

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 June 2012

BALCA Case No.: 2011-PER-00722
ETA Case No.: A-08130-50662

In the Matter of:

KOHLER CO.,
Employer

on behalf of

SHARATHKUMAR BADIGER,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Maria V. DeLapp, Esq.
Fragomen, Del Rey, Bernsen & Loewy, LLP
Chicago, IL
For the Employer

Gary M. Buff, Associate Solicitor¹
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

TIMOTHY J. McGRATH
Administrative Law Judge

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

¹ While the Certifying Officer is usually represented by an attorney from the Office of the Solicitor, no such appearance was entered in this matter.

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 14, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Computer SW Engineers, Applications.” (AF 1).² On March 11, 2009, the CO sent Employer an Audit Notification Letter requesting that Employer provide certain information including documentation of the basic recruitment process under 20 C.F.R. § 656.17, including a copy of the Prevailing Wage Determination (“PWD”). (AF 125-27). The Employer responded on April 9, 2009. (AF 51-124).

On July 15, 2010, the CO denied the application on two grounds, citing 20 C.F.R. §§ 656.10(c) and 656.17(e)(1)(ii)(G). (AF 21). The CO’s first reason for denial was that the wage offered in the job order and internal Notice of Filing was lower than the PWD, and § 656.10(c) requires an employer to certify that the “offered wage equals or exceeds the prevailing wage determination.” (AF 50). The Employer offered a wage of \$59,467, while the PWD was \$59,467.20. (AF 50). The CO’s second reason was that “the employer failed to provide dated copies of employer notices of memoranda advertising the [employee referral program with incentives].” (AF 50).

Employer requested Reconsideration on August 16, 2010, explaining that the State Workforce Agency had provided a PWD as an hourly rate, \$28.59 per hour, but the Employer’s practice is to advertise an annual salary. (AF 7-8). Therefore, the Employer referred to the U.S. Department of Labor’s Foreign Labor Certification (FLC) Data Center Online Wage Library, to determine the appropriate annual wage to advertise based on the PWD hourly rate. (AF 7-8, 27). The Employer argued that BALCA case law holds that an offered wage may be lower than a PWD by a *de minimus* deviation, and therefore its 0.0003%³ discrepancy should not warrant

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

³ The Employer alleges that the offered wage was 99.99997% of the PWD, it is actually 99.9997% of the PWD.

dismissal. (AF 8 (citing *Superior Landscape, Inc.*, 2009-PER-83 (Aug. 28, 2009)).) The Employer further cited *Clearstream Banking, S.A.*, 2009-PER-15 (March 30, 2010), and argued that it had provided adequate documentation of its Employee Referral Program by submitting a copy of its program’s flier and describing the program in its Recruitment Report. (AF 9).

The CO denied reconsideration and forwarded the case to BALCA on March 9, 2011. (AF 1). In this transmittal letter, the CO reiterated that the regulations require the offered wage be equal to or exceed the PWD, and that the Employer had failed to show how it had made its employees aware of the ongoing Employee Referral Program or the position being offered as part of its application. (AF 1).

BALCA issued a Notice of Docketing on April 21, 2011. The Employer submitted a Statement of Intent to Proceed and Appellate Brief on May 3, 2011. No filings were made by the CO. On March 22, 2012, the Employer certified via email that the job identified on the PERM application is still open and available and that the alien identified in the PERM application remains ready, willing, and able to fill the position.

DISCUSSION

Prevailing Wage Determination

Though the regulations require that an employer attest that it has offered a wage that equals or exceeds the PWD, § 656.10(c)(1), at least one BALCA panel has held that a *de minimus* variance below the PWD does not warrant denial of a permanent labor certification. See *Superior Landscape, Inc.*, 2009-PER-00083 (Aug. 28, 2009).⁴ *Superior Landscape* held that the INA’s requirement—that an alien be paid 100 percent of the required PWD—is not violated

⁴ *Superior Landscape* noted that, in drafting the PERM regulations, the Employment and Training Administration (“ETA”) removed a regulation that allowed offering a wage five percent lower than the PWD. 2009-PER-83, PDF at 3 n.1. This regulation was removed despite objections from many stakeholders because the ETA believed the new statutory language required that “[t]he prevailing wage required to be paid pursuant to subsection[] (a)(5)(A) . . . shall be 100 percent of the wage determined pursuant to those sections.” ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77327, 66 (Dec. 27, 2004) (quoting 8 U.S.C. § 1182(p)(3)). We note that the statutory language in subsection (a)(5)(A) does not actually mention a prevailing wage, but rather requires the Secretary to determine and certify that “the employment of [an] alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.” 8 U.S.C. § 1182(a)(5)(A). The other subsections referenced in § 1182(p) do reference prevailing wage rates. See §§ 1182(n)(1)(A)(i)(II), (t)(1)(A)(i)(II).

where an employer advertised a wage that was 99.95 percent of the PWD. *Id.*, PDF at 3. Although that holding was limited to the facts of the case, no reason is offered why the rationale in *Superior Landscape* should not be applied to the present case. Here, the Employer's advertised wage was 99.9997 percent of the PWD, and it chose that rate after seeking out additional guidance from the Department of Labor's Foreign Labor Certification Data Center Online Wage Library. Therefore, we find that the Employer's offered wage of \$59,467 satisfies the requirements of the statute. We limit our holding to the facts and circumstances of the case before us.⁵

Employee Referral Program with Incentives

The second reason for the CO's denial was that the Employer failed to adequately document its "employee referral program with incentives" pursuant to § 656.17(e)(1)(ii)(G). Such a program "**can** be documented by providing dated copies of employer notices or memoranda advertising the program and specifying the incentives offered." § 656.17(e)(1)(ii)(G) (emphasis added). BALCA has repeatedly noted that the regulatory history surrounding employee referral program suggests that "this recruitment option [may] be a passive form of recruitment that requires little or no active solicitation of applications by the employer." *Clearstream Banking, S.A.*, 2009-PER-15, PDF at 6 n.3 (Mar. 30, 2010); *see also Sanmina-Sci Corp.*, 2010-PER-697, PDF at 5 (Jan. 19, 2011). Furthermore, prior to August 3, 2010, ETA had provided no additional guidance as to what it expected from an employer as evidence of an employee referral program. *See Sanmina-Sci Corp.*, 2010-PER-697, PDF at 4-5, n.2 (discussing relatively recent PERM Frequently Asked Questions ("FAQ")).

The Employer argues that its employee referral program runs continuously. (AF 9). It has documented this program through a copy of the internal flier advertising the program, and a statement from Arlene Kozlowski, the company representative who oversaw recruitment in this case. (AF 9). On reconsideration the CO acknowledged the submission of the internal flier but

⁵ Our decision is made absent any arguments on behalf of the CO that advertising three ten-thousandths of one percent less than the PWD warrants a denial of certification. There is no allegation that the alien being paid less than 100 percent of the prevailing wage based on a difference of twenty cents per year in the advertised salary (would "adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1182(a)(5)(A); *cf. Kanebridge Corp.*, 2010-PER-1229 (Feb. 12, 2012) (affirming CO's denial where wage advertised was 99.5676% of the PWD).

continued to deny certification because “the employer must also demonstrate that its employees were made aware that the position listed on the ETA Form 9089 was available and eligible for the incentives offered by the [employee referral program].” (AF 1).

Sanmina-Sci Corp. considered the regulatory requirements for proving an employee referral program, and proposed a three part test to determine whether an Employer has adequately documented its employee referral program.⁶ It held that

an employer must minimally be able to document that (1) its employee referral program offers incentives to employees for referral of candidates, (2) that the employee referral program was in effect during the recruitment effort the employer is relying on to support its labor certification application, and (3) that the Employer’s employees were on notice of the job opening at issue.

2010-PER-697, PDF at 5. We hereby adopt this test, and find that the Employer has satisfied its requirements.

The Employer’s recruitment report included an attestation that that the employee referral program was in effect at the time of the recruitment and that the job opening had been advertised in the Careers section of the Employer’s website, and that the Employer’s Notice of Filing was properly published. (AF 37, 94). This was held sufficient in *Clearstream Banking*, where the Employer submitted a Recruitment Report that explained its employee referral program was an ongoing program and that the position was advertised on the company’s website. 2009-PER-15, PDF at 6. Furthermore, the CO has not argued that the Employer’s required posting of a Notice of Filing cannot satisfy its obligation to notify employees that a position is open that would qualify for the incentive program.⁷ See *Sanmina-Sci Corp.*, 2010-PER-697, PDF at 4, 6 n.2-3 (noting that at the time the employer’s application was filed little information was available as to how an employer should document this recruitment step, and that there was no prohibition on using a Notice of Filing to show employees were aware of the position).

⁶ *Sanmina-Sci Corp.* noted that ETA FAQ responses may be entitled to deference, and therefore Employers would do well to follow their guidance. 2010-PER-697, PDF at 5 n.4; see also *Auer v. Robbins*, 519 U.S. 452 (1997). However, the CO has not asserted in this case that the FAQ responses are entitled to deference.

⁷ The ETA FAQ response on this topic now says that Notices of Filing are not sufficient to document that employees were aware of the vacancy was on that qualified for the incentives offered in the employee referral program. www.foreignlaborcert.doleta.gov/faqsanswers.cfm#profno5 (visited May 22, 2012).

Thus, we reverse the CO's finding that the Employer had not adequately documented its use of an employee referral program with incentives.

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:

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TIMOTHY J. McGRATH
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.