



Issue Date: 28 October 2016

BALCA Case No.: 2012-PER-02980
ETA Case No.: A-11172-87041

In the Matter of:

GENWORTH NORTH AMERICA CORPORATION,
Employer,

on behalf of

YEUNG, YUK KI,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Amy C. Cococcia, Esquire
Fragomen, Del Rey, Bernsen & Loewy, LLP
New York, New York
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza,
and Marc R. Hillson¹, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

PER CURIAM. This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the “PERM” labor certification regulations at 20 C.F.R. Part 656.²

¹ Appointed under the U.S. Office of Personnel Management Senior Administrative Law Judge Program. *See* 5 C.F.R. § 930.209.

² “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 Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States in Richmond, Virginia. The occupational title listed in Form 9089, Section F-3 was “Actuaries,” Standard Occupational Classification Code 15-2011.00. (AF 207).³ The position was entitled Assistant Actuary—Life Pricing. The Form 9089 specified that a Bachelor’s degree in “Actuarial Science, Math Statistics or related field” was required, along with three years of experience in an actuarial or related position. (AF 207-208). In addition, the Form 9089 stated that:

The position requires experience with: Pricing and or actuarial modeling; Term and UL GAAP, Statutory, and tax accounting; working in a team environment; creating and presenting reports to senior level actuaries and business professionals; and with writing documentation for actuarial processes; programming and experience in data analysis. Completion of all ASA requirements with only FAP final assessment remaining.

The Certifying Officer (“CO”) audited the application (AF 201-205), focusing on whether the Employer passed over any qualified U.S. workers. The CO asked for copies of applicant resumes and detailed recruitment results. The Employer responded (AF 23-200), providing the applications and resumes of nineteen applicants, with detailed reasons why they were not selected for the position.

The CO denied the application (AF 20-22), finding that one of the U.S. applicants—Mr. G— was “potentially qualified to perform the duties involved in the occupation in the normally accepted manner.” (AF 21). This finding was made even though Mr. G did not meet “the special requirements of experience with Term and UL GAAP, statutory and tax accounting and creating and presenting reports to senior level actuaries and business professionals.” *Id.* The CO also found that Mr. G had three years of experience.

The Employer asked for reconsideration, contending that Mr. G was lacking in numerous skills required by the position, and that these skills could not be learned after a reasonable period of on-the-job training. Since Mr. G did not meet so many of the legitimate minimum requirements of the job, the Employer contended that it was under no obligation to investigate further or to interview Mr. G. (AF 12). Further, the Employer noted that at the time the application was filed, Mr. G had less than the required three years of experience, as apparently the CO had included several internships while Mr. G was earning his degree as fulfilling the experience requirement. The Employer also stated:

As Mr. [G] lacks three (3) years of post-Bachelor actuarial or related experience; does not have experience with Term and UL GAAP, Statutory, and tax accounting; and does not have experience creating and presenting reports to senior level actuaries and business professionals, he clearly does not meet the minimum requirements for the Assistant Actuary - Life Pricing position, nor is there a “reasonable possibility” that he qualified for this position. Accordingly, Genworth had no obligation to further investigate his credentials or qualifications. (AF 13).

³ Citations to the Appeal File are abbreviated as “AF” followed by the page number.

The CO reconsidered, but found that the ground for denial was valid. (AF 1-2). The CO found that “when an applicant’s resume demonstrates their credentials meet the job requirements and that their experience would possibly require the applicant to work with the employer’s specific skill set requirements, the burden to further investigate the applicant’s credentials rests with the employer. Since the employer rejected [Mr. G] without the further investigation of his credentials, the Certifying Officer has determined this reason for denial is valid in accordance with Departmental regulations at 20 CFR § 656.24(b)(2)(i).”

The Employer filed a statement confirming its intention to proceed with the appeal. The Employer requested that its reconsideration request be alternatively treated as an appeal request. The CO did not file an appellate brief.

DISCUSSION

We hold that the Employer met its burden in showing that Mr. G was not qualified by means of either training or experience. The regulations stipulate that the CO must find a U.S. worker able and qualified for the posted job opportunity if the worker, “by education, training, experience, or a combination thereof” is able to perform the job in “the normally accepted manner” and that a worker is able and qualified if the worker “can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.” 20 C.F.R. § 656.24(b)(2)(i).

In making a determination as to whether a U.S. worker is minimally qualified for a job opportunity, the CO cannot ignore the requirements posted in the Form 9089. Here, Mr. G. clearly does not meet either the training or experience requirements. He does not have experience in Term and UL GAAP, or in statutory or tax accounting, or in making presentations to senior level actuaries and business professionals. The conclusion of the CO that expertise in these areas can be picked up by reasonable on-the-job training is mere surmise, and refuted by the Employer’s detailed description of the complex duties of the position and the necessity for a solid background in the areas where Mr. G is deficient. Further, Mr. G did not have, at the time he applied for the position, three years of post-Bachelor’s actuarial experience.

Thus, since we find that no U.S. worker was unlawfully rejected, we reverse the decision of the CO and direct that the application be granted.

ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2).

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
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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.