



Issue Date: 18 February 2016

BALCA Case No.: 2012-PER-00847
ETA Case No.: A-10027-83635

In the Matter of:

GLOBAL TPA LLC,
Employer,

on behalf of

SHAH, KAUSHAL PRAKASHCHANDRA,
Alien.

Appearance: Dilip Patel, Esquire
Shutts & Bowen LLP
Tampa, Florida
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and
Larry S. Merck, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

PER CURIAM. This matter arises under the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the implementing regulations at 20 C.F.R. Part 656.

BACKGROUND

The Employer, Global TPA LLC, filed a labor certification application sponsoring the Alien for a position as a Project Manager. (AF 137-151).¹ On the Form 9089 application, the Employer described the job requirements as a Master's degree in Business Administration, Industrial Engineering or Health Care Administration. The Employer did not require experience in the job offered. In the required special skills section of the application, however, the Employer wrote:

¹ Citations to the appeal file are shown as "AF" followed by the page number.

4 years experience with project management; experience with personnel management; experience with PMO reporting structures; experience with project management tools; and experience with SQL, Oracle, Access, Excel, Microsoft Project and Visio.

(AF 139).

The Certifying Officer (“CO”) issued an audit notification. Included with the Employer’s audit response as documentation of its recruitment using the Employer’s website, the Employer presented a copy of a Project Manager job opening listed on the FreedomHealth website. (AF 79-91). One of the position requirements listed was “Masters degree in Industrial Engineering, 4-5 years work experience.” (AF 81). In the cover letter to the audit response, the Employer noted the following about this documentation:

*Please note Global TPA shares a website with its sister company, Freedom Health, Inc. Both Global TPA and Freedom Health are owned and controlled by Dr. Kiran C. Patel. A corporate structure chart illustrating the relationship between Freedom Health and Global TPA is attached as Exhibit 7. Global TPA and Freedom Health also operate from the same business premises located at 5403 Church Ave N., Tampa, FL (see Exhibit 8). Global TPA, LLC is a “behind the scenes” third-party administrator which performs all of the administrative functions for Freedom Health, Inc., a large Medicare and Medicaid manager in the State of Florida. Freedom Health, Inc. is a well-known healthcare management company with over 30,000 members and a significant web presence. As corporate counsel for both Global TPA and Freedom Health, I can confirm it is normal and customary for Global TPA to post all of its job advertisements at www.freedomh.com.

(AF 24).

The CO denied certification on three grounds: (1) that the advertisement on the Employer’s website did not contain the name of the Employer in violation of 20 C.F.R. § 656.10(c)(8) and 20 C.F.R. § 656.17(f)(1); (2) that the advertisement on the Employer’s website did not identify the job location in violation of 20 C.F.R. § 656.10(c)(8) and 20 C.F.R. § 656.17(f)(4); and (2) that the advertisement on the Employer’s website contained an experience requirement not listed on the Form 9089 in violation of 20 C.F.R. § 656.17(f)(6). (AF 20-22).

The Employer requested review of the denial. (AF 3-19). The Employer argued that 20 C.F.R. § 656.17(f) only applies to advertisements placed in newspapers of general circulation or in professional journals.

In regard to the Employer’s name, the Employer’s argued that it posted the job opportunity on the website of its sister company (its exclusive customer, with the same ownership and same address), and that the Employer being a “behind-the-scenes” third party administrator, would not be known to potential job applicants whereas the sister company is a

very well-known healthcare management company. Thus, the Employer maintained that it made a good faith effort to recruit workers, that the job was clearly open to U.S. workers, and that it had demonstrated a logical nexus between the advertisement on the sister website and the position for which labor certification was sought.

In regard to the location of the employment, the Employer argued that applicants could have just clicked the “contact us” link on its sister company’s website and learned the address. The Employer reiterated that the sister company and the Employer are at the same address.

In regard to experience requirement, the Employer argued that “[t]he language ‘4-5 years of experience’ clearly means ‘from 4 to 5 years of experience’ is acceptable. To suggest it could be interpreted to mean a potential applicant must have more than 4 but less than 5 years of experience would be silly. . . . Moreover, the language ‘4-5 years work experience’ is actually less restrictive than ‘4 years experience with project management’ and would attract a larger number of applicants because it is not qualified by the language ‘with project management.’” (AF 5).

The CO reconsidered, but found that the Section 656.17(f) content requirements and proscriptions apply to all advertisements placed for the recruitment efforts. (AF 1-2). In regard to the experience requirement issue, the CO wrote:

The denial notification states the recruitment conducted on the employer's Web site contains job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089. Specifically, the advertisement on the employer’s Web site requires “4-5 years work experience” and section H of the ETA Form 9089 requires “4 years of experience with project management.” In its request for reconsideration, the employer states requirement phrase “4-5 years work experience” could not have been interpreted to mean that more than four years of experience is required for the position. The employer also states the experience requirement in the advertisement was less restrictive than the requirements on the application and applicants with no project management experience would respond to the advertisement. However, the PERM process represented in the Department’s regulations at 20 § CFR 656 [sic] is structured to allow labor certification to be granted solely on the basis of the information contained in the ETA Form 9089. As such, the employer is required to present an application that is a complete and accurate picture of the employer’s job opportunity to ensure the integrity of the PERM process. The regulations specifically state that, “[i]f an employer wishes to include additional information about the job opportunity, such as minimum education and experience requirements or specific job duties, the employer may do so, provided these requirements also appear on the ETA Form 9089.” 69 Fed Reg at 77347. Additionally, in accordance with the Department’s regulations at 20 CFR § 656.17(i)(1), the job requirements must represent the employer’s actual minimum requirements for the job opportunity. The employer stated on the ETA Form 9089 the job opportunity requires four years experience in project management was required; however the advertisement required “4-5 years **work** experience” which under a plain meaning interpretation is a different level of

experience/qualification for the position. Since the job requirements listed in the advertisements exceed the job requirements listed on the ETA Form 9089 by stating the position requires “4-5 years work experience”, the Certifying Officer has determined this reason for denial as valid in accordance with the Department’s regulations at 20 CFR § 656.17(f)(6).

(AF 2).

Neither the Employer nor the CO filed appellate briefs.

DISCUSSION

In *Symantec Corp.*, 2011-PER-1856 (July 30, 2014) (en banc), the Board held that Section 656.17(f) does not regulate the content of the additional recruitment steps for applications involving professional occupations required under 20 C.F.R. § 656.17(e)(1)(ii). Accordingly, in the instant case in reviewing the Employer’s additional professional recruitment step of using its own website to advertise the occupation involved in the application, the CO erred in relying on the provisions of § 656.17(f) as grounds for denial of certification.

The CO also cited the regulation at 20 C.F.R. § 656.10(c)(8) in regard to the name of the employer and location of employment issues. Section 656.10(c)(8) requires that an employer attest that “[t]he job opportunity has been and is clearly open to any U.S. worker.” In this case, the Employer provided a reasonable explanation for why it chose to advertise the position on its sister company’s website, and why that choice would actually have been more likely to attract applications. The Employer also reasonably contended that the address for the position was a mere mouse click away. Based on the particular facts of this case, we find that the absence of the petitioning employer’s name and location of the job opportunity on the additional professional recruitment step did not cause the job not to be clearly open to U.S. workers.

In regard to the statement of the required experience on the website advertisement, the CO also relied on the regulation at 20 C.F.R. § 656.17(i)(1), which provides that “[t]he job requirements, as described, must represent the employer’s actual minimum requirements for the job opportunity.” The CO essentially reasoned that the regulations require an employer to identify its actual minimum requirements for the job opportunity on the Form 9089, and that an advertisement placed in support of the labor certification application that states requirements that exceed the requirements listed on the Form 9089 is violative of the regulations.

There is no evidence in this case, however, that the Employer failed to state its actual minimum requirements for the job opportunity on the Form 9089. And, the additional professional recruitment step of use of the employer’s website as a recruitment medium only requires a showing that the Employer advertised *the occupation involved in the application* rather than the particular job opportunity for which labor certification is sought. The Board made it clear in *Symantec* that the additional professional recruitment only requires documentation of recruitment for the occupation involved in the application, and not recruitment for the particular job opportunity at issue. Thus, the fact that the Employer’s website posting stated that the job required 4 to 5 years of experience, as opposed to the 4 years of experience

reported on the Form 9089 has not been shown to violate the regulations cited by the CO in his denial letter.²

ORDER

IT IS ORDERED that the Certifying Officer's denial of labor certification in the above-captioned matter is **VACATED** and that the CO is **DIRECTED** under 20 C.F.R. § 656.27(c)(2) to **GRANT CERTIFICATION**.

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.

² We note that the CO did not cite § 656.10(c)(8) as a ground for denial in regard to the discrepancy between the website posting and the Form 9089 in regard to the experience required, and therefore we voice no opinion on whether the Employer's website posting may have been in conflict with § 656.10(c)(8).