



Issue Date: 28 October 2016

BALCA Case No.: 2012-PER-02771
ETA Case No.: A-10077-90862

In the Matter of:

MCKINSEY & COMPANY, INC.,
Employer,

on behalf of

MOSUR, VEENA PADMAVATHY,
Alien.

Certifying Officer: William Carlson, Ph.D.
National Certifying Officer

Appearance: Freddi M. Weintraub, 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
William T. Barto, *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 656.¹

BACKGROUND

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States in New York, New

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

York. The occupational title listed on the Form 9089, Section F.3, was “Operations Research Analyst,” Standard Occupational Classification Code 15-2031.00. (AF 443-455).² The Employer attested in Section I.d.14 that it utilized on-campus recruiting as one of its additional recruitment steps. (AF 447).

On December 29, 2011, the Certifying Officer (“CO”) issued an audit notification to the Employer requesting, among other items, recruitment documentation as outlined in § 656.17(e). (AF 397-400). On January 12, 2012, the Employer submitted its audit response, including several pages from the Employer’s website evidencing its on-campus recruitment activities. (AF Exh. L, 175-247). Each page of the documentation contained the name of the university where recruitment was scheduled to take place, along with specific application instructions for students at each particular university, which referenced the name of the open position and the deadline for applying. *Id.* Each page also included dates of recruitment and interviewing events occurring at each specific university; eligible participants; and the name, time, and location of each event. *Id.* Further, each page explained the recruitment process, including a problem-solving test and participation in a two-part, in-person interview, and provided the name and contact information for the senior recruiter working with each university. *Id.*

After reviewing the Employer’s audit response, the CO denied certification on five grounds. (AF 14-17). The only denial ground remaining on appeal relates to the Employer’s on-campus recruitment documentation. The CO determined that while the Employer “provided copies of pages from its own website advertising the on campus recruitment,” it did not “provide copies of pages of the notification issued or posted by the college’s or university’s placement office naming the employer and the date it conducted interviews for employment in the occupation.” *Id.* The CO cited 20 C.F.R. § 656.17(e)(1)(ii)(D) for the deficiency. *Id.*

On January 25, 2012, the Employer submitted a request for reconsideration, arguing that the language of the regulation at § 656.17(e)(1)(ii)(D) is not an “exhaustive or exclusive illustration[] as to how an employer may document compliance.” (AF 3-6). As support, the Employer cited a Frequently Asked Question (“FAQ”) from the Office of Foreign Labor Certification’s (“OFLC”) website that states in relevant part:

If the employer does not have the primary evidence suggested by the regulation, it may attempt to satisfy the request through the use of alternative evidence not specifically listed in § 656.17....”

(Emphasis as in original) (AF 5). The Employer further argued:

[The Employer’s documentation of its on-campus recruitment] includes specific schedules of on-campus recruitment, listing the dates, locations, and times of the events. For instance, evidence is submitted confirming its on-campus recruiting at a number of schools. This evidence does not just list the name of the school, but also confirms the specific schedule of appearances, including date, time, and location, and event information. We respectfully submit that such evidence fully

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

demonstrates that the employer performed on-campus recruiting within the time frame listed on the ETA-9089 and therefore meets all regulatory requirements.

Id.

The Employer also submitted letters from three universities confirming its participation in those universities' recruitment programs. (AF 7-9). Two of the letters were dated February 28, 2012, and the third was dated February 24, 2012. *Id.*

The CO reconsidered, but found that the ground for denial was valid because while the regulation at § 656.17(e)(1)(ii)(D) is permissive, "the employer failed to provide documentation showing on-campus recruitment was actually conducted and the date it conducted interviews for employment in the occupation." (AF 1-2). Further, the CO declined to consider the letters submitted with the request for reconsideration in accordance with 20 C.F.R. § 656.24(g)(2)(i)-(ii) because the letters, dated after the date of the filing of the application, were not part of the file upon which the CO based his denial. *Id.*

On appeal, the Employer filed a statement confirming its intention to proceed with the appeal. The Employer also filed an appellate brief, incorporating its arguments from its request for reconsideration. The Employer also cited *Nine Muse & Apollo, Inc.*, 2011-PER-00025 (Dec. 27, 2011), *Paterson Charter Sch.*, 2010-PER-01084 (Sept. 29, 2011), and *Nav Consulting*, 2011-PER-00437 (May 24, 2012) in support of its position. The CO did not file a statement of position or an appellate brief.

DISCUSSION

When an employer files an application for permanent labor certification for a professional occupation under the basic process at § 656.17, an employer must conduct "mandatory steps," including two print advertisements and a job order, as well as three of ten "additional recruitment steps," prior to filing an application. 20 C.F.R. § 656.17(e)(1)(i)-(ii). One type of an additional recruitment step is on-campus recruiting. 20 C.F.R. § 656.17(e)(1)(ii)(D). On-campus recruitment "can be documented by providing copies of the notification issued or posted by the college's or university's placement office naming the employer and the date it conducted interviews for employment in the occupation." *Id.*

In this case, the Employer submitted several pages from its website that advertised its on-campus recruitment program at various colleges and universities. The Employer argues that its documentation of its on-campus recruitment is sufficient because the regulation at § 656.17(e)(1)(ii)(D) is permissive and allows on-campus recruitment to be documented in other ways. The CO contends that the employer failed to demonstrate "that on-campus recruitment was actually conducted and the date it conducted interviews...."

We agree with the Employer that § 656.17(e)(1)(ii)(D) is permissive. While the regulation at § 656.17(e)(1)(ii)(D) provides one method for documenting an employer's on-campus recruitment, an employer can document its participation by other means if the alternative documentation is reasonably equivalent to the primary proof required by the regulation, and it

indicates that the employer utilized on-campus recruitment as an additional recruitment step. *See St. Landry Parish Sch. Bd.*, 2012-PER-01135 (Apr. 28, 2016) (finding that alternative documentation of an additional recruitment step must be reasonably equivalent to the primary proof specified in the regulation); *Micron Tech., Inc.*, 2011-PER-02193 (Jan. 30, 2014) (finding alternate means of documentation must indicate the recruitment method was used and the necessary information was provided to potential U.S. applicants). Therefore, we must also consider whether the documentation submitted by the Employer is reasonably equivalent to the primary proof required by the regulation.

In *Micron Tech.*, the panel considered whether an employer's website advertisement promoting its on-campus recruiting event was an acceptable way to advertise for and document on-campus recruitment. There, the panel found that while the college or university itself did not issue a confirmation, the advertisement "included all of the essential details regarding the on-campus recruitment with enough specificity to inform an interested U.S. applicant." *Id.* at 3. The advertisement identified the employer and the general types of positions being recruited as well as the university, times, and location of the on-campus recruitment. *Id.*

Here, the Employer's website pages demonstrate that the essential details of its on-campus recruitment were readily available to U.S. applicants. The level of specificity and detail in the Employer's documentation of its on-campus recruitment efforts goes beyond the details of the documentation that was available to the panel in *Micron Tech.* The website pages include names, dates, and times of specific recruiting and interviewing events that were scheduled to occur at each particular college or university where the Employer participates in on-campus recruiting. The pages also include information for applicants regarding the application and interview process, as well as contact information of a recruiter. Furthermore, pages for some colleges and universities make specific references to specific career services platforms, demonstrating that the Employer collaborated with at least some colleges and universities with regard to its on-campus recruitment activities.³

We find the documentation is reasonably equivalent to the form of proof suggested in the regulation at 20 C.F.R. § 656.17(e)(1)(ii)(D). Furthermore, we reject the CO's contention that an employer's proof of on-campus recruitment must demonstrate that an employer *actually* participated in on-campus recruitment. The primary proof specified in the regulation, which is a notice or posting from the college's or university's placement office naming the employer and the date it conducted interviews for employment, does not require an employer to demonstrate actual participation, so we cannot impose that requirement when an employer chooses to document its use of on-campus recruitment with alternative documentation.⁴

³ For example, one page instructed applicants for a particular university to apply "through both the LionSHARE and McKinsey's online system to receive full consideration." (AF 215). Another page required applicants to complete the Employer's online application, "as well as on DartBoard." (AF 220). Further, one page required applicants to apply "through both OCS and McKinsey's online system..." (AF 222). Other examples like these were included in the Employer's on-campus recruitment documentation.

⁴ Because we find that the Employer's documentation of its on-campus recruitment submitted with its audit response was sufficient to comply with § 656.17(e)(1)(ii)(D), we do not make any findings as to whether the Employer's documentation submitted with its request for reconsideration was permissible under 20 C.F.R. § 656.24(g)(2)(i)-(ii). *But see Denzil Gunnels*, 2010-PER-00628 (Nov. 16, 2010) ("[T]hese limitations do not apply to

ORDER

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.

evidence submitted on appeal to the Board solely to support a legal argument that was preserved before the CO.”); *CVS Rx Servs., Inc.*, 2010-PER-1108 (Nov. 16, 2010) (same).