

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 09 February 2011

BALCA No.: 2010-PER-00006
ETA No.: A-07215-63103

In the Matter of:

UNICA CORPORATION,
Employer,

on behalf of

CHANDRASEKAR KRISHAN,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Ellen Davey-Fleming, Esquire
Costa & Riccio, LLP
Boston, MA
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: Malamphy, Sarno, 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), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).

BACKGROUND

On August 8, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Senior Software Engineer.” (AF 86-104).¹ Because the application was for a professional position, the Employer listed three additional types of recruitment, including listing the job on a job search website, advertising with an employee referral program, and listing the job with a private employment firm. (AF 90). On October 5, 2007, the CO issued an Audit Notification. (AF 84-85). In the Audit Notification, among other documentation, the CO required the Employer to submit documentation of all of the additional recruitment steps that the Employer undertook to advertise the position. (AF 84).

On October 19, 2007, the Employer responded to the Audit Notification, attaching: a copy of the ETA Form 9089; a letter from the company’s human resources manager addressing the business necessity of the employer’s stated minimum requirements; a copy of the position available notice posted on the job premises from May 21, 2007 to June 1, 2007; a recruitment report; a copy of the prevailing wage determination; a copy of tearsheets showing ads from The Boston Globe from June 3, 2007 and June 10, 2007; a copy of the posting with the Massachusetts Job Bank from May 17, 2007 to June 18, 2007; a copy of the posting with America’s Job Bank from June 6, 2007 to June 20, 2007; a copy of the corporation’s employee referral program; and a list of recruitment agencies the corporation contracts with, including background information printed from the webpages of each of the agencies. (AF 26-83).

The CO denied certification on February 11, 2008. (AF 21-25). The CO stated that the reason for denial was that the Employer had failed to provide adequate documentation of the additional recruitment steps for professional occupations as requested in the audit notification

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

letter. (AF 24). The CO stated that although the Employer indicated that it used private employment firms to advertise the position, the Employer failed to provide documentation sufficient to demonstrate that recruitment had been conducted for the job. (AF 24). The CO also gave as a reason for denial that the Employer had not adequately documented the business necessity requiring the stated minimum requirements of the job to exceed the SVP level assigned by O*NET. (AF 23).

On February 29, 2008, the Employer submitted a request for review. (AF 3-19). The Employer stated previously submitted evidence was sufficient to show business necessity for the minimum requirements of the job. (AF 4). Regarding the adequate documentation for the recruitment steps taken, the Employer argued the already submitted evidence was sufficient. The Employer further submitted additional evidence, including documentation of fee agreements with three private employment firms and an affidavit from the company's human resources director stating that separate contracts were not entered into for software engineer positions but that the standard fee agreement applied and the search was continuous and ongoing. (AF 3-19).

On September 25, 2009, the CO again denied the Employer's application, stating that the Employer failed to provide documentation sufficient to support that the firms conducted recruitment efforts for the position of software engineer or the timeliness of the recruitment effort. (AF 1). The CO accepted the employer's information concerning business necessity. (AF 1).

The CO forwarded the case to BALCA on September 25, 2009, and BALCA issued a Notice of Docketing on October 8, 2009. The Employer filed a Statement of Intent to Proceed on October 15, 2009 and filed an appellate brief on November 18, 2009. The Employer argued the previously submitted fee agreements with the private recruitment companies and the affidavit from the company's human resources manager showed a long-standing relationship for recruitment services. The Employer further observed that one of the recruitment agencies noted on its webpage that it provided recruitment services for software engineering positions and the company's fee agreement with another listed placement fees for software architects, a position within the same O*NET classification. The Employer also submitted a letter from one of the

recruitment services. The CO filed a Statement of Position on November 23, 2009, contending that the Employer did not sufficiently document its recruitment step as required by 20 C.F.R. § 656.17(e)(ii)(F). The CO states that the provided documentation is not sufficient to show that domestic workers were given the opportunity to apply for the position or that any recruitment done was done in a timely manner.

DISCUSSION

Under 20 C.F.R. § 656.17(e)(1)(ii)(F), one of the additional recruitment steps an employer can utilize to advertise a professional occupation is to use private employment firms or placement agency for recruitment. For an employer that uses this method, documentation can be “by providing documentation sufficient to demonstrate that recruitment has been conducted by a private firm for the occupation for which certification is sought.” The regulation gives as an example of documentation “copies of contracts between the employer and the private employment firm and copies of advertisements placed by the private employment firm for the occupation involved in the application.” 20 C.F.R. § 656.17(e)(1)(ii)(F). The recruitment may not have taken place more than 180 days prior to filing the application. 20 C.F.R. § 656.17(e)(1)(ii). The regulations provide that a substantial failure by the employer to provide the documentation required by the audit will result in the application for permanent labor certification being denied. 20 C.F.R. § 656.20(b).

The regulation at 20 C.F.R. § 656.24(g)(2) limits the type of documentation that can be included in the request for reconsideration to:

- (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
- (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of §656.10(f).

Further, the PERM regulations restrict BALCA’s review of a denial of labor certification to evidence that was part of the record upon which the CO’s decision was made. *See* 20 C.F.R.

§§ 656.26(a)(4)(i) and 656.27(c). Since the Employer submitted additional evidence on November 18, 2009 in the form of a letter from a recruitment company, this documentation constitutes new evidence not in the record on which the denial was based, and therefore cannot be considered by the Board.² The Employer has not made any argument that this documentation existed at the time the application was filed but that it did not have an opportunity to present it to the CO.

Based on the record upon which the denial of labor certification was based, the CO properly denied certification. The Employer's audit response did not provide sufficient documentation of the Employer's request that any of the employment agencies recruit for the position of software engineer, that the employment agencies actually solicited for the position, or that any solicitation that occurred during the time period indicated by the Employer's Form 9089. Although the description for Technical Futures, Inc. states that it provides recruitment services for software engineers, there is no evidence it actually provided those services for the Employer. Similarly, although the fee agreement entered into with Unica on February 25, 2005 includes a provision for placement fees to be provided for software architect positions, there is no evidence the agency actually recruited for software engineers for the Employer or that that recruitment occurred within 180 days of the filing the labor application. The Employer substantially failed to comply with the regulations by failing to provide adequate documentation that it used a private employment agency to advertise the position in the labor application.

Based on the foregoing, we affirm the CO's denial of labor certification.

² We make no determination regarding whether the Employer's submission of the October 14, 2009 letter signed by the president of the recruitment agency and confirming a list of positions, including senior software engineers, that the agency actively recruited for between February 2000 and September 2008 constitutes adequate documentation of this additional recruitment step.

ORDER

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

For the panel:

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/AMC/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.