



Issue Date: 06 October 2016

BALCA Case No.: 2012-PER-02324
ETA Case No.: A-11133-77952

In the Matter of:

KELLY GROUP ENTERPRISES CORP.,
Employer,

on behalf of

CONTRERAS MELENDEZ, LOURDES CAROLINA,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Fernando M. Socol, Esquire
Fernando M. Socol, P.A.
Miami, Florida
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; William T. Barto,
and Marc R. Hillson, *Administrative Law Judges*

DECISION AND ORDER
AFFIRMING DENIAL 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 656.¹

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 Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States in Miami, Florida. The occupational title listed in Form 9089, Section F-3 was “Sales Manager,” Standard Occupational Classification Code 11-2022.00. (AF 139).² The Form 9089 indicated that a bachelor’s degree in business administration was required, along with two years experience in the job offered. (AF 139-140). The Employer attested in Section H.11 that the position of Sales Manager contained the following job duties:

Direct and coordinate the sales activities of the company. Review operational records and reports to project sales and determine profitability. Supervise sales staff. Prepare sales report. In charge of establishing and implementing departmental policies, goals and objectives. Responsible for planning and directing staffing, training, and performance evaluations to develop and control sales and service programs[.]

(AF 140).

The Certifying Officer (“CO”) audited the application and directed the Employer to submit, among other documents, “resumes and applications for all U.S. workers who applied for [the position ... and] a report that lists ... information for each U.S. worker rejected” (AF 135-136).³ A different section of the audit notification specified that the Employer was required to submit “a report that lists ... the specific lawful job related reason(s) [U.S. workers were rejected]” (AF 137). The Employer’s audit response contained, *inter alia*, applicant resumes and a recruitment report explaining the reasons each applicant was rejected. (AF 16-134).

While the CO initially denied certification on two grounds, only one ground remains at issue on appeal. Specifically, the CO denied certification pursuant to “20 C.F.R. § 656.24(a)(2)(b),”⁴ finding that:

[Four] applicants appear to possess the minimum requirements and should have at least been afforded an interview to discuss their qualifications further. Although some of the job titles on the applicant's resumes are not identical to what was stated on the ETA Form 9089 (Sales Manager); the job duties listed on the applicant’s resumes and in Section H.11 of the ETA Form 9089 appear to qualify the applicants for the job opportunity.

(AF 15).

² Citations to the Appeal File are abbreviated as “AF” followed by the page number.

³ The CO requested this information in a second section of the audit letter as well. (AF 137).

⁴ The CO erroneously cited “20 C.F.R. § 656.24(a)(2)(b),” a provision that does not exist. Based on the regulatory language quoted by the CO in the denial letter, we find that he intended to cite 20 C.F.R. § 656.24(b).

The Employer filed a request for reconsideration and contested the CO's finding that four applicants were qualified for the position. Whereas the Employer's recruitment report used general language, including "did not possess the required experience as specified in the advertisement," the Employer's brief on reconsideration clarified and elaborated on its reasons for rejecting each worker. For the purposes of this decision, we limit our consideration to one applicant identified by the CO— Mr. C. On reconsideration, the Employer provided the following clarifications for why it rejected Mr. C:

1. Mr. C's resume "demonstrated a lack of professional grammar usage, not reflective of his experience and Master's degree in Business administration [*sic*]." (AF 11).
2. Mr. C "does not indicate the common job duty position: approve budget expenditures. [Mr. C] does have experience in coordinating sales and demonstrated responsibility with a 40 million dollar 'Sales budget.' However, the responsibility of a sales budget does not necessarily entail an expenditure budget, let alone the approval of one." (AF 12).
3. Mr. C did not have experience "[m]onitor[ing] customer preferences." *Id.*

The CO reconsidered, but affirmed his earlier denial. (AF 1-2). Specifically, the CO found that the information provided in the reconsideration request— the more detailed explanations of why the four applicants were rejected— should have been supplied to the CO in response to the audit request, and that it would not be considered by him at this stage of the proceeding pursuant to 20 C.F.R. § 656.24(g)(2). (AF 2).

On appeal, the Employer filed a statement confirming its intention to proceed with the appeal. Neither the Employer nor the CO, however, filed appellate briefs.

DISCUSSION

Whether the Employer's Explanations on Reconsideration Are Part of the Record

For applications submitted after July 16, 2007, a request for reconsideration of a denial may only include: (1) documentation the CO actually received from the employer in response to a request from the CO; or (2) documentation the employer did not have an opportunity to present to the CO, but which existed at the time the application was filed. 20 C.F.R. §§ 656.24(g)(2)(i)-(ii). However, when "the circumstances of an audit may not be specific enough to put an employer on notice of the potential deficiency with its application [and] where the type of documentation at issue is not the standard documentation submitted in response to an audit," an employer may supplement the record on reconsideration notwithstanding the § 656.24(g)(2) prohibition. *Denzil Gunnels*, 2010-PER-00628, slip op. at 16 (Nov. 16, 2010).

The regulation at § 656.17(g)(1) provides that an "employer must prepare a recruitment report ... describing ... the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections." In the instant case, this requirement was set forth in the CO's audit notification letter. We find that the Employer's recruitment report, which stated the lawful job related reasons applicants were rejected (*e.g.* "did not possess the required experience

as specified in the advertisement”), satisfied the regulation. Based on a review of applicant resumes, the CO determined that some U.S. workers may have been qualified for the job opportunity. While the CO was within his authority to make this determination, we find that it constituted a new and discrete issue beyond the Employer’s recruitment report. Accordingly, the CO exceeded his authority under § 656.24(g)(2) when he prevented the Employer from responding merely because the Employer had provided a recruitment report with its audit response. Specifically, we find that the Employer was first put on notice of an issue related to applicant resumes when the CO denied the application. Additionally, a detailed explanation of rejection reasons beyond what is normal for a recruitment report is not the type of documentation an employer usually submits in response to an audit. Accordingly, the explanations offered by the Employer on reconsideration are part of the record before us.

Whether the Employer Improperly Rejected Qualified U.S. Workers

In evaluating an application for Permanent Employment Certification, the CO must determine, pursuant to 20 C.F.R. § 656.24(b)(2) whether “[t]here is a worker in the United States “who is able, willing, qualified, and available for and at the place of the job opportunity.” An employer may only reject U.S. applicants for “lawful job related reasons.” 20 C.F.R. § 656.17(g)(1). That an alien might be *more qualified* than a U.S. worker is not a lawful job related reason for rejecting the U.S. worker; the relevant inquiry is whether the U.S. worker is *minimally qualified* for the position. *Cf. East Tennessee State University*, 2010-PER-00038 (Apr. 18, 2011). When evaluating whether a U.S. worker is minimally qualified, an employer “cannot look outside the minimum requirements as listed on the [application].” *Jakob Mueller of America, Inc.*, 2010-PER-01069 (Dec. 22, 2011). In other words, a U.S. worker is minimally qualified if he or she meets the requirements listed on the Form 9089.

For the purposes of this decision, we need only examine the Employer’s arguments with respect to the first disputed applicant, Mr. C, to conclude that the CO’s determination should be affirmed. The Employer rejected Mr. C because he used poor grammar and formatting in his resume, lacked experience approving budget expenditures, and lacked experience monitoring customer preferences. We will review each of these arguments in turn.

First, the Employer’s use of grammar as a proxy for applicant quality does not constitute a lawful job related reason for rejecting a U.S. worker. As long as an applicant meets the position’s minimum qualifications, an employer may not reject an applicant merely because he or she is less qualified relative to other workers or applicants.

Second, the record establishes and the Employer concedes that Mr. C has experience overseeing a \$40 million sales budget. The Employer nevertheless argues that Mr. C is not qualified for the position because he lacks experience approving an “expenditure budget.” However, the Employer’s Form 9089 states only that experience in the job offered is required. Crucially, Section H.11 of the Form 9089 does not specify that the Sales Manager position entails approving an expenditure budget. Accordingly, the Employer may not look outside the minimum requirements as listed on the Form 9089 for reasons to reject Mr. C.

Third, “monitoring customer preferences” is not explicitly listed as a core job duty of the

Sales Manager position on the Form 9089. The Employer is therefore precluded from using Mr. C's purported lack of experience in this area as a reason for rejecting him. However, assuming *arguendo* that "monitoring customer preferences" was implicitly a part of more general job duties listed on the Form 9089 such as "develop and control sales and service programs," we still find that Mr. C's resume establishes that he has the requisite experience. Specifically, Mr. C's description of a job he held from March 1980 to November 1994 includes a reference to "contact[ing] and monitoring of key clients." (AF 65).

We therefore find that the Employer improperly rejected Mr. C from consideration for the position. Having found that the CO may be affirmed on the basis of Mr. C's application, we need not consider the other three applicants at issue.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

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.