



Issue Date: 10 February 2014

BALCA Case No.: 2011-PER-02902
ETA Case No.: A-08018-14885

In the Matter of:

FEDERAL HOME LOAN MORTGAGE CORPORATION,
Employer

on behalf of

XIAOLI WANG,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: James D. Alexander, Esq.
Maggio & Kattar, P.C.
Washington, DC
For the Employer

Gary M. Buff, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Geraghty, Calianos, McGrath**
Administrative Law Judges

COLLEEN A. GERAGHTY
Administrative Law Judge

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.”). For the reasons set forth below, we reverse the denial of the Employer’s Application for Permanent Employment Certification.

BACKGROUND

On January 6, 2009, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Financial Analyst - Senior.” (AF 128, 135).¹ On June 26, 2009, the CO issued an Audit Notification, requesting the Employer provide certain information, including information on laid-off U.S. workers. (AF 124-126). On July 27, 2009, the Employer submitted its response to the Audit Notification. (AF 43-123).

On June 10, 2010, the CO denied the Employer’s application, because, based on the audit documentation, the Employer rejected a qualified U.S. worker in violation of 20 C.F.R. § 656.24(a)(2)(b). (AF 41). Specifically, “[T]he resume of the qualified laid-off U.S. worker indicated that he/she was a Senior Financial Analyst, with a bachelor’s degree in Economics, which is a substantially equivalent degree for the financial industry.” (AF 41). Furthermore, “[t]he qualified laid-off worker’s experience reflects experience in accounting processes, financial reporting, data analysis, and secondary mortgage markets.” (AF 41). Thus, “there is a United States worker who is able, willing, qualified, and available for and at the place of the job opportunity.” (AF 41). On July 8, 2010, the Employer filed a request for reconsideration. (AF 3-39).

On September 15, 2011, the CO forwarded the case to BALCA. (AF 1). In his transmittal letter, the CO upheld his denial on the basis that the Employer “failed to consider an able, willing, qualified and available laid-off U.S. worker” for the job offered. (AF 1). Specifically, “the employer’s primary minimum requirements as described on the ETA Form 9089 are a Bachelor’s degree in Computer Science, Finance, Accounting or related discipline plus five years of progressive post-baccalaureate experience in business applications.” (AF 1). The Employer, however, “failed to consider the [] laid-off U.S. worker with a Bachelor’s degree in Economics, who worked in the job opportunity with the employer for three years and has an additional three to six years of progressive post-baccalaureate experience in business applications.” (AF 1). The CO noted that the Employer, in its request for reconsideration, argued “the most critical skill set for the position is advanced programming skills, which the laid-off U.S. worker does not possess,” yet “that requirement is not reflected on the ETA Form 9089.” (AF 1). The CO concluded, “[b]ased on his/her qualifications, the laid-off U.S. worker is minimally qualified for the job opportunity and would likely be able to acquire any additional job-specific knowledge during a reasonable period of on-the-job training.” (AF 2).

On January 3, 2012, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on January 17, 2012, and filed an appellate brief (Er. Br.) on February 21, 2012. The CO did not file a Statement of Position. On January 6, 2014, in response to this Panel’s Order Requiring Certification on Mootness, the Employer certified that the job identified on the PERM application is still open and available and that the alien identified in the application remains ready, willing, and able to fill the position.

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

DISCUSSION

An important goal of the Immigration and Nationality Act is to prevent foreign workers from obtaining permanent employment in the United States unless there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work. *See* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.1(a)(1). Accordingly, when an employer files an application for permanent employment certification, it must certify that “[t]he job opportunity has been and is clearly open to any U.S. worker” and “the U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.” 20 C.F.R. § 656.10(c)(8), (9). Furthermore, the PERM regulations require an employer to conduct mandatory recruitment steps in 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(e). Additionally, if an employer has laid-off any employees in the intended employment area within 6 months of filing an application, “the employer must document it has notified and considered all potentially qualified laid off (employer applicant) U.S. workers of the job opportunity involved in the application and the results of the notification and consideration.” 20 C.F.R. § 656.17(k)(1).

The Board has long held that under the PERM regulations, an employer bears the burden to establish eligibility for labor certification. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (en banc). An employer’s mere statement in support of the rejection of a U.S. worker, standing alone, is insufficient to meet this burden. *Jakob Mueller of America, Inc.*, 2010-PER-01069, PDF at 5 (citing *Your Employment Service, Inc.*, 2009-PER-00151 (Oct. 30, 2009)); *see also Fritz’s Garage*, 88-INA-98, slip. op. at 3 (Aug. 17, 1988) (en banc) (finding the Employer’s basis for rejection of U.S. worker was vague and unconvincing).

As part of its audit response, the Employer presented the resumes of several laid-off workers, all of whom it deemed unqualified for the position of Financial Analyst-Senior. (AF 55-62). One laid-off worker, a former Financial Analyst Senior, had three years of experience in that position with the Employer, as well as experience as an Investment Accountant, Loan Auditor/Assistant Underwriter, Senior Pricing Analyst, Lending Specialist, and Senior Account Executive with different employers. The laid-off worker also earned a bachelor’s degree in Economics from the University of Rochester in 1995. The laid-off worker described his computer skills as “Windows, Word, Excel, PowerPoint, SuperTrump, Bloomberg, HP 12c.” (AF 56).

The Employer argues the laid-off worker’s Economics degree is not substantially equivalent to a degree in Computer Science, Finance, or Accounting. (AF 25-28). The Employer went so far as to provide course descriptions of the required core courses for an Economics degree from the University of Rochester, finding the courses to be too theoretical and without sufficient instruction in practical financial accounting practices. (AF 26-27). The CO disagreed, arguing “Economics is more related to Computer Science than Finance or Accounting because it comprises mathematical, analytical, statistical modeling, and data mining and interpretation skills.” (AF 1). While the CO provides no data or information specific to the University of Rochester’s degree programs to support his contention, we need not decide whether the Employer or CO is correct on this particular issue, as it is clear the laid-off worker

lacks the required experience and skill with the Employer's specified financial accounting and modeling programs.

In its Form 9089, the Employer states the chosen applicant will "serve as a liaison between business areas and programmers to resolve financial modeling issues," use programs such as "SAS programming and relational databases such as Structured Query Language (SQL), and database tools [and p]roduce reports using [Online Analytical Processing] tools such as Microstrategy." (AF 137). Furthermore, qualified applicants must have "experience using database tools including MS Query and Excel." (AF 138). Employer's business necessity statement, as requested in the CO's Audit Notification,² notes "a very deep knowledge of SAS is needed for this position, including SAS on Unix, as well as SAS for Windows. We also use SAS/Graph to produce graphic trend analysis and use an HTML interface to accept use input via our own intranet." (AF 85).

The laid-off worker does not have experience with any of these program tools except Microsoft Excel. (AF 56). The CO asserts "it can be logically concluded that the laid-off U.S. worker has at least 3 years [of] experience working with the employer's software since the U.S. worker was last employed with the sponsoring employer." (AF 1). However, the CO's assumption that all Financial Analyst-Seniors within Freddie Mac have experience with the software and programs required for this Financial Analyst-Senior position is unfounded and unsupported by the record. The laid-off worker's resume does not indicate that he worked in the Single Family Analytics and Strategy division of Freddie Mac and is notably silent in regards to any computer programming responsibilities or experience with the required software. (AF 55-56). Furthermore, as the current managing senior director of Single Family Analytics and Strategy noted in the Employer's request for reconsideration, "this job opportunity is unique to other financial analysts within [that] division and most certainly the majority of financial analysts within Freddie Mac. The responsibilities for this particular Financial Analyst-Senior job opportunity are highly technical and include activities that require advanced programming skills." (AF 25). The managing senior director's contention is supported by the education and experience requirements detailed in the Employer's Form 9089.

Although an employer "cannot look outside the minimum requirements as listed on the ETA 9089 and the SWA request for disqualifying factors to support a rejection of qualified U.S. applicants," in this instance the discrepancy between the laid-off worker's skill set and the required experience is plain on the face of the laid-off worker's resume and the Employer's Form 9089. See *Jakob Mueller of America, Inc.*, 2010-PER-01069, PDF at 5; see also 20 C.F.R. § 656.17(h)(1).

The Employer has shown that it evaluated the laid-off worker against the minimum qualifications it provided on its ETA Form 9089 and that it rejected the laid-off worker for lawful, job-related reasons. Accordingly, we reverse the CO's denial of certification.

² The CO, in his Audit Notification, requested the Employer submit "[p]roof of business necessity as outlined by § 656.17(h) if the . . . job duties and/or requirements are beyond those defined for the job by the SOC/O*Net code and Occupation Title provided by the State Workforce Agency." (AF 124).

ORDER

It is **ORDERED** that the denial of labor certification in this matter is hereby **REVERSED** and we direct the Certifying Officer to grant labor certification in this case.

For the Panel:

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

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.