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BALCA Case No.: 2015-TLN-00036; 2015-TLN-00037
ETA Case No.: H-400-15020-523461; H-400-15020-184492

In the Matters of:

PERSONA, INC.,
Employer.

Appearances: Heleen Van Tonder (lay representative)
Golden Opportunities International, LLC
McGregor, Iowa
For the Employer

Gary M. Buff, Associate Solicitor
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Office of the Solicitor of Labor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **JONATHAN C. CALIANOS**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIALS OF CERTIFICATION

These cases arise from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of the denials by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA") of its applications for H-2B temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20 C.F.R. Part 655, Subpart A (2009). The above-captioned cases have been consolidated because they present common issues of fact and law. For the reasons set forth below, the CO's denials of temporary labor certification in these matters are affirmed.

STATEMENT OF THE CASE

On January 20, 2015, Persona, Inc. (“Employer”) filed two applications for H-2B temporary labor certification with the Employment and Training Administration (“ETA”), one application requesting two foreign workers for a painter position, and the other application requesting three foreign workers for a welder position, for employment from March 17, 2015 to October 30, 2015, based on a temporary peak-load need. (AF-37 at 118; AF-36 at 117).¹

The Employer submitted recruitment reports with its applications. For the painter position, the Employer stated that it received two referrals – Jaylen Traversie and Karen Liebl – in response to its recruitment efforts, neither of who met the minimum qualifications of basic mathematical and reading skills for the position. (AF-37 at 139). The Employer also stated that Jaylen Traversie had an “unstable job history.” (AF-37 at 139). For the welder position, the Employer stated that it received one referral, Michele Bolocon, who did not possess the required basic mathematical and reading skills. (AF-36 at 138).

On January 27, 2015, the CO issued a Request for Further Information (“RFI”) in both cases, and one of the deficiencies identified by the CO was that the Employer’s recruitment reports did not satisfy the regulatory requirements set forth at 20 C.F.R. § 655.15(j)(2)(iii) because the Employer did not adequately explain the lawful job-related reasons for not hiring U.S. workers who applied or were referred to the position. (AF-36 at 109; 114; AF-37 at 111; 115). To overcome the deficiency, the CO required the Employer to provide an explanation detailing how it determined that the applicants did not possess the required basic math and reading skills for the position. (AF-36 at 114; AF-37 at 116).

On February 3, 2015, the Employer responded to the RFIs, attaching amended recruitment reports. (AF-37 at 94; AF-36 at 87). For the painter position, the Employer explained that the two applicants, Jaylen Traversie and Karen Liebl, did not possess the required basic mathematical and reading skills based on their scores on the Thurstone Test of Mental Alertness (“Thurstone Test”). (AF-37 at 96). The Employer also stated that Jaylen Traversie had an unstable job history, and Karen Liebl did not want to work the overnight shift required for the position. (AF-37 at 96). For the welder position, the Employer explained that it had received three referrals, Michele Bolocon, Jacob Vortherms, and Corey Jensen, who it attempted to

¹ The appeal file for Case Number 2015-TLN-00036 will be cited as “AF-36” followed by the page number; similarly, the appeal file for Case Number 2015-TLN-00037 will be cited as “AF-37” followed by the page number.

contact to schedule interviews, but had been unable to reach. (AF-36 at 89).

The Employer also submitted in response to the RFIs, a letter from its HR Manager, Amber Dahl, dated February 2, 2015, which stated in relevant part:

As part of the application process, we require an applicant to complete an application for employment along with taking a Thurstone Test of Mental Alertness. By utilizing this test, we are able to assess whether a candidate is alert to language and math – specifically whether they are able to process basic mathematical problems and/or demonstrate his/her ability to read and process the English language fluently enough to understand and process tasks in each area of our business. In regards to production roles (i.e. Welder, Painter and General Helper), we have identified a minimum level of alertness for an employee to succeed in his/her role. By utilizing this tool with every applicant, we are fair and consistent in our expectations of math and language skill.

(AF-37 at 110; AF-36 at 107).

On February 20 & 23, 2015, the CO issued second RFIs in both cases, identifying a new deficiency, namely that the Employer failed to comply with 20 C.F.R. § 655.22(a), which requires employers to offer terms and conditions normal to U.S. workers similarly employed in the area of intended employment. (AF-37 at 90, 92; AF-36 at 85). The CO found that the Employer's responses to the first RFIs failed to explain how, or if, the Thurstone Test, "is going to be administered to foreign workers, if the test is applied equally to U.S. workers as well as foreign workers, or how the employer determines whether or not an applicant has passed." (AF-37 at 92; AF-36 at 83; 85). The CO found that the Employer also did not provide evidence that the U.S. applicants for the positions did not possess basic mathematical and reading skills, "as it has not adequately established that the [Thurstone Test] is a condition that is normal to the occupation." (AF-37 at 92; AF-36 at 85).

To remedy the deficiency, the CO directed the Employer to provide the following evidence:

1. Documentation showing that the [Thurstone Test], or any equivalent test, is a normal and accepted qualification consistent with normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations;
2. Whether/how the test is applied equally to US workers and foreign workers;
3. A complete (blank) copy of the [Thurstone Test] that the employer is administering;

4. How the employer determines what a passing score is;
5. The objective standards that the employer uses for determining whether an applicant has “passed” or “failed” the [Thurstone Test];
6. A copy of the actual test that was taken (completed) by [U.S. applicants];
7. A copy of the [Thurstone Test] with a list of the answers which the applicant “failed;” and
8. Written permission to include “basic mathematical and reading skills required” to Section F.b. Item 5. of the ETA Form 9142.

(AF-36 at 86; AF-37 at 93).²

The Employer responded to the second RFIs on February 24, 2015. (AF-37 at 69; AF-36 at 68). The Employer provided a copy of the Thurstone Test and the actual tests taken by Jaylen Traversie and Karen Liebl.³ (AF-37 at 73-89; AF-36 at 72-82). The Employer also submitted a letter from Amber Dahl dated February 24, 2015, explaining that the Thurstone Test is required from all candidates (U.S. and foreign workers). (AF-37 at 71; AF-36 at 70). Ms. Dahl stated “for consistency purposes, our company has established [Thurstone Test] score minimums for three levels of positions (Production, Support Staff and Engineering/Management)” and for the Production position (including welders and painters), the Employer requires a minimum math score of 29 and a total composite score (percentile rank) of 30. (AF-37 at 71; AF-36 at 70). For the painter position, Ms. Dahl stated Jaylen Traversie did not pass the total composite score, and Karen Liebl did not meet either the minimum math score or total composite score. (AF-37 at 71). For the welder position, Ms. Dahl stated that its original statement that Michele Bolocon was rejected for not having the basic mathematical and reading skills was in error, and in fact she did meet the requirements for the Thurstone Test, but accepted another position with a different company. (AF-36 at 70).

On February 27, 2015, the CO issued a Final Determination denying certification for both applications. (AF-37 at 64; AF-36 at 62). The CO stated that although the Employer explained how it personally determines whether or not applicants are qualified for its job opportunity, its

² For the painter position, the CO did not include requests 2 & 4. (AF-37 at 93).

³ The Employer stated that it did not retain the actual test results for Michele Bolocon. (AF-36 at 70).

response “does not satisfy the regulation, as the employer has not established that the method for which it determines whether or not applicants have basic mathematical and reading skills is a normal term and condition of employment for U.S. workers similarly employed in the area of intended employment.” (AF-37 at 68; AF-36 at 66). The CO also found that the Employer did not provide evidence “that meeting a minimum math score of 29 and a total composite score of 30 on the [Thurstone Test], is a score that is commonly accepted by other employers in the area of intended employment that also require U.S. workers to have ‘basic mathematical and reading skills’”; nor did the Employer provide documentation “that the Thurstone Test, or any equivalent test, is a normal and accepted qualification consistent with normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.” (AF-37 at 68; AF-36 at 66).⁴

On March 9, 2015, the Employer requested administrative review of the denials before BALCA. (AF-37 at 1; AF-36 at 1). For the painter position, the Employer stated that the Thurstone Test is just part of the consideration of an applicant. (AF-37 at 8). The Employer stated that Karen Liebl was not interested in working the required night shift and Jaylen Traversie had no experience in painting and had attendance issues with his previous employer. (AF-37 at 8). For the welder position, the Employer wrote that its statement in its original recruitment report that Michele Bolocon did not meet its requirements for the position was inaccurate, and that by the time of the second RFI response, Michele Bolocon had informed the Employer that she had accepted another position. (AF-36 at 8). Both requests for review emphasized the high demand for welders and painters in South Dakota. (AF-36 at 8-9; AF-37 at 7-8).

On March 25, 2015, I issued a Notice of Docketing and on April 1, 2015, both parties filed appellate briefs. The Employer reiterated arguments previously made in its request for reconsideration and stated that the Thurstone Test is a standard tool used in many different industries. The CO argued that the Employer failed to provide any documentation to establish that requiring applicants to take and pass the Thurstone Test is consistent with the normal and accepted qualifications by non-H-2B employers in the same or comparable occupations as

⁴ For the welder position, the CO also denied the application because the Employer failed to submit a complete and accurate recruitment report pursuant to 20 C.F.R. § 655.20(a) & § 655.15(j), due to its changing explanations of why applicant Michele Bolocon was not hired for the position. (AF-36 at 66-67). However, because I affirm the denial based on a violation of 20 C.F.R. § 655.22, I need not address this additional denial reason in any detail.

required by the regulations, and therefore the denials of certification should be affirmed.

DISCUSSION

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. *See D and R Supply*, 2013-TLN-00029, PDF at 6 (Feb. 22, 2013) (*citing* 8 U.S.C. § 1361). The Employer must offer “terms and working conditions normal to U.S. workers similarly employed in the area of intended employment, meaning that [the terms and conditions of employment] may not be unusual for workers performing the same activity in the area of intended employment” 20 C.F.R. § 655.22(a). The qualifications for the job opportunity must be “consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.” 20 C.F.R. § 655.22(h).⁵

In determining whether an employer’s qualifications are normal and accepted, it is appropriate to take official notice of, and defer to, the experience requirements listed in the O*Net database.⁶ *Weeks Landscaping Management d/b/a Manders Maintenance*, 2012-TLN-00016 (Feb. 21, 2012); *Golden Construction Services, Inc.*, 2013-TLN-00030, PDF at 8-9 (Feb. 26, 2013). Upon review of the O*Net Summary Report for code 51-0123.00 (Painting, Coating, and Decorating Workers), basic mathematics and reading skills are not required, and in fact no skills are required for the occupation.⁷ However, such skills are typically required for code 51-4121 (Welders, Cutters, Solderers, and Brazers).⁸ Even if basic mathematics and reading skills

⁵ The CO only cited to section 655.22(a) in denying the Employer’s application, although section 655.22(h) is more applicable to the facts at hand, as passing the Thurstone Test is a qualification for employment, rather than a term and condition of employment. Although generally BALCA’s review of a CO’s denial is limited to the ground cited by the CO, where the CO gave the employer adequate notice of the issues, failure to cite the precise regulation does not prevent BALCA review of the issue. *Jourose, LLC d/b/a/ Tong Thai Cuisine*, 2011-TLN-00030 (June 15, 2012). Even though section 655.22(h) was not cited by the CO until his appellate brief, the Employer had sufficient notice that the CO’s basis for denial was that its requirement that applicants take and pass the Thurstone Test was not a normal and accepted qualification for the occupation.

⁶ O*Net is a comprehensive database developed by the U.S. Department of Labor, Employment and Training Administration, containing information on hundreds of standardized and occupation-specific descriptors and is the country’s primary source of occupational information.

⁷ *See* O*Net Online, Summary Report for: 51-0123.00 – Painting, Coating and Decorating Workers, <http://www.onetonline.org/link/summary/51-9123.00> (last visited April 2, 2015).

⁸ *See* O*Net Online, Summary Report for: 51-4121.06 - Welders, Cutters, and Welder Fitters, <http://www.onetonline.org/link/summary/51-4121.06> (last visited April 2, 2015).

are normal and accepted for these occupations, the Employer has not established that requiring an applicant to take and pass the Thurstone Test, or equivalent test, to establish such mathematics and language skills is normal and accepted for the same or comparable occupations.

The Employer stated that applicants are required to take the Thurstone Test so that the Employer can “assess whether a candidate is alert to language and math – specifically whether they are able to process basic mathematical problems and/or demonstrate his/her ability to read and process the English language fluently enough to understand and process tasks in each area of our business.” (AF-37 at 110; AF-36 at 107). The Employer stated that the test is a “tool to aid us as the employer to whether the applicant has the capacity to master the job requirements.” (AF-37 at 8, 71). The Employer’s brief states that “the Employer is simply trying to hire better qualified candidates.” (Er. Br. 2).

The Employer’s stated reasons for using the test represents its own preference to ensure applicants possess mathematics and language skills required for the job. However, an employer’s own preference is insufficient under section 655.22. *See S&B Construction, LLC*, 2012-TLN-00046 (Sept. 19, 2012). “The standard is not ‘based on an employer’s specific needs or preferences,’ but rather, what is ‘normal and accepted by non-H-2B employers in the same or comparable occupations.’” *MS Drywall and Paint Co.*, 2015-TLN-00018, PDF at 6 (Feb. 10, 2015) (*citing Massey Masonry*, 2012-TLN-00038 (June 22, 2012)). The Employer did not provide any evidence that passing the Thurstone Test is normal and accepted for the same or comparable occupation.

The CO required in its RFIs, evidence showing that the Thurston Test, or any equivalent test, “is normal and accepted qualification consistent with normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.” (AF-36 at 86; AF-37 at 93). A failure to comply with an RFI, including not providing all documentation requested, can lead to a denial of an application. 20 C.F.R. § 655.23(d). The Employer never provided any evidence that the required Thurston Test, or any equivalent test, was normal and accepted qualification in the same or comparable occupations, as required by the RFIs.⁹ For the first time in its appellate brief, the Employer wrote the Thurstone Test “is a standard tool used in many

⁹ Furthermore, the Employer has not established that the minimum passing scores it uses are commonly accepted by other employers in the area of intended employment requiring basic mathematical and reading skills. In fact, it appears that the Employer chose its own passing scores for the Thurston Test without references to a generally accepted standard or norm. (AF-37 at 71; AF-36 at 70).

different industries.”¹⁰ However, a bare assertion without supporting evidence is insufficient for an employer to meet its burden of proof. *See John Gosney*, 2012-TLC-00009 (Dec. 30, 2011) (*citing Carlos Uy III*, 1997-INA-00304 (Mar. 3, 1999) (en banc)).

Based on the foregoing, we find the Employer failed to establish that the qualifications for the painter and welder positions, specifically the taking and passing of the Thurstone Test to establish basic mathematics and reading skills, are “normal and accepted” in the same or comparable occupations as required by 20 C.F.R. § 655.22(h). We therefore affirm the CO’s denials of certification.

ORDER

It is hereby **ORDERED** that the Certifying Officer’s denials of the Employer’s Applications for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

For the Board:

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts

¹⁰ To the extent that the Employer submitted new evidence not previously submitted with its request for review and with its appellate brief, such evidence is barred from my consideration under the regulations. 20 C.F.R. § 655.33(a)(5) (requests for review may “contain only legal argument and such evidence as was actually submitted to the CO in support of the application”); 20 C.F.R. § 655.33(e) (“BALCA must review a denial of temporary labor certification only on the basis of the Appeal File, the request for review, and any legal briefs submitted.”).