U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 June 2012

BALCA Case No.: 2011-PER-01306
ETA Case No.: A-08228-78888

In the Matter of:

S.T.K. INDUSTRIES, INC.,
Employer

on behalf of

RAUL CALLE,
Alien.

Certifying Officer: William L. Carlson
Atlanta National Processing Center

Appearances: Mitchell C. Zwaik, Esquire
Bohemia, New York
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, D.C.
For the Certifying Officer

Before: **Romero, Avery, and Kennington**
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 September 29, 2008, the Certifying Officer (CO) accepted for processing Employer's Application for Permanent Employment Certification (ETA Form 9089) for the position of "Duct & Hood Cleaner." (AF 49-59).[1]

On May 8, 2009, the CO notified Employer that its ETA Form 9089 was selected for audit. (AF 45-48). Among other documentation, the CO directed the Employer to submit its recruitment documentation. (AF 45). Employer responded on June 2, 2009. (AF 18-44). Employer submitted a copy of a newspaper advertisement that stated, "6 months experience a plus." (AF 39).

On October 22, 2010, the CO denied certification of Employer's application on four grounds, all of the grounds for denial were based on the advertisements containing wages or terms and conditions of employment that were less favorable than those offered to the alien in violation of 20 C.F.R. § 656.17(f)(7). (AF 14-16). Employer requested review on November 18, 2010, arguing that "six months experience a plus" was not a requirement for the position or a term and condition of employment. (AF 3-13).

The CO determined Employer's request did not overcome all deficiencies noted in the determination letter and thus forwarded the case to BALCA on May 10, 2011. (AF 1-2).The CO reasoned, "applicants may perceive the employer's preference for 6 months experience as a requirement, thereby creating a chilling effect and artificially exclude potentially qualified U.S. workers who would otherwise minimally qualify for the position." (AF 1). On July 28, 2011, BALCA issued a Notice of Docketing. Employer filed a Statement of Intent to Proceed on August 10, 2011. On September 19, 2011, the CO filed a Statement of Position requesting affirmation of the CO's denial of labor certification.

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). The regulations at 20 C.F.R. § 656.17(f)(7) state that advertisements placed in newspapers of general circulation or in professional journals must "not contain wages or terms and conditions of employment that are less favorable than those offered to the alien."

The regulations specifically state that, "[i]f an employer wishes to include additional information about the job opportunity, such as minimum education and experience requirements or specific job duties, the employer may do so, provided these requirements also appear on the ETA Form 9089." 69 Fed. Reg. at 77347. The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity. 20 C.F.R. § 656.17(i)(1).

Employer argues that 6 months of experience was not a requirement of the position. Employer cites *XAND Corporation*, 2008-INA-109 (2008), where the CO found an employer's Spanish language requirement was unduly restrictive under 20 C.F.R. § 656.21(b)(2)(i)(C). The employer revised its job description to state: "Bilingual (Spanish / English) a plus." *Id*. The CO found that the newly worded job description would have remedied the error, but denied certification on other grounds. *Id*. The panel did not address the issue. *Id*.

In *East Tennessee State University*, 2010-PER-338 (Apr. 18, 2011) (en banc), the CO found that the employer violated 20 C.F.R. § 656.17(f)(6) by including several preferences in its advertisements, including that an applicant have a Ph.D. in applied linguistics, whereas the degree requirement stated on the Form 9089 was simply a master's degree in Spanish. The panel found that "stating preferences in advertisements may have such a chilling or restrictive effect on the recruitment." *Id*. at 12. Therefore, employer preferences stated in recruitment will be treated as requirements for purposes of the PERM application. *Id*. at 13.

In the instant case, Employer stated, "6 months experience a plus" in its advertisements. Under the reasoning set forth in *East Tennessee State University*, this preference will be treated as a requirement because it may have caused a chilling or restrictive effect on recruitment. Therefore, Employer's advertisements violate 20 C.F.R.

§ 656.17(f)(6) because they contained a job requirement that exceeded the job requirements listed on the ETA Form 9089. Employer has also violated 20 C.F.R. § 656.17(f)(7) by offering terms and conditions of employment to U.S. applicants which were less favorable than those offered the alien. The ETA Form 9089 does not indicate 6 months of experience is "a plus." If Employer had not included the preference in its advertisements, more U.S. workers may very well have applied. 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.

ORDER

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

For the Panel:

A

Lee J. Romero, Jr.
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.