

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 07 March 2014**

**BALCA Case No.: 2012-PER-00007**  
ETA Case No.: A-09093-37362

*In the Matter of:*

**WICHITA PARTNERSHIP LTD. DBA WICHITA RANCH,**  
*Employer*

*on behalf of*

**RODRIGUEZ, SIRENIA,**  
*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearances: Zhengyi Wu, Esquire  
Law Offices of Lhengyi Wu  
Houston, Texas  
*For the Employer*

Before: Johnson, Bergstrom, Krantz  
Administrative Law Judges

**DECISION AND ORDER**  
**VACATING 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.”).

**BACKGROUND**

On April 3, 2009, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Ranch Worker.” (AF 125-134)<sup>1</sup> On February 4, 2010, the CO sent Employer an Audit Notification Letter requesting

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

that Employer provide certain information, including a recruitment report, in accordance with 20 C.F.R. § 656.20. (AF 121-124) Employer responded on March 4, 2010. (AF 53-120) On August 16, 2010, the CO requested additional information. (AF 51-52) Employer responded on August 16, 2010 answering the specific questions asked by the CO in his letter. (AF 44-50) Employer sent more information on August 24, 2010. (AF 43-50) A denial letter was issued on November 16, 2010, citing Employer's failure to respond to the CO's letter requesting additional information. (AF 33-34) Employer requested reconsideration on November 22, 2010, attaching proof of mailing the additional information requested by the CO. (AF 17-32)

The CO again denied certification on April 19, 2011, stating that Employer rejected a U.S. applicant, Erin Mead, for the position on the basis of her lack of physical ability to perform the physical work required by the position and noting that no physical requirement had been listed in the ETA Form 9089. (AF 15-16) Employer requested reconsideration on May 6, 2011, stating that it had not hired Ms. Mead because she did not have the experience required by the ETA Form 9089 and supporting materials. (AF 3-14)

The CO forwarded the case to BALCA on September 28, 2011. BALCA issued a Notice of Docketing on January 10, 2012. The Employer filed a Statement of Intent to Proceed on January 23, 2012, but did not include an appellate brief. The CO did not file a statement of position.

## **DISCUSSION**

An important goal of the Immigration and Nationality Act is to prevent foreign workers from obtaining permanent employment in the United States unless there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work. *See* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.1(a)(1). Accordingly, when an employer files an application for permanent employment certification, it must certify that “[t]he job opportunity has been and is clearly open to any U.S. worker” and “the U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.” § 656.10(c)(8), (9). Furthermore, the PERM regulations require an employer to conduct mandatory recruitment steps in a good faith effort to recruit U.S. workers prior to filing an application for permanent alien labor certification. *See* § 656.17(e). The employer must also prepare a recruitment report stating the number of U.S. applicants rejected for the job and categorizing them by the lawful job-related reasons for their rejection. § 656.17(g)(1). The regulations state that “[r]ejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers.” § 656.17(g)(2).

20 CFR § 656.24(b)(2)(i) states that:

The Certifying Officer must consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly

employed. For the purposes of this paragraph (b)(2)(i), a U.S. worker is able and qualified for the job opportunity 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.

In its audit response, Employer included a statement of recruitment concerning Ms. Mead. (AF 104-106) Employer recorded that:

Applicant has experience working as an equine vet tech where there were only 3 stalls to maintain. She owns a couple of horses of her own at home. She has never worked on a large ranch caring for both horses and cattle. Applicant did not appear to be in the kind of physical shape required for this physical labor job which often has 40 horse stalls to maintain daily. Declined to hire this applicant.

Employer also included a recruitment report stating that “most of the job seekers showed no interest in working on the ranch. One job seeker was denied for not having any ranch worker experience.” (AF 77) The recruitment records submitted with the recruitment report reveal that the only job seeker remaining after contact with all job seekers was Ms. Mead and that Ms. Mead “has never worked on a large ranch.” (AF 81-104) The ETA Form 9089 listed an experience requirement of four months in the position of ranch worker. The job duties listed included “feed and water horses and cattle. Clean stalls. Check animals for illness and injuries.” (AF 127)

With certain exceptions not relevant here, BALCA conducts a de novo review of a CO’s determinations based on the evidence and argument before the CO when he made the decision to deny certification. *Albert Einstein Medical Center*, 2009-PER-379, slip op. at 30-32 (Nov. 21, 2011) (en banc). Per 20 C.F.R. § 656.17(i)(1), the job requirements described on the application must represent the employer’s actual minimum requirements and additional requirements cannot be the basis for a lawful job-related reason for rejecting a U.S. worker. Thus, this panel must determine whether Employer’s comments in its audit response regarding its rejection of Ms. Mead constituted an additional physical job requirement not listed on the ETA Form 9089, or were related to the uncontested four month experience requirement.

In this case, Ms. Mead does not have the requisite experience as listed in the ETA Form 9089. Employer explained in its audit response that Ms. Mead worked as an equine vet tech with only three stalls. Although the CO rejected the instant application on the basis of Employer’s reference to Ms. Mead’s physical ability, this comment was made in the larger context of discussing Ms. Mead’s inexperience with ranch work, explicitly stating that Ms. Mead had no experience working on a ranch with both horses and cattle. The employer showed Ms. Mead did not have the required skills for the position as listed on ETA Form 9089, and that its rejection was based on Ms. Mead’s lack of required experience. The CO cannot dismiss the employer’s stated requirements and substitute his judgment for the employer’s. *Concurrent Computer Corp.*, 1988-INA-00076 (Aug. 19, 1988) Here, the CO erred in the basis for denial of the application. Accordingly, we vacate the CO’s denial of certification.

**ORDER**

**IT IS ORDERED** that the denial of labor certification in this matter is hereby **VACATED** and remanded for processing.

For the Panel:

PAUL C. JOHNSON, JR.  
District Chief Administrative Law Judge

PCJ,JR/JRS/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.