U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 March 2012

BALCA Case No.: 2011-PER-00635
ETA Case No.: A-09261-65038

In the Matter of:

JP MORGAN CHASE & CO.,
Employer

on behalf of

LORIFERNE, XAVIER CHRISTIAN,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Jenny Nieves, Attorney
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For the Employer

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Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson, and Vittone**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF LABOR 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 20 C.F.R. Part 656.

BACKGROUND

On September 16, 2009, the Certifying Officer ("CO") accepted for processing the Employer's Application for Permanent Labor Certification on behalf of Xavier Christian Loriferne, for the position of "Vice President, Mergers & Acquisitions."[1] (AF 363-380).[2] Thereafter, the CO sent the Employer a draft advertisement instructions letter which the Employer responded to on April 20, 2010. (AF 345-347; 337-342). On May 7, 2010, the CO sent the Employer a recruitment instruction letter which the Employer responded to on June 23, 2010. (AF 329-332; 198-228). The CO notified the Employer of the resumes the DOL received on May 26, June 4, June 11, June 25, July 2, July 16, July 23, August 27, and September 24; the applicants' resumes were enclosed with each notice. (AF 287-288; 266-267; 233-234; 196-197; 186-187; 182-183; 174-175; 168-169; 162-163).

On October 21, 2010, the CO sent the Employer a recruitment report instructions letter. (AF 159-161). The instructions specifically directed the report to, among other requirements, "[s]tate the names, addresses, and provide resumes (other than those sent to the employer by the CO) of the U.S. workers who applied for the job opportunity." (AF 34).

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[1] The Employer filed its application in accordance with the Department of Labor's Notification of Supervised Recruitment for Future Filings issued June 22, 2009.

[2] In this decision, AF is an abbreviation for Appeal File.

On December 16, 2010, the Employer submitted the results of its PERM recruitment efforts and responded to the CO's recruitment report instructions. (AF 12-156). The Employer informed the CO that it received 77 resumes for the offered position. The Employer stated: "The resumes of the applicants who responded directly to JP Morgan Chase are attached to this report. Please note that the resumes, which are part of this recruitment report, include the name and address of each applicant." (AF 26)(emphasis in original).[3] The Employer reported that seven applicants were not U.S. workers and 70 applicants were U.S. workers. After reviewing the resumes, three applicants were interviewed. The Employer concluded, based on the resumes and interviews, that none of the applicants were qualified for the role as each lacked the critical experience and skills required for the position. The Employer stated the name of each applicant along with the reasons that each was disqualified. The recruitment report did not state the addresses of the applicants.

Upon review, the CO denied the Employer's application on December 28, 2010. (AF 9-11). The CO determined that the recruitment report was not in compliance with 20 C.F.R. § 656.21(e)(3) because the Employer failed to state the addresses of the U.S. workers who applied for the job opportunity on the recruitment report. (AF 11).

On January 20, 2011, the Employer requested reconsideration and/or review of this decision. (AF 2-8). The Employer argued that it did not fail to provide the addresses of the U.S. workers who applied for the job opportunity because each applicant's resume, which included the applicant's address, were incorporated by reference in the Employer's recruitment report. The Employer asserted that the resumes, which included the applicants' addresses, were attached to the recruitment report.

Upon review, the CO issued a decision on reconsideration on February 18, 2011 finding that since the Employer failed to provide the addresses of each U.S. applicant on the recruitment report as requested in the recruitment report instructions letter, the CO's denial was valid. (AF 1). The CO transferred the appeal file to the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). (AF 1).

On April 13, 2011, BALCA issued a "Notice of Docketing and Order Requiring Submission of Statement of Intent to Proceed." The Employer and the CO submitted Statements of Position on May 26, 2011, and June 1, 2011, respectively.

DISCUSSION

The regulation governing supervised recruitment requires an employer to submit a "signed, detailed written report of the employer's supervised recruitment," 20 C.F.R. § 656.21(e), that must: "[s]tate the names, addresses, and provide resumes (other than those sent to the employer by the CO) of the U.S. workers who applied for the job opportunity, the number of workers interviewed, and the job title of the person who interviewed the workers." 20 C.F.R. § 656.21(e)(3). Consequently, the question on appeal is whether the recruitment report submitted by the Employer violated the regulations because it failed in the text of the report to state the addresses of the U.S. applicants.

The regulation is awkwardly phrased, as it mixes in the same enumeration items required to be "stated" in the report, and an item (resumes) required to be "provided" with the report. Nonetheless, the plain language of the regulation requires the employer to "state" the addresses of the U.S. workers who applied for the job opportunity as a separate requirement from the provision of resumes. The regulation makes a distinction between the report stating an element, and providing an element. The regulation requires the employer to "state" the addresses of applicants, not merely to "provide" them.

[3] The Employer submitted the applicants' resumes with the recruitment report. (AF 47-144).

Thus, in the instant case, the Employer's recruitment report did not comply with the regulatory requirement that the addresses of the applicants be stated, if what the regulation contemplates is a discrete statement of those addresses within the written report itself. This is the CO's position on appeal: "The CO wants to have the addresses stated in the recruitment report itself not just because the regulation requires this, but also for reasons of administrative efficiency." (CO's Brief at 2). Although the CO did not elaborate on this argument, it is apparent that the CO would like to have the information enumerated in Section 656.21(e)(3) in the body of the report to promote a quick review the applicants' addresses without having to search through the resumes himself, whether attached to the report or within the CO's file if the resumes had been provided to the employer by the CO. Although this may not seem like much extra effort, it must be kept in mind that the CO processes thousands of PERM applications each year. *See* Employment and Training Administration, Office of Foreign Labor Certification, *Annual Report October 1, 2009 - September 30, 2010* at 14. (82,685 PERM applications processed in FY2010).[4] Moreover, ETA thought that requiring the employer to "state" the address of U.S. applicants in the recruitment report was important enough to make an explicit requirement in the regulation.

The Employer argues that the DOL elevated form over substance when denying the labor certification because each applicants' address was incorporated by reference into the Employer's recruitment report. The Employer contends that the form in which the applicants' addresses were provided was immaterial to the review of the substance of

[4] The CO argued that the facts in this case are comparable to those in *A Plus Masonry, Inc.*, 2010-PER-87 (May 5, 2010) and *Hyundai Motor Manufacturing, AL*, 2010-PER-883 (Oct. 27, 2010). In those cases, the Board held that a missing or incorrect signature is an express failure to comply with the regulation and, therefore, a fatal omission. The cases are similar, but distinguishable because the signature of the employer is a significant requirement in that it binds the employer to all obligations attached to the PERM process, and signifies its certification and compliance with the regulation (much like the signature on a contract would bind those signing it). The failure to list addresses of applicants in the body of the written recruitment report may inconvenience the CO, but it is not an omission on the same level as a failure of the employer to sign the report.

the application, and, therefore, argues that the recruitment report was in compliance with the regulation. The Employer asserts that the reasonable purpose of 20 C.F.R. § 656.21(e)(3) is to provide the DOL a means of contacting and assessing the qualifications of an applicant who applied directly to the employer. The Employer further asserts that this provision could not have been intended to require the employer to unnecessarily retype each applicant's address into the employer's letter when each applicant's contact information was clearly provided on his/her resume.

As previously explained, however, the plain language of the regulation requires the employer to "state" the addresses of the U.S. workers who applied for the job opportunity on the recruitment report itself and does not permit for addresses to be incorporated by reference to other documents within the administrative file. Moreover, the Employer appears to have assumed that all of the applicants stated their address on their resumes; however, there were a few resumes where no address was stated. (*See* AF 53; 69; 131; and 133).

BALCA, while emphasizing that the regulations clearly require that petitioning employers submit complete applications,[5] has nonetheless recognized that some omissions may not be material to the review of the substance of an application. *Yasmeena Corp.*, 2008-PER-73 (Nov. 14, 2008); *Ben Pumo*, 2009-PER-40 (Oct. 29, 2009). Thus, in certain circumstances where the CO did not explain in the denial or on reconsideration why an omission is material, a denial of certification may reversed, *Yasmeena Corp.*, *supra*; *Ben Pumo*, *supra*; *Shastriji Pennsylvania Donuts Corp.*, 2010-PER-437 (Mar. 29,

[5] The Board has warned that failure to file a complete application is itself a ground for denial of the application and that an employer who fails to fully answer all of the questions on the Form 9089 runs the risk of having its application denied. PERM is an attestation based program, and as such, it can only be maintained by strictly following the letter of the law. The PERM regulations very purposefully were designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *HealthAmerica*, 2006-PER-1, slip op. at 19 (July 18, 2006) (en banc). The CO is under no obligation to gather the information needed to perfect an application. *Alpine Store, Inc.*, 2007-PER-40 (June 27, 2007).

2011). Similarly, where an employer has presented a colorable argument with a motion for reconsideration as to why an omission was not material, but the CO did not rule on the motion for reconsideration, the matter may remanded to the CO to consider whether the omission was material. *Steve's Bakery and Cuchifrito Corp.*, 2010-PER-844 (Mar. 9, 2011). The omissions in those cases, however, were found not to be material (or not obviously material) in very specific contexts. Here, there was a wholesale failure to provide an element of a report directly mandated by the regulations.

We note that the very fact that this case was selected for supervised recruitment puts the employer on notice that special scrutiny is being placed on the application. The recruitment report required following supervised recruitment is more detailed than the recruitment report required under basic labor certification processing. Compare 20 C.F.R. § 656.17(g) with 20 C.F.R. § 656.21(e). The CO's limited resources are heavily engaged in a supervised recruitment, and we decline to find that a failure to include a required element of a report is an immaterial omission, especially when the employer, as in this case, is on clear notice both from the regulation itself and a specific notice issued by the CO that it would have to state the addresses of applicants in the recruitment report. Simply put, an employer cannot shift the burden to the CO to look through resumes to find the addresses of U.S. applicants.[6]

[6] We also note that there is no guarantee that applicants will always put their address on the face of a resume.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED.**

For the panel:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

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.