

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 August 2015

BALCA Case No.: 2011-PER-01344
ETA Case No.: A-08102-41568

In the Matter of:

LAKHA ENTERPRISES, INC.
d/b/a
USMANIA,
Employer

on behalf of

LODHI, MOHAMMAD-AMJAD KHAN,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Reza Baniassadi, Esquire
The Law Offices of Reza Baniassadi
Chicago, Illinois
For the Employer

Before: Stephen R. Henley, *Acting Chief Administrative Law Judge*; Morris D. Davis, *Administrative Law Judge*; and Larry S. Merck, *Administrative Law Judge*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

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 found at 20 C.F.R. Part 656.¹

¹ “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

BACKGROUND

The issues on appeal in this matter both relate to whether the Employer's supervised recruitment report met regulatory content requirements.

On July 16, 2008, the Certifying Officer ("CO") accepted for processing the Employer's Form 9089 Application for Permanent Labor Certification on behalf of Mohammad-Amjad Khan Lodhi for the position of "Cook." (AF 170-179).² The position was located in Chicago, Illinois. (AF 171). The job requirements were an eighth grade education and 24 months of experience in the job offered. (AF 171-172). The job duties were:

Prepare Pakistani/Indian dishes, e.g., murgh curry, chicken tikka masala & Saag, benglan bhata, malai kofta, achari aloo, Nihari, lamb rogan josh, jhal fragi, bengalu fish curry; desserts, e.g, gulab jamon, rasmalai; bake bread e.g paratha, naan and roti.

(AF 172). The Employer stated on the Form 9089 that it had placed a State Workforce Agency ("SWA") job order that started on May 15, 2008 and ended on June 18, 2008. (AF 173).

On March 13, 2009, the CO issued an Audit Notification. (AF 167-169). Among other documentation, the CO directed the Employer to submit a copy of the job order placed with the SWA. (AF 168-169). The audit response did not include a copy of the actual job order, but rather a May 15, 2008 printout from the Illinois Skills Match Workforce Development System (hereinafter ISMS) entitled "Job Order Dates" confirming that a job order was posted on May 15, 2008 and closed on June 18, 2008 (AF 157), and a April 1, 2009 ISMS printout entitled "Recruiting Outcomes" showing that two U.S. workers had shown an interest in the position in June of 2008, but that both were not hired. (AF 158).³ Also attached to the audit response were ISMS information sheets on the two job seekers who were not hired. (AF 159-160). The recruitment report included with the audit response stated that the Employer "received only two inquiries and resumes in response to our Ads and the job order that we placed with the Illinois Skills Match but none of the Applicants were qualified for positions, because they did not have the necessary qualifications and experience." (AF 153).

On June 4, 2010, the CO issued a Notification of Supervised Recruitment. (AF 131-134). The CO directed that the Employer submit a draft advertisement to use in the supervised recruitment process. The notice informed the Employer that the advertisement was to direct applicants to send resumes to the Department of Labor's Office of Foreign Labor Certification in Atlanta. (AF 133). The notice also informed the Employer that after the advertisement is approved and placed, the CO would refer any resumes or applicants from U.S. workers for the Employers' consideration. In addition, the Employer was informed that "You will be required to

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

³ Two dates in December 2008 are shown in the "Recruitment Outcome" column of the printout. The way the column is structured it is unclear whether the applicants were reported not hired on that date, or only if that was the date the system updated the field.

consider or interview all U.S. workers referred to you, including those who apply directly to you, for this job opportunity.” (AF 132). The notice indicated that the advertisement would have to be placed in a newspaper or other publication, and that the CO would also notify the Employer of other required recruitment measures or sources. (AF 132). The notice did not mention a SWA job order.

The Employer responded with its draft advertisement on June 8, 2010. (AF 125-130). The draft included the required address in Atlanta for submission of applications.

On June 23, 2010, the CO issued a “Recruitment Instructions” letter indicating that the draft advertisement was approved and that the Employer should proceed as instructed in the instant letter. Among other recruitment, the instructions directed the Employer to:

Place a job order containing information from the employer’s approved draft advertisement with the Illinois State Workforce Agency (SWA), for a period of 30 days. Documentation of this step can be satisfied by furnishing a copy of the job order form and listing identifying the dates the job order was placed.

The letter further informed the Employer that “The Certifying Officer will refer to the employer for its consideration any resumes or applications received from U.S. workers. The employer is required to consider and/or interview all qualified U.S. workers referred to it by the Certifying Officer, as well as those qualified U.S. workers who apply directly to the employer for this job opportunity.” (AF 123).⁴

On August 3, 2010, the Employer submitted a report to the CO verifying that the newspaper advertisements, internal job posting and job order had all been placed. (AF 88-106). In regard to the job order the Employer’s attorney stated that the job order had been placed on July 19, 2010, “and currently is open and pending.” (AF 88). In support, the Employer provided an August 3, 2010 printout from the ISMS showing the content of the job order. This document includes the Employer’s name, address, phone number and email address. It does not direct applicants to send resumes to the CO’s Atlanta address. (AF 104). The Employer also provided an August 3, 2010 ISMS printout entitled “My Job Order List.” This document lists five positions. The Cook position posted on July 19, 2010 shows “Number of Matches 53 (**53 New**)” and Recruiting Outcomes “17”. (AF 105) (emphasis as in original).

On October 26, 2010, the Atlanta National Processing Center (ANPC) Supervised Recruitment Help Desk sent the Employer an email stating that the ANPC had not yet received the Employer’s schedule for placement of the SWA job order. (AF 80).

⁴ On July 14, 2010, the CO issued “Amended Recruitment Instructions.” (AF 113-115). The instructions regarding the job order and the required consideration of qualified applicants did not change. Correspondence relating to the amendments and other similar documentation in the Appeal File relating to the Employer’s difficulties getting advertisements posted in the Chicago Sun-Times under the terms required by the CO, and obtaining documentation of such, are not detailed in this Decision and Order, as the sole issues on appeal relate to the SWA job order and the recruitment report of that recruitment step.

By letter dated October 27, 2010, (AF 73-79) the Employer's attorney replied that the Employer had enclosed a copy of the Job Order with its August 3, 2010 submission, but that it was enclosing a courtesy copy of the job order with its instant response. (AF 73). But the document enclosed with the October 27, 2010 response is not a copy of the previously submitted job order documentation. Rather, the "My Job Order List" was printed on October 26, 2010. The Cook position posted on July 19, 2010 shows "Number of Matches 0" and Recruiting Outcomes "20". (AF 75). The Job Order itself was identical to the one submitted in August, except that it was printed on October 26, 2010. (AF 76).

On November 1, 2010, the ANPC emailed the Employer informing it that the problem with the SWA job order documentation was that it did not contain the start date and end date of the job order. (AF 72).

The Employer's attorney emailed back a ISMS printout dated November 1, 2010 showing that a job order had been posted on July 16, 2010⁵ and closed on August 16, 2010. (AF 69-71).

On November 4, 2010, the CO issued a letter entitled "Recruitment Report Instructions." (AF 66-68). 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," and "[e]xplain, with specificity, the lawful job-related reason(s) for not hiring each U.S. worker who applied." (AF 67).

On December 1, 2010, the Employer submitted the results of its PERM recruitment efforts and responded to the CO's recruitment report instructions. (AF 16-65). The Employer's president stated in the recruitment report, in pertinent part:

[T]he Employer opened a job order that ran for more than 30 days with Illinois Skills Match from July 16, 2010, through August 16, 2010. Enclosed please find a copy of said job order. ... As a result, we received 20 inquiries. However, none of the Applicants were qualified. Enclosed please find a copy of 20 people who viewed the job order on the Illinois Skills Match.....

... We received neither any inquiries or resumes in response to our Ads and the job order that we placed with the Illinois Skills Match nor your office referred anybody in response thereof to us for consideration and interview. Accordingly, no one was hired and the position remains open.

(AF 21). In support, the Employer provided another copy of the November 1, 2010 ISMS printout entitled "Job Order Dates" showing posting in July 16, 2010 and closure on August 15, 2010. (AF 29). The Employer also provided a December 1, 2010 ISMS printout entitled "My Job Order List" showing a Cook position evidently posted on July 19, 2010, and showing

⁵ As described above, the Employer's August 3, 2010 documentation submission indicated a posting date of July 19, 2010.

“Number of Matches 0” and Recruiting Outcomes “20.” (AF 30).⁶ Also attached were the ISMS Job Seeker resumes for 20 U.S. workers. (AF 31-63). In the cover letter to this submission, the Employer’s attorney stated that “As the Employer’s Supervised Recruitment Report indicates the Employer received neither any inquiries nor resumes in response to its Ads and the Job Order that it placed with the Illinois Skills Match. In addition, [the CO’s] office did not refer anyone in response to the Employer’s recruitment efforts for consideration and interview to the Employer.” (AF 16).

The CO denied the Employer’s application on February 9, 2011. (AF 13-15). The CO determined that the supervised 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 14). Furthermore, the CO found that the recruitment report was not in compliance with 20 C.F.R. § 656.21(e) because the Employer made only a generalized statement that none of the U.S. workers were qualified rather than listing the number of U.S. workers rejected, categorized by the lawful, job-related reason for rejection. (AF 14).

On February 28, 2011, the Employer requested reconsideration and/or review of the CO’s decision. (AF 3-12). The Employer argued that it did not fail to provide the addresses of the U.S. workers who applied for the job opportunity and the reasons for not hiring each applicant because the Employer did not in fact receive any applications for the position. The Employer argued that the 20 people who responded to the SWA Job Order merely inquired about the job posting by viewing it, and did not actually apply for the job. The Employer further asserted that it submitted the addresses for all 20 people who inquired about the SWA Job Order by including a copy of all 20 inquiries with its recruitment report. (AF 4). The Employer also argued that because it operates an Indo-Pakistani restaurant, and the job description required two years of experience in cooking Indo-Pakistani dishes, and none of the individuals who inquired about the job on the Illinois Skill Match had such experience, it was justified in stating that none of the applicants were qualified. (AF 4-5).

The CO issued a decision on reconsideration on May 12, 2011, finding that since the Employer failed to provide in the recruitment report the addresses of each U.S. applicant and the lawful, job-related reasons for not hiring each applicant as requested in the recruitment report instructions letter, the grounds for denial were valid. (AF 1). The CO rejected the Employer’s argument that there were no applicants for the position, only inquiries. The CO stated that

... a review of the Illinois Skills Match system ... reveals the matching of job to candidates’ skill sets is an automatic passive process, while the decision whether to allow the candidate to remain a match and receive additional information beyond a candidate profile belongs to the employer. Thus the employer using Illinois Skills Match determines whether or not a candidate is allowed to submit an application. Because the employer reviewed the 20 originally matched

⁶ The version of this document printed on August 3, 2010 showed in the Status/Last Update” field a posting date of July 19, 2010. (AF 105). The version printed on December 1, 2010 stated in the “Status/Last Update” field “Closed Pending 07/19/2010” (AF 30), as did the version of the document printed on October 26, 2010. (AF 75).

candidates' resumes/profiles against its requirements, the candidates would be considered "applicants" for supervised recruitment purposes.

(AF 1).

The CO transferred the appeal file to the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). (AF 1). The Employer filed an appellate brief on September 15, 2011 in which it reiterated the arguments made in its request for reconsideration.

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). The report 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). The recruitment report must also: "[e]xplain, with specificity, the lawful job-related reason(s) for not hiring each U.S. worker who applied." 20 C.F.R. § 656.21(e)(4).

In the instant case, the Employer's recruitment report did not state the names and addresses of the SWA job order candidates,⁷ and did not explain specific, lawful job-related reasons for not hiring those candidates. Thus, if the SWA job order candidates were "U.S. workers who applied" for the job opportunity, the Employer's supervised recruitment report did not comply with the regulatory content requirements.

The Employer argued in its motion for reconsideration/review that the 20 people who responded to the SWA Job Order merely inquired about the job posting by viewing it, and did not actually apply for the job.

The CO found when deciding the motion for reconsideration that the Illinois Skills Match system automatically matches job postings to candidates' skill sets. In other words, the system identifies a group of candidates whose skills appear to match the employer's job requirements. It is then up to the employer to determine whether those candidates will be permitted to submit an application. The CO then found that because the Employer in this case reviewed the list of candidates, they are considered "applicants" when conducting supervised recruitment in support of a PERM application.

⁷ The Employer argued in its brief that its recruitment report was compliant with the regulations because it included a printout of all 20 people who inquired into the job order, and these printouts included each candidate's address. The plain language of 20 C.F.R. § 656.21(e)(3), however, 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. *Benvenuti's Ristorante*, 2011-PER-633 (Mar. 27, 2012). The regulation explicitly instructs employers to state the addresses of the U.S. workers who applied for the job opportunity in the recruitment report and does not allow for the addresses to be incorporated by reference to other documents within the administrative file. *See JP Morgan Chase & Co.*, 2011-PER-635 (Mar. 27, 2012), *Mayfair, Inc.*, 2011-PER-634 (Mar. 27, 2012), *Gilli, Inc.*, 2011-PER-1880 (Jan. 7, 2013)

Neither the Employer nor the CO provided any documentation showing how the ISMS actually works. This lack of documentation has limited the Board's ability to determine on appeal the relative merits of the parties' positions on what happened in this case.⁸ However, under both the Employer's and the CO's version of how the 20 candidates from the ISMS came to the Employer's attention during supervised recruitment, it is clear that the candidates did not affirmatively apply for the cook position at issue. Notably, the job order clearly asks for resumes to be sent to the employer (AF 28) and none were received. (AF 16). Thus, the Board must determine what are an employer's obligations in regard to candidate referrals from a SWA job order for candidates who did not affirmatively apply for the job.

The Office of Foreign Labor Certification ("OFLC") posted a FAQ on June 1, 2005 that addresses that question. That FAQ states:

JOB ORDER

Must the employer contact all individuals identified as a "match" by a computerized state employment system or must the employer only contact those applicants who have submitted a resume and/or response as specified by the employer in the job order?

The employer is responsible for considering/contacting those applicants who have affirmatively provided a response as specified by the employer in the job order.

www.foreignlaborcert.doleta.gov/pdf/perm_faqs_6-1-05.pdf (visited Aug. 17, 2015). Although the posting of FAQs is not a method by which an agency can impose substantive rules that have the force of law, the OFLC's public pronouncements on compliance are binding on the CO. The FAQ clearly states that an employer is only required to consider and contact applicants who affirmatively applied for the job through the SWA job order system.

The ultimate issue is the ability of the CO to assess the employer's disposition of workers who have applied for the vacancy. Such an assessment presumes that the employer has evaluated the qualifications of job applicants. In the instant case, the Employer did not receive applications or resumes from the 20 individuals at issue, and the FAQ does not indicate that it was required to reach out and solicit them. Thus, the CO's finding that the employer still needed to report the names and addresses of such individuals in the body of the supervised recruitment report is untenable.⁹ The individuals in question were not "applicants" for the position in any

⁸ We note that the CO is obligated to include in the Appeal File "copies of all the written materials, such as pertinent parts and pages of surveys and/or reports upon which the denial was based." 20 C.F.R. § 656.26(b)(1). And it would have behooved the Employer, who had the ultimate burden of proof, to submit evidence to support its assertions of fact about the operations of ISMS.

⁹ Since we have concluded that the 20 workers who inquired about the position were not "applicants" whose identity had to be provided to the CO in the body of the supervised recruitment report, we need not address the issue of the Employer's alleged failure to identify lawful job-related reasons for their rejection. We note, however, that all 20 applicants were dramatically unqualified for the position. The job opportunity required two years of experience in cooking Indo-Pakistani dishes. Not one of the 20 had any experience with Indo-Pakistani dishes and most did not even have 2 years of experience in the food service industry. This is likely the reason that none of the 20 actually

meaningful way and therefore the Employer's recruitment report was not required to identify them.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **VACATED** and that the CO is **DIRECTED** under 20 C.F.R. § 656.27(c)(2) 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
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 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.

applied. *See also Anonymous Management*, 1987-INA-00672 (Sept. 8, 1988) (en banc) (employers are not required to further investigate the qualifications of domestic applicants whose resumes demonstrate they are clearly unqualified for the position).