

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 January 2011

BALCA Case No.: 2010-PER-00245
ETA Case No.: A-07200-58269

In the Matter of:

ALUM-A-LIFT, INC.,
Employer,

on behalf of

FNU (FIRST NAME UNKNOWN) WILLIAM,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Jeff Z. Xie, Esquire
Norcross, Georgia
For the Employer

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Johnson, Rae and Vittone**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

PER CURIAM. 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.

BACKGROUND

On July 24, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Production Planning/Scheduling Manager.” (AF 123-134).¹ The Employer indicated that the wage offered to the Alien was \$67,000 per year and that a Master’s degree in Industrial Engineering was required and that six months of experience in an alternate occupation was acceptable. (AF 124-125).

On September 27, 2007, the CO issued an Audit Notification, requesting, among other documentation, a copy of the Employer’s Notice of Filing (“NOF”). (AF 119-121). Additionally, the CO required the Employer to submit proof of business necessity as outlined by § 656.17(h) if the job duties and/or requirements of the position are beyond those defined for the job by the SOC/O*Net code and Occupation Title provided by the State Workforce Agency (“SWA”). (AF 119).

The Employer responded to the Audit Notification on October 9, 2007, submitting, among other documentation, a copy of its NOF. (AF 41-117). The Employer’s NOF listed the salary for the position as \$66,435 per year. (AF 94).

The CO denied the Employer’s application for permanent labor certification on December 19, 2008. (AF 38-39). In stating the grounds for denial, the CO found that

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

that the Employer's NOF contained a wage that was less than the wage offered to the Alien in violation of 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(7). (AF 39). Additionally, the CO found that the Employer's stated minimum requirements exceed the Specific Vocational Preparation ("SVP") level assigned by O*NET to the occupation, and the Employer did not adequately document that its experience requirements of a Master's degree and six months of experience arise from business necessity. (AF 39).

On January 13, 2009, the Employer requested review of the denial, arguing that at the time the Employer filed its application, the guidance provided by the Office of Foreign Labor Certification ("OFLC") created the impression that the NOF need not contain the wage offered to the Alien and only needed to include the prevailing wage determination ("PWD"). (AF 1-36). Additionally, the Employer argued that the CO did not adequately notify the Employer that it needed to submit proof of business necessity, because the CO did not specifically request proof of business necessity in the usual manner. (AF 4-5).

The CO forwarded the case to BALCA, and BALCA issued a Notice of Docketing on February 17, 2010. The Employer filed a Statement of Intent to Proceed, but did not file an appellate brief. The CO filed a Statement of Position on April 7, 2010, asserting that the CO properly denied certification because the NOF contained a wage lower than the offered wage.²

DISCUSSION

The regulations require that an employer filing an application for permanent labor certification must provide notice to the employer's employees at the facility or location of employment. 20 C.F.R. § 656.10(d)(ii). Additionally, the regulations require that the Notice of Filing must contain the information required for advertisements in newspapers

² The CO did not brief the issue of business necessity, and therefore we assume that the issue is not before us on appeal.

of general circulation or in professional journals by § 656.17(f). 20 C.F.R. § 656.10(d)(4). The regulation at § 656.17(f)(7) requires that advertisement must not contain wages or terms and conditions of employment that are less favorable than those offered to the alien. Thus, the Notice of Filing must contain the wage offered to the Alien if the offered wage is more than the PWD. 20 C.F.R. § 656.17(f)(7); *Thomas L. Brown Associates, P.C.*, 2009-PER-347 (Sept. 1, 2009).

While the Employer argues that the OFLC's responses to Frequently Asked Questions ("FAQ") create the impression that the NOF need only include the PWD, a thorough review of the OFLC's responses to reveals no contradiction between the regulatory requirements and the guidance provided to the public in the FAQ responses.

Based on the foregoing, we find that the CO's denial of permanent labor certification was appropriate because the Employer's NOF contains a wage less than that offered to the Alien in violation of 20 C.F.R. §§ 656.10(d)(4) and 656.17(f)(7).

ORDER

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

Entered at the direction of the panel by:

A

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 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.