaper and web advertisements, and a job order advertising the position of “Marketing and Product Managers.” The position listed the following responsibilities: “Responsible for computer software product or technology strategy, definition, promotion, pricing, and/or position, and/or for planning, implementing and managing marketing strategies and campaigns.” The job required a BA/BS, MA/MS, or MBA degree or equivalent in Business, Marketing, Engineering, Computer Science, Design, or a related field, and contained a further list of extensive experience requirements. *Microsoft Corp.*, slip op. at 3, 4.

From these facts, the panel concluded that, when the advertisements were viewed as a whole, the phrase “may require employer-reimbursed travel” is indistinguishable from the DOL-endorsed phrase “some positions may require travel.” The panel reasoned that the numerous education and experience requirements described in the job description were listed both in the plural and in the alternative, which conveyed to a reader that not all requirements applied to every Marketing and Product Manager position available. Instead, the numerous requirements were written in the disjunctive to show the contrast between the various job openings and the differing duties of each job. Furthermore, since the advertisement was for multiple job opportunities, and the requirements were written in the passive voice, it was understood that the

⁴ The decision in *Microsoft Corp.*, was rendered following an oral argument that had the express purpose of assisting the Board’s resolution of pending appeals involving the same issue. The panel requested the parties to stipulate to the other pending appeals which could be disposed of consistent with this lead decision. Although the parties did not stipulate that the instant case’s disposition could be stipulated to, it presents issues analogous to those decided in *Microsoft Corp.*, and we will refer to it in the discussion below as the “lead decision” for purposes of convenience.

subject of each sentence is “some positions” as it relates to the content between each “or” in the requirements listed. *Id.* at 14, 15.

Although the panel concluded that the phrase “may require employer-reimbursed travel” was indistinguishable from the DOL-endorsed phrase “some positions may require travel” in the context of the Marketing and Product Manager positions, the panel also indicated that, “If an employer does not use the DOL-endorsed language, a fact-specific inquiry will be necessary to determine whether any potential applicants could have been confused or misled into believing that all positions advertised require travel.” *Id.* at n. 11.

The job description in the case at bench includes the requirement, “May require employer-reimbursed travel.” The form of the advertisement in the case at bench is consistent with that in the lead decision. Like the “Marketing and Product Managers” position advertised in the lead decision, the job position advertised here is also described in the plural. Moreover, the position title in the case at bench clearly delineates in parentheses different types of Software Professional positions on offer: “Support Engineers, Technical Account Managers, Support Managers, Support Analysts.” Furthermore, like the responsibilities and requirements described in the lead case, the responsibilities and requirements in the job description here are phrased both in the plural and in the alternative. This suggests to a reader that there are multiple Support Engineer positions open that involve various stages of the support process.

Accordingly, the lead decision governs the NOF issue presented here. Based on the foregoing, we find that the Employer’s NOF does not contain a job requirement that exceeds that which is on the ETA Form 9089, because it is clear within the overall context of the advertisements that not all of the Support Engineering positions require travel. We find that the Employer’s advertisements were not misleading, nor did they cause any confusion that could have prevented a potential U.S. applicant from applying for the job opportunity. As such, we reverse the CO’s determination on this issue.

II. Denial Reason 2: State Workforce Agency Job Order

In this matter, the CO’s second ground for denial of certification was that the SWA job order violated 20 C.F.R. § 656.17(f)(6) because the job order stated that the job requires five years of experience, while the Employer only listed six months of experience as a requirement on the Form 9089 application.

We find the CO’s reliance on Section 656.17(f)(6) to be erroneous. The text of Section 656.17(f) states that it applies to “advertisements placed in newspapers of general circulation or professional journals before filing the application for Permanent Employment Certification.” As Section 656.17(f) does not apply to SWA job orders, the CO erred in relying on Section 656.17(f)(7) as the ground for denial. *See Fidelus Technologies*, 2011-PER-1635 (June 11, 2015) (§ 656.17(f)(6)); *Special Lotus Inc.*, 2011-PER-2312 (Jan. 13, 2015) (§ 656.17(f)(2)); *Cape Advisors, Inc.*, 2011-PER-2882 (Dec. 11, 2014) (§ 656.17(f)(2)); *American Express Travel Related Services*, 2011-PER-2831 (Nov. 25, 2014) (§ 656.17(f)(6)); *Business Intelligence Systems, Inc.*, 2011-PER-2232 (Sept. 12, 2014) (§ 656.17(f)(4)). *See also Chabad Lubavitch Center*, 2011-PER-2614, (July 29, 2013) (“[W]e hold based on the plain and unambiguous

language of the regulations that the content requirements of 20 C.F.R. § 656.17(f) do not apply to job orders placed with the applicable SWA.”). *But see Techdemocracy, LLC*, 2012-PER-499 (Nov. 24, 2014) (panel apparently affirmed denial in part because SWA job order did not comply with § 656.17(f)(3); however, newspapers advertisements had the same defect).

Because 20 C.F.R. § 656.17(f)(7) does not regulate the content of SWA job orders, and this was the only regulatory basis cited by the CO for denial reason number two, we vacate the denial of certification on this ground.⁵

ORDER

Based on the foregoing, we **REVERSE** the Certifying Officer’s denial and **DIRECT** the Certifying Officer to **GRANT** certification.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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

⁵ Given this ruling, we have not reached the question of whether the Employer timely supplied supplemental information for the record in an effort to correct a clerical error in submitting the wrong SWA job order with the audit response.

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 en banc 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.