U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 March 2012

BALCA Case No.: 2011-PER-00637
ETA Case No.: A-08178-65174

In the Matter of:

PIXAR,
Employer

on behalf of

TRAN QUANG THIEU, JEAN-CLAUDE,
Alien.

Certifying Officer: William L. Carlson
Atlanta National Processing Center

Appearances: La Verne Ramsay, Esquire
San Francisco, California
For the Employer

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

Before: **Romero, Price, and Rosenow**
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 June 26, 2008, the Certifying Officer (CO) accepted for processing Employer's Application for Permanent Employment Certification (ETA Form 9089) for the position of "multi-media artists & animators." (AF 126-139).[1]

On June 8, 2009, the CO notified Employer that its ETA Form 9089 was selected for audit. (AF 123-125). Employer responded on July 1, 2009. (AF 66-122). On July 14, 2010, the CO denied certification. (AF 63-65). The CO denied certification of Employer's application on three grounds, one being that the job described in the advertisement did not match the job described on the ETA Form 9089 Section H, in violation of 20 C.F.R. § 656.10 & 656.17(f)(3). The CO noted the recruitment conducted through the web site did not apprise U.S. workers of the job opportunity. Specifically, the employer advertised that the job required a high school minimum education, but the ETA Form 9089 listed requirements of a Bachelor's degree plus 24 months, or in the alternate four years of work experience. (AF 64). Employer requested reconsideration, arguing clear government error. (AF 12).

The CO issued a second denial on February 18, 2011, and forwarded the case to BALCA. (AF 1-2). The CO found that "the recruitment is not accepted because it did not accurately apprise U.S. workers of the job opportunity as presented by the employer on the ETA Form 9089 and at the same terms and conditions of employment offered to the foreign worker. The employer is required to conduct an adequate test of the labor market to apprise all U.S. workers of the job opportunity." (AF 1). On April 13, 2011, BALCA issued a Notice of Docketing. Employer filed a Statement of Intent to Proceed on April 21, 2011.

DISCUSSION

Under 20 C.F.R. § 656.17(e), most sponsoring employers are required to attest to having conducted recruitment prior to filing the application. Among other requirements, applications involving both professional and non-professional occupations normally

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

require the sponsoring employer to attest to having placed two print advertisements in a newspaper of general circulation in the area of intended employment most appropriate to the occupation. 20 C.F.R. § 656.17(e)(1)(i)(B) and 656.17(e)(2)(ii). Furthermore, the regulations require that the advertisement "provide a description of the vacancy specific enough to apprise the U.S. worker of the job opportunity for which certification is sought." 20 C.F.R. § 656.17(f)(3).

Employer has violated 20 C.F.R. § 656.17(f)(3) by not specifically apprising U.S. workers of the job opportunity. The position advertised to U.S. workers stated a high school diploma was required, while the ETA Form 9089 required more education. (AF 18, 56). Employer argues this would only be an issue if the job advertised to U.S. workers had more stringent requirements than those listed on the ETA Form 9089. (AF 18). However, that is not what § 656.17(f)(3) requires. U.S. workers viewed different requirements than those listed on the ETA Form 9089. Thus, the advertisement was not specific enough to apprise the U.S. worker of the job offered to the foreign worker. If Employer had informed U.S. workers of the same job requirements which were provided to foreign workers, more U.S. workers may very well have applied. Some qualified potential U.S. applicants may have disregarded the advertisement because it did *not* require additional education, and may have thought they were overqualified. Therefore, it was appropriate for the CO to deny certification of the application.

Based on the foregoing, we affirm the CO's denial of labor certification.[2]

[2] Because we affirm the denial based on the reason discussed herein, we have not considered the other grounds cited by the CO for denial of certification, or Employers arguments concerning the other grounds.

ORDER

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

For the Panel:

A

Larry W. Price
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.