U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 26 September 2013

BALCA Case No.: 2011-PER-02916
ETA Case No.: A-08288-95860

In the Matter of:

W. ALEX CHOI, CPA, PC,
Employer

on behalf of

JUNGHYEOK CHOI,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Kang C. Lee, Esq.
Kang C. Lee, PC
Norcross, GA
For the Employer

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

Before: **Calianos, Geraghty, McGrath**
Administrative Law Judges

JONATHAN C. CALIANOS
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."). For the reasons set forth below, we affirm the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On October 15, 2008 the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Accountant, Level I." (AF 582).[1] On April 21, 2009, the CO issued an Audit Notification, requesting that the Employer provide certain information in accordance with 20 C.F.R. § 656.20. (AF 582-84). On May 15, 2009, the Employer submitted its response to the Audit Notification. (AF 485-581).

On November 22, 2010, the CO sent a letter notifying the Employer that it would be required to conduct supervised recruitment. (AF 481-84). On December 17, 2010, the Employer responded to the DOL's notification of supervised recruitment and included proposed language for its advertisement. On December 30, 2010, the Employer submitted a revised advertisement, per the CO's instructions, and on January 4, 2011, the CO approved the Employer's revised advertisement and included a letter with further instructions on how to proceed with the supervised recruitment process. (AF 461-64, 469).

On February 28, 2011, the Employer responded to the recruitment instructions letter, and included copies of its advertisements, including a job order with the Georgia State Workforce Agency, as well as its in-house job notice. (AF 268-304). The CO notified the Employer of resumes it received on eight different occasions, and sent the Employer forty-four resumes for the advertised position. (AF 263-67 & 305-460). On April 15, 2011, the CO sent a letter informing the Employer that the recruitment period for the position had ended and that the Employer should submit a detailed recruitment report within thirty days. (AF 260-62).

On May 16, 2011, the Employer submitted its supervised recruitment results. (AF 86-259). The Employer rejected all available U.S. applicants, either because they did not meet the minimum qualifications for the position, the Employer was unable to communicate with them, or the U.S. applicants "did not respond to the interview invitation nor appear at the interview time scheduled by the employer." (AF 107-13).

On May 19, 2011 the CO denied the Employer's application, because, based on the supervised recruitment documentation, the Employer rejected U.S. applicants who met the

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

minimum requirements as outlined in its ETA Form 9089, in violation of section 656.10(c)(9) of the regulations. (AF 83-85). Specifically, the CO found that the Employer "failed to use good-faith efforts to reach these applicants." (AF 84). The CO also found that the Employer had emphasized fluency in Korean to encourage an otherwise qualified U.S. applicant to withdraw his application, even though the Employer did not list fluency in Korean as a required or preferred skill on its ETA Form 9089. (AF 85).

On June 20, 2011, the Employer filed a request for reconsideration. (AF 2-82). The Employer argued that its use of email to contact U.S. applicants, and certified mail to issue interview invitations, were good faith communication efforts. (AF 4). The Employer also argued that its incomplete certified mail receipts did not constitute lack of proof that it mailed the interview invitations because the receipts were for the Employer's own records, and the Employer could prove the applicants received the certified mail invitation by tracking on the USPS website. (AF 5-7). Further, the Employer argued that it did not take specific action to discourage an applicant for lack of fluency in Korean. (AF 8). Instead, the Employer maintained that it was simply reiterating the contents of its DOL approved advertisement, and considered it "merely a helpful description," rather than an attempt to discourage a qualified U.S. applicant from applying for the position. (AF 8).

On September 21, 2011, the CO forwarded the case to BALCA. (AF 1). In his transmittal letter, the CO upheld his denial because the Employer "failed to demonstrate it made concerted efforts to contact and interview four (4) qualified U.S. workers prior to rejection." (AF 1).[2] The CO asserted that the Employer rejected U.S. applicants whose certified mail interview invitations were returned as undeliverable, despite the fact that the Employer had an alternate means of contacting these four U.S. workers, but did not do so. The CO concluded that "[t]he employer's rejection of these U.S. workers cannot be considered as lawful or job-related," and therefore, denial of labor certification was appropriate pursuant to section 656.10(c)(9). (AF 1).

On January 4, 2012, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on January 18, 2012, and filed an appellate brief (Er. Br.) on February 21, 2012. The CO did not file a Statement of Position. On April 5, 2013, in response

[2] In his transmittal letter, the CO did not address his second reason for denial, that the Employer discouraged applicants for lack of fluency in Korean. It is unclear whether the CO accepted the Employer's arguments for this second denial reason on reconsideration. However, it is not necessary for us to address this second reason in any depth as we affirm the CO's denial based on his first reason.

to this Panel's Order Requiring Certification on Mootness, the Employer certified that the job identified on the PERM application is still open and available and that the alien identified in the application remains ready, willing, and able to fill the position.

DISCUSSION

An important goal of the Immigration and Nationality Act is to prevent foreign workers from obtaining permanent employment in the United States unless there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work. *See* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.1(a)(1). Accordingly, when an employer files an application for permanent employment certification, it must certify that "[t]he job opportunity has been and is clearly open to any U.S. worker" and "the U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons." 20 C.F.R. § 656.10(c)(8), (9). Furthermore, the PERM regulations require an employer to conduct mandatory recruitment steps in a good faith effort to recruit U.S. workers prior to filing an application for permanent alien labor certification. *See* 20 C.F.R. § 656.21(b). The employer must also prepare a recruitment report stating the number of U.S. applicants rejected for the job and categorizing them by the lawful job-related reasons for their rejection. 20 C.F.R. § 656.21(e)(2)-(4).

Pursuant to section 656.24(b), the CO "makes a determination either to grant or deny the labor certification on the basis of whether or not: . . . (2) There is in the United States a worker who is able, willing, qualified, and available for and at the place of the job opportunity." 20 C.F.R. § 656.24(b). When determining whether to grant or deny certification on this basis:

> The Certifying Officer must consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. For the purposes of this paragraph (b)(2)(i), 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.

20 C.F.R. § 656.24(b)(2)(i).

The Employer indicated in its ETA Form 9089 that the minimum requirements for the job opportunity were a Bachelor's degree in accounting, finance, or related area. (AF 586). The Employer's supervised recruitment report indicated that the Employer rejected a number of qualified U.S. applicants because it was not able to contact them via email or certified mail. (AF

107-113). The Employer sent interview invitations via certified mail to four qualified U.S. applicants, but when the tracking information revealed that these letters did not reach these applicants (AF 18, 46, 60, & 63), the Employer did not make additional attempts to contact the applicants via the email addresses or phone numbers provided on their resumes and cover letters. (AF 333, 352-53, 363-64, & 384-85).

We agree with the CO that the Employer failed to make good faith efforts to contact qualified U.S. applicants. In its request for reconsideration, (AF 86-259), the Employer argued that its certified mail receipts for the interview invitations prove that it made a good faith effort to contact qualified U.S. applicants. (AF 8). Specifically, the Employer argued that it tracked the certified mail online, to ensure that each applicant received the interview invitation. (AF 7-8). The Employer cannot have diligently tracked the certified mail to the four applicants in question because the online tracking shows that the applicants did not receive their interview invitations until April, four to seven weeks *after* the interview was supposed to have occurred. (AF 18, 46, 60, & 63). If the Employer had been making a real effort to contact these four applicants, it would have realized that its certified mail interview invitation would not arrive in time, and it would have emailed or telephoned the four applicants, using the information provided on their resumes and cover letters. (AF 333, 352-53, 363-64, & 384-85); *Ramzi Kiriakos*, 1997-INA-23 (July 22, 1999) (holding that "[i]t is well established that in order to prove good faith recruitment an employer has an obligation to try alternative means of contact"); *see also Danny's Café*, 1996-INA-280 (May 26, 1999) (finding that a letter may not be sufficient to demonstrate good faith when the Employer has been provided with telephone numbers to contact applicants). There is no record that the Employer attempted other means of contacting the applicants, or even realized that its interview invitations did not arrive until well after the scheduled interview dates. (AF 2-82). This shows that the Employer did not make a good faith effort to contact qualified U.S. applicants.

The Board has long held that under the PERM regulations, the Employer bears the burden to establish eligibility for labor certification. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (en banc). An Employer's mere statement, standing alone, is insufficient to meet the burden. *Jakob Mueller of America, Inc.*, 2010-PER-01069, PDF at 5 (*citing Your Employment Service, Inc*., 2009-PER-00151 (Oct. 30, 2009)); *see also Fritz's Garage*, 88-INA-98, slip. op. at 3 (Aug. 17, 1988) (en banc) (finding that the Employer's basis for rejection of

U.S. worker was vague and unconvincing). Here, the documentation the Employer submitted in support of its PERM application does not support its statement that it made good faith efforts to contact qualified U.S. applicants. (AF 2-82 & 86-259). In its appellate brief, the Employer noted that it usually contacts applicants either through the postal service, or through other reasonable means "which may appear on their resumes," (Er. Br. 1), but the Employer did not make an effort to contact these applicants through other reasonable means once it should have been apparent that the certified mail interview invitations would not reach the applicants in a timely manner. The Employer failed to establish that it made a good faith effort to contact qualified U.S. applicants, and therefore did not establish that the U.S. applicants were not "able, willing, qualified, and available to perform the work." *See* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.1(a)(1). Accordingly, we affirm the CO's denial of certification.

ORDER

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

For the Panel:

Digitally signed by JONATHAN CALIANOS
DN: CN=JONATHAN CALIANOS, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

JONATHAN C. CALIANOS
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.