U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 March 2011BALCA Case No.: 2010-PER-00167

ETA Case No.: A-07272-80570

In the Matter of:

SIMMONS AUDIO VIDEO ETC., INC.,
Employer

on behalf of

AARON TAPIA-BONILLA,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Rafael A. Velez, Esquire
Hendersonville, Tennessee
For the Employer

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

Before: **Krantz, Sarno, Malamphy**
Administrative Law Judges

KENNETH A. KRANTZ
Administrative Law Judge

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 October 5, 2007, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Electronic Home Entertainment Equipment Installer & Repairer" (AF 9).[1]

On November 20, 2007, the CO sent Employer an Audit Notification Letter requesting that Employer provide certain information in accordance with 20 C.F.R. §656.20(a). (AF 53-56) Employer responded on December 14, 2007 (AF 19-52). On September 17, 2009, the CO denied the application on the grounds that the recruitment report made only a generalized statement that U.S. workers did not meet the minimum requirements under §656.17(g)(1). The recruitment report did not contain the number of U.S. workers rejected and categorized by the lawful job-related reason for rejection, and states that two applicants responded and that they were rejected for not being qualified but did not give the reason for disqualification. (AF 17-18)

Employer requested review on October 9, 2009, asserting that the CO's conclusion rested on a contradiction as it stated that the recruitment report both failed to contain the number of workers rejected and that the report listed two rejected applicants. Further, it argued that "not qualified" constitutes a generalized category for rejection under the regulations and the CO did not request supervised recruitment, under which more specificity would have been required. (AF 1-16)

BALCA issued a Notice of Docketing on January 12, 2010. The Employer filed a Statement of Intent to Proceed on January 26, 2010, but did not file an appellate brief. On February 26, 2010, the CO filed a Statement of Position, reiterating its reasons for denial.

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

DISCUSSION

PERM is an attestation based program. 20 C.F.R. § 656.10(c). Accordingly, the regulations require an employer to conduct mandatory recruitment steps and make a good-faith effort to recruit U.S. workers to prior to filing an application for permanent alien labor certification. *See* 20 C.F.R. § 656.17; 69 Fed. Reg. 77326, 77348 (Dec. 27, 2004). 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). Therefore, the CO must verify the employer's attestations and determine whether the employer conducted the mandatory recruitment steps required by the regulations to ensure that U.S. workers were apprised of the job opportunity in the labor application. 20 C.F.R. § 656.20(b)(1).

CO's denial based on contradiction

The CO first stated that Employer's recruitment report did not meet the minimum requirements under § 656.17(g)(1) because it did not contain the number of U.S. workers rejected. Employer argues in its Request for Review that this is inaccurate, and that the CO's reason for denial contains an inherent contradiction. The CO's denial states:

> The recruitment report did not contain the number of U.S. workers rejected, categorized by the lawful job-related reason for rejection. The recruitment report states that two applicants responded and that those two applicants were rejected for not being qualified.

(AF 18) Clearly this is a contradiction: either the report contained no number of workers rejected, or it listed two; it cannot have done both. Employer's Recruitment Report provided the following Results Achieved:

> We received two referrals as a result of the total recruitment, and each respondent was contacted.
>
> - 2 applicants
> - Number of U.S. workers rejected: 2

- Lawful job related reasons for rejections:
    - Not qualified: 2

(AF 45) It is clear that Employer's Recruitment Report *did* provide the number of U.S. workers rejected. The CO's first reason for denial, that the report did not contain the number of U.S. workers rejected, is therefore inaccurate and the application cannot be denied on that ground.

Lawful job related reasons for rejection too generalized under §656.17(g)(1).

The CO next stated that Employer's recruitment report did not meet the minimum requirements under § 656.17(g)(1) of the regulations. Those requirements are:

> The employer must prepare a recruitment report . . . describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections. The Certifying Officer, after reviewing the employer's recruitment report, may request the U.S. workers' resumes or applications, sorted by the reasons the workers were rejected.

§ 656.17(g)(1). In this case, Employer's recruitment report gave the results achieved, the number of U.S. workers rejected (two), and categorized those rejected workers as "Not qualified." (AF 45) The CO chose to request neither the workers' resumes nor their applications sorted by the reasons for rejection. Employer therefore met the minimum requirements of §656.17(g)(1), so long as "Not qualified" *is* a lawful job related reason for rejection.

Employer argues that the specificity demanded by the CO is only required under a "supervised recruitment." A supervised recruitment occurs when a CO determines it appropriate, and requires it of the employer, post-filing, for the pending application. § 656.21(a). The supervised recruitment has markedly higher requirements for the recruitment report, including: identifying each recruitment source by name and documenting that each recruitment source named was contacted; stating the names,

addresses, and providing resumes of the U.S. workers who applied for the job opportunity; the number of workers interviewed and the job title of the person who interviewed the workers; and explaining, with specificity, the lawful job-related reason(s) for not hiring each U.S. worker who applied. § 656.21(e). In this case, the CO did not request or require a supervised recruitment from Employer, so these higher requirements did not apply to Employer's application.

Employer points out that pre-PERM regulations utilized the "with specificity" language for all audits, but current PERM regulations only use that language within the supervised recruitment process. Employer argues that this distinction signifies that the "with specificity" language does not apply to standard audit requirements under §656.17(g)(1).

The CO cites to several cases to support his statement that Employer did not adequately document that domestic workers were rejected only for lawful job related reasons. However, almost all of these cases were decided under the pre-PERM regulations, whose language differed from the current regulations with respect to the "with specificity" requirement.[2] The CO also cites two cases that were decided under the current regulations. First, he states that the instant case is similar "to the Board's decision in *Shogun at Bey Lea*, 2006-PER-00059, 2006 WL 5040169 (BALCA 2006) [in that] 'Employer's documentation does not establish compliance with the regulations.'" However, *Shogun* was decided on completely different issues than those present in the instant case. *Shogun* is irrelevant to lawful job-related reasons for hiring and the recruitment report. It does not speak to whether the documentation provided by Employer in this case does or does not establish compliance.

[2] The following cases cited by the CO in support of his argument are all based on the pre-PERM regulations with specificity language that differs from the current regulations: *Reuven Zfat,* 1998-INA-48, 1998 WL 564228 (BALCA August 26, 1998); *Gandhi Engineering, P.C.*, 90-INA-355 (Mar. 11, 1992); *Platon Interior, Inc.*, 2003-INA-275, 2004 WL 235682 (BALCA September 29, 2004); *Lolly International, Inc.*, 1988-INA-237 (March 28, 1990); *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989); *Cathay Carpet Mill, Inc.*, 1987-INA-161, 1988 WL 235682 (BALCA December 7, 1988).

The second case cited by the CO, *Luyon Corporation*, 2007-PER-00027, 2007 WL 4157713 (BALCA June 12, 2007), similarly fails to address any of the particular issues of the instant case, and holds that failing to submit an SWA job order within the 30-day requirement is not a mere clerical error, but a substantive violation of the regulatory requirement. This too, is irrelevant to the facts at hand.

The only case law the CO has cited in support of his argument, then, are cases decided under the language of the pre-PERM regulations, the language of which differed from the current regulations with respect to the "with specificity" requirement. After a review of case law under the current PERM regulations, the Board does not appear to have ruled with respect to the question of whether "Not qualified" is insufficient as a lawful job-related reason for rejection.

Section 656.17(g) provides the minimum requirements for the recruitment reports. The only guidance it provides with respect to what is or is not a lawful job related reason for rejection is the following:

> A U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training. Rejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers.

§ 656.17(g)(2). Employer did not specifically reject the two U.S. workers because they lacked the skills necessary to perform their duties, rather he stated that they were "Not qualified." Without further information, it is impossible to determine whether the U.S. workers were not qualified because they lacked necessary skills or for other reasons. This presents difficulty for the CO because in order to perform his duty of determining

whether there were sufficient U.S. workers able, willing, qualified, and available at the time of the application, he must be able to ascertain whether the rejected workers were capable of acquiring the skills necessary to perform the duties of the job during a reasonable period. The information provided by Employer is insufficient for the CO to make this determination.

For this reason, I find that the Employer did not provide sufficient documentation showing that he rejected the U.S. workers for lawful job related reasons, as required by the standard audit. While the specificity of a supervised recruitment under §656.21 is not required for a standard audit under §656.17(g), in this case Employer did not provide sufficient documentation to enable the CO to make the proper determination under §656.17(g)(2). A substantial failure by an 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).

ORDER

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

For the Panel:

A

KENNETH A. KRANTZ
Administrative Law Judge

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.