U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 October 2015

BALCA Case No.: 2012-PER-00335
ETA Case No.: A-09271-66292

In the Matter of:

DNP AMERICA, LLC,
Employer

on behalf of

ERA, KOTARO,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Deborah J. Notkin, Esq.
Barst, Mukamal & Kleiner LLP
New York, NY
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: **ROMERO, KENNINGTON, and ROSENOW**
Administrative Law Judges

PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER
VACATING DENIAL 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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").

BACKGROUND

On September 28, 2009, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Accounting Specialist" (AF 276-288).[1] The CO audited the application on May 6, 2010 and Employer requested an extension to respond on June 3, 2010. (AF 268-275). The CO granted that extension on June 9, 2010. (AF 268). On July 6, 2010, Employer responded to the CO's audit. (AF 36-266). The CO denied certification on April 12, 2011 because, *inter alia*, pursuant to 20 C.F.R. 656.17(f)(6) advertisements placed in newspapers of general circulation or in professional journals must "not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089" and Employer listed experience requirements that are not listed on the ETA Form 9089.[2] (AF 33-35).

The Employer requested reconsideration on May 10, 2011, arguing that Sections H10, H10-A, and H-10B of the ETA Form 9089 listed a primary experiential requirement of 2 years of *similar accounting experience* in addition to the requirement of a Bachelor's degree listed in Section H6 of the Form. Employer argues that the format of the Form is misleading and responsible for the CO's conclusion that it did not comply with the regulations, when in fact the advertisement and the ETA Form 9089 list the same experiential requirements. (AF 3-32).

The CO denied the request for reconsideration and forwarded the case to BALCA on November 1, 2011. In its denial of reconsideration, the CO noted that the Employer listed two years of work experience and a Bachelor's degree in its advertisement, but only a Bachelor's degree in its ETA Form 9089. Thus, the advertisement's minimum requirements exceeded those listed on the ETA Form 9089, violating 20 C.F.R. 656.17(f)(6) and 656.10. (AF 1-2).

BALCA issued a Notice of Docketing on February 10, 2012. The Employer filed a Statement of Intent to Proceed and a Request for Extension on February 22, 2012. Employer filed an appellate brief on March 22, 2012. In its brief, Employer argues that the two year experiential requirement listed in the advertisement is also in the ETA Form 9089 in Section H-

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

[2] The CO also denied certification for the following reasons: the notice of filing for the Application does not apprise the U.S. worker of the job opportunity pursuant to 20 C.F.R. 656.10(d)(4) because the job described in the notice requires a Bachelor's degree and 2 years of worker experience while the 9089 states Bachelor's degree only; the job order placed with the State Workforce Agency serving the area of intended employment does not apprise U.S. workers of the job opportunity pursuant to 20 C.F.R. 656.17(f)(3) because the job order states Bachelor's degree and 2 years of work experience while the 9089 states Bachelor's degree only; and the Employer failed to provide adequate documentation of the additional recruitment steps for professional occupations pursuant to 20 C.F.R. 656.10 because the recruitment conducted through the Employer's web site does not apprise U.S. workers of the job opportunity because the advertisement does not match the job described in the ETA Form 9089 Section H. (AF 34-35). All grounds for denial are based on the same fundamental argument and because we vacate the CO's denial on the issue of minimum requirements in advertisements exceeding those in the ETA Form 9089, we need not address the remaining reasons for denial.

10, H-10A, and H-10B and thus, the minimum requirements in the advertisement and the Form are identical. Employer argues it did not list the two year requirement in Section H6 because Employer is not requiring two years the specific job offered (Accounting Specialist), but rather two years in a broader, less restrictive designation of a similar accounting position.[3] The CO did not file a Statement of Position.

DISCUSSION

PERM is an exacting process, 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). An employer bears the burden of proof to establish eligibility for labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b).

The applicable regulation in this case provides that advertisements placed in newspapers of general circulation or in professional journals must "not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089." 20 C.F.R. § 656.17(f)(6). In the instant case, the application was denied because the newspaper advertisement contained a requirement for a Bachelor's degree and two years of experience in a similar position, while the ETA Form 9089 required a Bachelor's degree and no experience in the job offered.

The PERM regulations require an employer seeking to apply for permanent labor certification on behalf of an alien to file an ETA Form 9089. 20 C.F.R. § 656.17(a). The burden is on the employer to ensure that it is submitting a complete application to the Certifying Officer. 20 C.F.R. § 656.2(b); *All Ohio Air Filter Sales & Service Co*., 2009-PER-205 (April 7, 2010); *Alpine Store Inc.*, 2007-PER-40 (June 27, 2007).

The job requirements listed on the application must represent the employer's actual minimum requirements for the job opportunity and the employer must not have hired workers with less training or experience for the job opportunity. 20 C.F.R. § 656.17(i)(1)-(2). The purpose of this requirement is to address the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *Your Employment Service Inc.*, 2009-PER-151 (Oct. 30, 2009) *citing ERF Inc., d/b/a Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990).

In the ETA Form 9089, Employer answered "No" to Section H6 asking "[i]s experience in the job offered required for the job?" In Section H10, H10-A, and H10-B, Employer answered that experience in an alternate occupation would be acceptable. Specifically, Employer required 24 months (the equivalent to two years) in a "similar accounting position." In the newspaper

[3] Employer alternatively argues that in Section H8, H8-A, H8-B, and H8-C, it lists alternative experiential requirements of Certified Public Accountant Certification and two years of experience.

advertisement, Employer's requirements included a Bachelor's degree and two years of experience in a similar accounting position.

Employer argued it answered "No" to Section H6 because it was not requiring experience in *the job offered*, as an "Accounting Specialist", but instead in a *similar accounting position*. Employer cited to the DOL Stakeholders Meeting on December 11, 2006, where the Board addressed the issue when an employer answers "No" to Section H6, but "Yes" in Section H10. In this instance, the Board concluded that the employee is qualifying for the position based on the primary requirement indicated in Section H10, not Section H6.

The CO did not file a Statement of Position and thus, the only argument presented is in the CO's Denial of Reconsideration where he argued the requirements listed in the newspaper advertisement exceed those listed on the Form ETA 9089. The CO does not specify why he found no experience requirement in the Form, but it follows that his finding is based on Employer answering "No" to Section H6 of the Form. However, Employer correctly answered the question in Section H6 because it was not requiring experience in the *job offered*. Instead, Employer accurately listed the primary experiential requirement in Section H10, H10-A, and H10-B as two years in a *similar accounting position*, which is consistent with the experiential requirement listed in the advertisement.[4]

The Board has declared that the "deficient format of the form" which can give the appearance that an "employer was not in compliant" with the regulations, is not a sufficient basis for a denial. *Federal Insurance*, 2008-PER-00037, at 13 (Feb. 20, 2009). The format of ETA's Form, specifically the CO's broad interpretation of the question posed in Section H6, is largely responsible for the difficulty in the instant case.

[4] Alternatively, Employer cites *HealthAmerica* for the proposition that if Section H6 on the ETA Form 9089 is found to be the only area where an experience requirement is to be placed, it was harmless error. However, following the decision in *HealthAmerica*, the Employment and Training Administration ("ETA") amended the regulations to prevent an employer from modifying its application. 20 C.F.R. § 656.11(b); ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives for Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27916 (May 17, 2007) ("To the extent the BALCA favored allowing the employer in *HealthAmerica* to present evidence that effectively change the response to a question on the application, the BALCA's approach is inconsistent with the Department's objective and the NPRM proposal that applications cannot be changed or modified after submission."). The regulatory history succinctly explains that ETA considered the costs associated with permitting employers the opportunity to modify their applications and determined that it would be a significant and costly resource drain on the PERM case management system and staff. 72 Fed. Reg. at 27918. Additionally, ETA rejected the argument that typographical errors were immaterial, noting that "typographical or similar errors are not immaterial if they cause an application to be denied based on regulatory requirements." 72 Fed. Reg. at 27917. This argument is moot, however, because Section H6 on the Form is not the only area where an experience requirement can be placed.

Accordingly, we vacate the CO's denial based on the inconsistencies in experiential requirements of the Form and the newspaper advertisement and order that the CO grant certification.

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is hereby **VACATED** and that the Certifying Officer is directed to **GRANT CERTIFICATION**.

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

PATRICK M. ROSENOW
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.