U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 July 2013

BALCA Case No.: 2012-PER-02882
ETA Case No.: A-10237-15521

In the Matter of:

RIVERWALK EDUCATION FOUNDATION, INC.,
Employer

on behalf of

IHSAN KARA,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Garrett M. White, Esq.
Law Office of Garrett White
Houston, TX
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: **Geraghty, Calianos, McGrath**
Administrative Law Judges

COLLEEN A. GERAGHTY
Administrative Law Judge

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), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). For the reasons set forth below, we affirm the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On August 25, 2010, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Instructional Coordinator: Computer Cluster." (AF 1, 88).[1] On October 28, 2010, the CO sent the Employer an Audit Notification Letter requesting that the Employer provide certain information in accordance with 20 C.F.R. § 656.20. (AF 83-86). On December 2, 2010, the Employer responded to the Audit, attaching documentation of its various recruitment steps. (AF 14-82).

On June 9, 2011, the CO denied the application because the Employer's various forms of recruitment did not list the travel requirement included in the Employer's ETA Form 9089. (AF 11-13). Specifically, the ETA Form 9089 stated in an addendum to Section H.14 that "[o]ccasional day travel within San Antonio Metropolitan area and/or to Corpus Christi, Texas. No Overnights." (AF 12). The job order placed with the State Workforce Agency, the advertisements placed in the San Antonio Express-News, on the employer's website and on www.hotjobs.yahoo.com, and the advertisement read on the radio station KTKR AM, did not include this travel requirement. (AF 12). The CO based his denial on 20 C.F.R. § 656.17(f)(7), which states that advertisements must "[n]ot contain wages or terms and conditions of employment which are less favorable than those offered to the alien." (AF 12-13).

On June 28, 2011, the Employer filed a Request for Reconsideration. (AF 2-10). The Employer argued that it did not violate 20 C.F.R. § 656.17(f)(7) because its advertisements did not list wages or terms and conditions of employment that exceeded those listed on the ETA Form 9089. (AF 2). The Employer argued that its "recruitment did not say travel **wasn't** required, it said nothing about travel whatsoever . . . . Silence cannot be inferred as saying there is no travel involved in the job." (AF 3) (emphasis in original). The Employer cited the Department of Labor's ("DOL") Frequently Asked Questions ("FAQs") which state that employers are not required to list every job duty in their advertisements. (AF 5). Alternatively, the Employer argued that it did not violate 20 C.F.R. § 656.17(f)(7) because travel has routinely been viewed by the DOL as a detriment, and therefore not listing a travel requirement makes the terms and conditions of employment offered to U.S. workers more favorable, not less favorable, than the terms and conditions of employment offered to the foreign worker. (AF 3).

On February 14, 2012, the CO denied reconsideration and forwarded the case to the Board of Alien Labor Certification Appeals ("BALCA") for administrative review. (AF 1-2). The CO affirmed his denial pursuant to 20 C.F.R. § 656.17(f)(7), maintaining that "[e]xclusion of travel from the advertisements could deter U.S. applicants seeking mobile employment." (AF 1).

On January 11, 2013, BALCA filed a Notice of Docketing, and on January 31, 2013, the Employer submitted its Response to the Notice of Docketing and its appellate brief ("Er. Br."). The Employer argued in its brief that Section 656.17(f)(7) states that advertisements may not "contain" terms and conditions less favorable than those offered to the alien, and therefore silence on the issue of travel does not violate the regulation. (Er. Br. 3). The Employer cited *Emma Willard School*, 2010-PER-01101 (Sept. 28, 2011) as an affirmation of this argument.

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

(Er. Br. 3-4). The Employer emphasized that not every term or condition of employment needs to be included in an employer's advertisements, citing to the DOL's FAQs.

On June 4, 2013, this Panel issued an Order Requiring Certification on Mootness. On June 13, 2013, in response to the Order, the Employer certified that the job identified in the application is still open and available on the same terms and that the alien identified in the application remains ready, willing, and able to fill the position.

DISCUSSION

An employer filing an application for permanent alien labor certification is required to conduct certain recruitment steps prior to filing its application. Advertisements placed as part of the recruitment process must meet certain content requirements as outlined in 20 C.F.R. § 656.17(f). For instance, the advertisements must "[n]ot 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). Additionally, advertisements must "indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity." 20 C.F.R. § 656.17(f)(4).

The following response to a Frequently Asked Question ("FAQ") on the Office of Foreign Labor Certification's website clarifies what geographic information needs to be included in advertisements:

> **Does the job location address need to be included in the advertisement?**
>
> No, the address does not need to be included. However, *advertisements must indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements* and where applicants will likely have to reside to perform the job opportunity. Employers are not required to specify the job site, unless the job site is unclear; for example, if applicants must respond to a location other than the job site (e.g., company headquarters in another state) or if the employer has multiple job sites.

OFLC Frequently Asked Questions and Answers, http://www.foreignlaborcert.doleta.gov /faqsanswers.cfm (last visited June 26, 2013) (emphasis added).

In the matter before us, the Employer's ETA Form 9089 states: "Occasional day travel within San Antonio Metropolitan area and/or to Corpus Christi, Texas. No Overnights." (AF 98). Despite this travel requirement listed on the ETA Form 9089, none of the Employer's recruitment materials, except for its Notice of Filing, mentioned any potential travel requirements. (AF 31, 39-52). This is a violation of Section 656.17(f)(4), which requires employers to include in their advertisements any travel requirements listed on the ETA Form 9089.

Unfortunately, the CO did not cite to Section 656.17(f)(4) as authority for his denial, and instead he unnecessarily complicated the matter by relying on Section 656.17(f)(7). Reliance on Section 656.17(f)(7) is flawed for several reasons. As pointed out by the Employer in its brief,

travel can be considered either a benefit or a burden depending on the individual applicant, and therefore not including travel as a term of employment does not necessarily make the position "less favorable." Additionally, the Employer persuasively argues that because it simply was silent as to any travel requirements, its advertisements did not "contain" a term or condition that was less favorable in violation of Section 656.17(f)(7). It is inexplicable to us why the CO would cite to Section 656.17(f)(7) where there is another subsection directly on point, and we note that this is not the first time the CO has cited to questionable, or patently incorrect, regulations when there is a more applicable and appropriate regulatory section to support his reason for denial. Such deficiencies by the CO defeat the PERM process' goals of efficiency and streamlining cases.

With that said, we do not find, in this specific case, the CO's failure to cite to Section 656.17(f)(4) entitles the Employer to certification where there was a clear violation of the regulations on the basis of the record before the CO. *See* 20 C.F.R. § 656.27(c). Although not every term and condition need be included in advertisements, it is clear through the regulations and FAQs that travel requirements *always* need to be included in advertisements. 20 C.F.R. § 656.17(f)(4). Section 656.17(f)(4) specifically requires employers to indicate "*any*" travel requirements, without qualification. There is no dispute that the Employer did not list its travel requirement on its various advertisements. Thus, the Employer is in violation of the regulations, and as such we must affirm the CO's denial of certification.

We acknowledge a potential due process concern due to the CO's reliance on Section 656.17(f)(7) instead of Section 656.17(f)(4) as the regulatory authority for his denial; however, considering the circumstances of this matter, we do not believe that affirming the denial would result in a violation of due process. Although the CO did not cite to Section 656.17(f)(4) as authority for denial, his factual basis for denial remains the same: the Employer failed to include its travel requirement listed on its ETA Form 9089 in its various recruitment materials. Thus, we find that the Employer was on notice of the reason for denial, despite the CO's improper reliance on subsection 7 instead of subsection 4 of Section 656.17(f).[2]

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court laid out the three factors to weigh in determining whether there is a violation of due process. The Court stated:

> due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Here, the private interest is the Employer's interest in seeking to sponsor an alien for permanent employment. The risk of an erroneous deprivation of this interest, and the value of additional

[2] In fact, the Employer implicitly acknowledges Section 656.17(f)(4) in its brief. The Employer listed out all of the subsections of Section 656.17(f), including subsection 4, and it conceded: "[the CO] could attempt to justify a denial using a different part of 656.17(f), although I would dispute that as well. In any event, he has not done so." *Id.* at 2, 4.

procedural safeguards, are nonexistent. The Employer concedes that the travel requirement was not listed in its advertisements; thus there is no evidence or argument that could be presented to the CO, if given the opportunity to do so, that would entitle the Employer to certification. The CO's failure to cite to the appropriate subsection of Section 656.17(f) did not prevent the Employer from obtaining a labor certification that should have been granted. *Kay Mays*, 2008-PER-00011, PDF at 6 (Aug. 27, 2008).

On the other hand, the Government's interest is substantial in this matter. Under the PERM regulations, we are limited to either affirming the denial of certification, or reversing the denial and granting certification; we do not have authority to remand the case. 20 C.F.R. § 656.27(c); ETA Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77363 (Dec. 27, 2004) ("we have concluded BALCA should not have authority to remand cases to the CO."). Thus, by reversing the CO's denial, we would be required to grant certification for a foreign worker despite a clear violation of the regulations, potentially preventing a qualified U.S. worker from obtaining the position. This is a serious consequence, as it defeats the primary intent of the Immigration and Nationality Act and the implementing PERM regulations. Accordingly, weighing the three factors set out in *Mathews v. Eldridge*, we find no violation of due process.

Because the record shows that the Employer's various advertisements did not include the phrase "Occasional day travel within San Antonio Metropolitan area and/or to Corpus Christi, Texas. No Overnights," that was listed on the ETA Form 9089, we affirm the denial of labor certification pursuant to 20 C.F.R. § 656.17(f)(4).

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED.**

For the Panel:

Digitally signed by Colleen Geraghty
DN: CN=Colleen Geraghty,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges, L=Boston,
S=MA, C=US
Location: Boston MA

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, MA

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.