

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 24 November 2014

BALCA Case No.: 2012-PER-00497
ETA Case No.: A-09265-65511

In the Matter of:

PHILLIP DUTTON EVENTING, LLC,
Employer

on behalf of

WOOD, RYAN NICHOLAS,
Alien.

Certifying Officer: William Carlson
National Certifying Officer
Atlanta, Georgia

Appearance: John Combs, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Denver, Colorado
For the Employer

BEFORE: **Bergstrom, Johnson, and Krantz**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), (the “Act”), and the “PERM” regulations found at 20 C.F.R. Part 656 (the “Regulations”).

BACKGROUND

On November 17, 2009, the Employer filed ETA Form 9089 Application for Permanent Employment Certification sponsoring the Alien for permanent employment in the United States

for the position Event Rider in Occupation Title “Animal Trainer.” (AF 65-75).¹ On September 15, 2010, the Certifying Officer (CO) issued an Audit Notification letter to the Employer advising that the application on behalf of the Alien had been selected for audit. (AF 61-64). The CO requested the Employer send additional documentation and asked the Employer to answer several questions and provide supporting documentation. (AF 63-64). Request 1.C. under Audit Reason #1 stated “If residing with the employer is a benefit of the job offered, document that U.S. applicants were afforded the same benefit.” (AF 63). On October 14, 2010, the Employer responded, providing additional documentation and information. (AF 18-60). The letter from Employer’s counsel dated October 14, 2010, responded specifically to the request for additional information labeled 1.C in the Audit Notification: “If any of the 3 applicants for the position had qualified for the position, they would have been offered the same benefit of housing on the farm. (Please note that none of the 3 applicants qualified for the PERM position).” (AF 18). The Employer’s response to the Audit Notification also included a statement signed by the co-owner of the Employer stating

Like many horse farms of similar size, we provide on-site housing for some employees. This same housing has been made available to [the Alien], but it also would have been offered to any other person who was qualified and offered such a position. Whether or not employees avail themselves of [Employer’s] housing has no effect on the pay they receive.

(AF 21).

On April 20, 2011, the CO issued a Determination Letter denying certification stating several reasons for denial. (AF 15). Denial Reason #1 stated that the notice of filing for the Application for Permanent Employment Certification offers terms and conditions of employment that were less favorable than those offered to the foreign worker pursuant to 20 C.F.R. §656.10(d)(4). (AF 16). Specifically, the Employer’s statement regarding on-site housing attached to the response to the Audit Notification described the housing offered to the Alien, but the Employer failed to note the availability of on-site housing in the notice of filing. (AF 16). “Therefore, the notice contains terms and conditions that are less favorable than those offered to the foreign worker.” (AF 16). Denial Reason #2 similarly stated that the advertisement placed in a newspaper of general circulation offered terms and conditions of employment that were less favorable than those offered to the foreign worker for the same failure to mention the on-site housing pursuant to 20 C.F.R. §656.17(f)(7). Denial Reason #3 also similarly stated that the Job Order placed with the Pennsylvania State Workforce Agency offered terms and conditions of employment that were less favorable than those offered to the foreign worker for the same failure to mention on-site housing pursuant to 20 C.F.R. §§ 656.10 and 656.17(f).

On May, 13, 2011, the Employer requested that the Department of Labor reconsider the determination denying certification. (AF 2). The Employer stated that each of the denial reasons cited essentially the same regulatory basis, 20 C.F.R. §656.17(f)(7), which requires that advertisements placed in newspapers of general circulation or professional journals and the Notice of Filing not contain “wages or terms and conditions of employment that are less

¹ Citations to the Appeal File are abbreviated as “AF” followed by the page number.

favorable than those offered to the alien.” The Employer argues that the Determination Letter implies in each of the three Denial Reasons that the Employer is under an affirmative duty to mention housing availability in its recruitment efforts. (AF 4). The Employer cites the Department of Labor’s FAQ answers which describes an employer’s required level of detail in advertisements as follows:

What level of detail regarding the job offer must be included in the advertisement?

Employers need to apprise applicants of the job opportunity. The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity. An advertisement that includes a description of the vacancy, the name of the employer, the geographic area of employment, and the means to contact the employer to apply may be sufficient to apprise potentially qualified applicants of the job opportunity.²

The Employer further argued that this explanation would be meaningless if the failure to mention any benefit available to all workers, such as health insurance or free meals, could later be used as a basis for denial. (AF 5). The Employer also stated that the rationale for denial carried to its logical extreme would result in an employer only being sure of avoiding denial by listing every aspect of a position that could be considered beneficial by the Department of Labor. (AF 5). In short, it is the Employer’s position that silence on a benefit offered to all workers is not in conflict with the Regulations or the Department’s interpretation of the Regulations provided in the FAQ Answer materials excerpted above. (AF 5).

On November 18, 2011, the CO issued a Determination on Reconsideration letter again denying certification. (AF 1). The CO stated that the Employer’s request for reconsideration did not overcome the deficiencies stated in the Determination letter.

The CO transmitted the Appeal File to the Board of Alien Labor Certification Appeals (the “Board”), and the Board issued a Notice of Docketing on February 28, 2012. In response to the Notice of Docketing, the Employer filed a statement confirming its intention to proceed with an appeal before the Board on March 9, 2012. The CO filed a statement of position citing to *Blue Ridge Erectors*, in which the Board found that “[t]he option to live on Employer’s premises is a term and condition of employment that creates a more favorable job opportunity for which the labor market was not tested by the Employer’s recruitment effort,” and that “U.S. workers who might have responded to an ad if on-premises housing was an option were not given the opportunity to do so.” 2010-PER-0097, at 3 (Jul. 28, 2011).

DISCUSSION

The Regulations require an exacting attestation-based process, one designed to promote administrative efficiency over dialogue in order to better serve the public interest overall, given

² Available at: <http://www.foreignlaborcert.doleta.gov/faqanswers.cfm#adcont1>.

the resources available to administer the program. *HealthAmerica*, 2006-PER-0001, slip op. at 19 (Jul. 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. §652(b). The Regulations require an employer seeking to apply for permanent labor certification on behalf of an alien to file an ETA Form 9089, which will be denied if incomplete. 20 C.F.R. 656.17(a).

The Regulations also require an employer to conduct mandatory recruitment steps and make a good-faith effort to recruit U.S. workers prior to filing an application for permanent alien labor certification. 20 C.F.R. §656.17; 69 Fed. Reg. 77326, 77348 (Dec. 27, 2004). The CO may only certify permanent labor applications if there are not sufficient U.S. workers who are able, willing, qualified, and available at the time of the application. 20 C.F.R. 656.1(a)(1). Therefore the CO must determine if the Employer properly conducted all mandatory recruitment steps designed to apprise U.S. workers of the job opportunity. One requirement for recruitment efforts is that they not “contain wages or terms and conditions of employment that are less favorable than those offered to the alien.” 20 C.F.R. §656.17(f)(7).

In the Audit Notification, the CO required the Employer to submit additional information regarding the availability of on-site housing to U.S. workers. (AF 63-64). In response, the Employer submitted a statement from one of its co-owners describing the availability of on-site housing at no additional cost to all workers if they chose it, but failed to provide documentation showing that U.S. workers were apprised of this fact in recruitment efforts. (AF 21). The Employer’s statement also explained that the decision whether or not to live in the employer-provided housing had no effect on the workers’ pay. (AF 21). The CO concluded that because the advertisements, job order, and notice of filing failed to list the availability of on-site housing, they did not comply with the requirements of 20 C.F.R. 656.17(f) as a U.S. worker could not have known that the arrangement was offered.³

The option to live on the Employer’s premises at no additional cost is a term or condition of employment that creates a more favorable job opportunity for which the labor market was not tested by the Employer’s recruitment efforts. *See Feldts Services, Inc.*, 2011-PER-02960 (Aug. 28, 2013). U.S. workers who might have responded to the recruitment efforts if they had been apprised of the availability of free lodging on the Employer’s premises were not given the opportunity to do so. *Id.* The Employer argues that silence on a particular benefit of the job does not automatically create a presumption that the benefit does not exist in the same way that failure to state a wage in recruitment efforts does not create an assumption that there is no wage. However, unlike on-site housing at no additional cost, wages are a legal requirement of work in this country. No-cost, on-site housing is not. Unlike wages, no reasonable potential applicant would have assumed that no-cost, on-site housing was a benefit associated with this job

³ The Employer’s application should also have been denied on the basis that the Employer rejected three applicants for failure to meet the Employer’s minimum experience requirements (AF 38) despite stating that no experience, education, or training were required for the job in section H-4, H-5, and H-6 of ETA Form 9089. (AF 66-67). The Employer did state that special skills were required for the job opportunity in section H-14 of ETA Form 9089 (AF 67) but stated that zero applicants were rejected for not meeting the skill requirements (AF 38). Moreover, the Alien also did not meet the skill requirements stated in section H-14 at the time of hire, as required by 20 C.F.R. §656.17(i)(3), and only gained the required level of skill while working for the Employer. (AF 70-71). The Employer therefore failed to show that the job opportunity is clearly open to qualified U.S. workers and that U.S. worker applicants were rejected for lawful, job-related reasons. See 20 C.F.R. §§ 656.10(c)(8) and (9).

opportunity and therefore, qualified U.S. workers may have been dissuaded from applying. The Employer failed to demonstrate that there are insufficient able, willing, and qualified U.S. workers available as required by 20 C.F.R. §656.1(a)(1). Accordingly, the Board finds the CO's denial of certification must be affirmed.

ORDER

IT IS ORDERED that the Certifying Officer's **DENIAL** of labor certification is hereby **AFFIRMED**.

For the panel:

ALAN L. BERGSTROM
Administrative Law Judge

ALB/RMK/jcb
Newport News, Virginia

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.