U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 March 2011

BALCA No.: **2010-PER-00236**
ETA No.: A-07171-48431

In the Matter of:

CCG METAMEDIA, INC.,

Employer,

on behalf of

NICOLA LANDUCCI,

Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Allen E. Kaye, Esquire
New York, New York
For the Employer

Gary M. Buff, Associate Solicitor
Heather A. Vitale, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson and Rae**
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 ("C.F.R.").

BACKGROUND

On August 31, 2007, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Technical Design Director." (AF 135-152).[1]

On October 19, 2007, the CO issued an Audit Notification, directing the Employer to submit evidence of recruitment. (AF 133-134). On November 19, 2007, the Employer submitted the requested documentation.[2] (AF 78-132).

The CO denied certification on October 26, 2009, citing several grounds for denial, three of which remain at issue on appeal. (AF 57-59). These remaining reasons are grounded in the fact that the Employer's advertisements placed in the newspaper of general circulation, a local newspaper, and on the Employer's website, contain job requirements in excess of those listed on the Employer's application. Specifically, these advertisements state that the job opportunity requires 2-4 years of experience, whereas ETA Form 9089 states that the job opportunity requires 2 years of experience.

On November 24, 2009, the Employer submitted a Request for Reconsideration. (AF 1-56). The Employer asserted that the 2-4 years experience requirement indicated in its advertisements is accurate, but that Form ETA 9089 does not provide for an experience requirement other than a whole number, thus it could not indicate this

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

[2] The CO issued an additional audit on September 4, 2009, requesting a notarized affidavit explaining the nature of the payment the Employer received for submission of the application. The Employer complied with this request, thus it is not an issue on appeal.

requirement on its application. (AF 1-2). The Employer cited to *Federal Insurance Co*., 2008-PER-00037 (Feb. 20, 2009), which considered whether an application should be denied because the Employer did not affirmatively write the *Kellogg* language on its application. Comparing its case to this decision, the Employer quoted the Board's decision in *Federal Insurance*: "Because the existing Form 9089 does not reasonably accommodate an employer's ability to express this attestation, we hold that it would offend fundamental due process to deny an application for failure to write the attestation on the Form 9089." Slip op. 3. The Employer asserted that its case is similar in that Form 9089 does not reasonably accommodate its ability to express the attestation of 2-4 years minimum experience required. (AF 2).

On January 19, 2010, the CO issued a letter of reconsideration, finding that the Employer's advertisements placed in the newspaper of general circulation, a local newspaper, and on the Employer's website contain job requirements in excess of those listed on the Employer's application. The CO asserted that per 20 C.F.R. § 656.17(i)(1), the job requirements must represent the employer's actual minimum requirements for the job opportunity.

BALCA issued a Notice of Docketing on February 17, 2010. On February 22, 2009, the Employer filed a Statement of Intent to Proceed.[3] The CO filed a Statement of Position on April 5, 2010, contending that the Employer's advertisements contain job requirements in excess of those listed on the Employer's application. The CO asserted, "Stating that the job requires '2-4' years experience in the recruiting materials, rather than 2 years of experience as stated in the Employer's application, is against the permanent labor certifications regulations' goals of the job advertisements." He argued that the Employer's 2-4 years experience requirement communicates the preference that the job applicant have more than two years of experience, and that the Board has held that "employer preferences are actually job requirements." *The Frenchway Inc.*, 2005-INA-451, slip op. at 4 (Dec. 8, 1997). Responding to the Employer's argument that the application did not provide a place for it to list its requirement of 2-4 years, the CO

[3] In this statement, the Employer indicated that it would first like the case to be sent to the CO for his consideration, as it stated in its Request for Reconsideration, and if that is denied then to proceed with the appeal. Since the Appeal File includes a Letter of Reconsideration from the CO, this request is moot.

contended the instant case is not about shortcomings in the ETA Form 9089. Instead, he argued that in this case, "the Employer used wording [in] its advertisements that may have discouraged applications from U.S. workers who meet the minimum requirements of the job opportunity, and therefore the Employer conducted an inadequate test of the labor market."

DISCUSSION

The CO may only certify permanent labor applications if there are not sufficient United States workers who are able, willing, qualified, and available at the time of the application. *See* 20 C.F.R. § 656.1(a)(1). Accordingly, an employer has the duty to actively recruit U.S. workers in good faith prior to filing an application for permanent labor certification. *See* Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326 (Dec. 27, 2004). Additionally, the Immigration and Nationality Act ("INA") requires that an employer must hire any minimally qualified U.S. worker. *See* 8 U.S.C. § 1182(a)(5)(A)(i)(I); *see also V/H Electrical General Maintenance*, 2002-INA-215 (Sept. 30, 2003); *Coventry Place*, 1995-INA-319 (Feb. 6, 1997); *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991); *AmericanCafé*, 1990-INA-26 (Jan. 24, 1991); *RichcoManagement*, 1988-INA-509 (Nov. 21, 1989); *Microbilt Corp.*, 1987-INA-635 (Jan. 12, 1988).

In order to ensure that an employer conduct an adequate test of the labor market and document that no qualified U.S. workers are available for the job opportunity in the application, employers must conduct certain mandatory, and in the case of professional positions, additional recruitment steps prior to filing an application. 69 Fed. Reg. at 77347. One such mandatory recruitment step is to place advertisements in newspapers of general circulation. 20 C.F.R. § 656.17(e)(1)(i). The PERM regulations require that a newspaper advertisement must "[n]ot contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089." 20 C.F.R. § 656.17(f)(6). On the Form 9089, the employer must indicate its actual minimum requirements for the job opportunity. 20 C.F.R. § 656.17(i)(1).

Because the PERM application consists of a single form, it is fundamental to the permanent labor certification process that an employer's application contain all of the job requirements and conditions of the job opportunity. In order to streamline the labor certification process, the drafters created a system that may grant labor certification solely on the basis of information contained in the application. 69 Fed. Reg. at 77327-328; *see also HealthAmerica*, 2006-PER-1 (July 18, 2006)(en banc). Ensuring that an employer's application is a complete and accurate picture of an employer's job opportunity is essential to maintaining the integrity of the PERM process.

In the instant case, the Employer's advertisements placed in a newspaper of general circulation, a local newspaper, and on the Employer's website, state that the job opportunity requires 2-4 years of experience, whereas the ETA Form 9089 states that the job opportunity requires 2 years of experience. (AF 137). As the CO stated, this experience requirement communicates the preference that the job applicant have more than two years of experience, and as the Board has held, "employer preferences are actually job requirements." *The Frenchway Inc.*, 2005-INA-451, slip op. at 4 (Dec. 8, 1997).[4] Stating a range of experience in the recruiting materials that goes above the minimum experience requirements stated in the application inflates the job requirements in the job advertisements, and does not accurately reflect the Employer's attestations on the ETA Form 9089. Moreover, it is in violation of the regulations.

In the Employer's Request for Reconsideration, it asserted that the 2-4 years experience requirement indicated in its advertisements is accurate, but that Form ETA 9089 does not provide for an experience requirement other than a whole number, thus it could not indicate this requirement on its application. (AF 1-2). Citing to *Federal Insurance Co.*, the Employer contended that because the existing Form 9089 did not accommodate its ability to express the attestation of 2-4 years minimum experience, it would offend fundamental due process to deny an application for failure to write the attestation on the Form 9089. The issue in this case is not about the ETA Form 9089 and

[4] Although this case relied on 20 C.F.R. § 656.21(b)(2)(iv), a pre-PERM regulation not retained in the PERM regulations that provided that an employer's "preference" was deemed to be a job requirement, we find that this principle is implicit in the requirement that the position be clearly open to U.S. workers. *See* 20 C.F.R. § 656.10(c)(8).

Federal Insurance Co. is not applicable.[5] The issue in this case is whether the Employer listed requirements in its advertisements that exceed its minimum requirements, thereby discouraging minimally qualified U.S. applicants from applying for this position. Here, the Employer's newspaper advertisements list its experience requirement as a range, thereby exceeding the Employer's actual minimum requirement of 2 years experience. Because the Employer included requirements in its advertisement that does not reflect its actual minimum experience requirement, it did not conduct an adequate test of the labor market and failed to comply with the regulation at 20 C.F.R. § 656.17(f)(6).

Accordingly, we affirm the CO's denial of labor certification.

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

[5] In *Federal Insurance Co.*, 2008-PER-37 (Feb. 20, 2009), the Board found that there was a lack of effective notice to the public on just how to comply with the requirement that the employer include the *Kellogg* language on its Form 9089. In the instant case, however, the Form specifically requires the number of months of experience required for the job opportunity, which, because the regulations require an employer to provide its actual minimum requirements for a job opportunity, must be a discrete number, not a range. Because a range of 2-4 years is not a minimum requirement, it is not an acceptable response to the experience requirement at 6-A on the ETA Form 9089.

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.