

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 11 May 2012

BALCA Case No.: 2010-PER-01216
ETA Case No.: A-07353-06534

In the Matter of:

BIRLASOFT INC.,
Employer

on behalf of

MUKESH KUMAR AGRAWAL,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Anuj Sharma, Esquire
Corporate Legal Counsel, Birlasoft Inc.
Edison, New Jersey
For the Employer

Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson and Vittone**
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.

BACKGROUND

On December 19, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s application for permanent labor certification for the position of “Oracle Database Administrator.” (AF 138-147).¹ The Employer stated that the location of the job opportunity is in Edison, New Jersey. (AF 139). The Employer’s application did not mention a travel requirement.

On January 25, 2008, the CO issued an Audit Notification, instructing the Employer to file, among other documentation, its recruitment documentation and its Notice of Filing (“NOF”). (AF 134-137).

The Employer responded to the Audit Notification on February 21, 2008. (AF 24-132). The NOF submitted with the Employer’s audit response materials stated the location of the job opportunity as “Middlesex County, NJ and other unanticipated locations in USA.” (AF 61). The Employer’s State Workforce Agency (“SWA”) job order, newspaper advertisements, and website advertisements also indicated that the job opportunity was located in Edison, New Jersey and “other unanticipated locations” in the U.S. (AF 67-70; 72-74; 78-83; 86-87; 91-92).

On January 26, 2010, the CO denied certification on the grounds that the Employer’s NOF, SWA job order, newspaper advertisements, and website advertisements all included a travel requirement that was not included on the ETA Form 9089. (AF 21-23). The CO determined that the Employer’s advertisements contained conditions of employment that are less favorable than those offered to the foreign worker in violation of 20 C.F.R. § 656.17(f)(7). (AF 22-23).

The Employer requested reconsideration on February 19, 2010. (AF 3-19). With its request for reconsideration, the Employer submitted a modified ETA Form 9089 stating that the job location was in Middlesex County, New Jersey, and other unanticipated locations in the United States.

On July 14, 2010, the CO denied reconsideration. (AF 1-2). The CO refused to consider the modified ETA Form 9089 because it was new evidence, and found that the Employer failed to comply with Section 656.17(f)(6) because the NOF, SWA job order, and advertisements

¹ Citations to the appeal file will be referenced as “AF” followed by the page number.

included a job requirement – travel to unanticipated locations – which exceeded the requirements on the originally submitted ETA Form 9089.

The CO forwarded the matter to BALCA, and the Board issued a Notice of Docketing on August 20, 2010. The Employer filed a Statement of Intent to Proceed on August 27, 2010, reiterating its position that because it has modified its ETA Form 9089, it is now in compliance with the regulations.

DISCUSSION

Scope of Review

The PERM regulations restrict BALCA’s review of a denial of labor certification to evidence that was part of the record upon which the CO’s decision was made. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c); *Eleftheria Restaurant Corp.*, 2008-PER-143 (Jan. 9, 2009); *5th Avenue Landscaping, Inc.*, 2008-PER-27 (Feb. 11, 2009); *Tekkote*, 2008-PER-218 (Jan. 5, 2008). Here, the CO based his decision on ETA Form 9089 filed on December 19, 2007, and the Employer’s audit response materials. The CO refused to consider the modified application submitted with the Employer’s request for reconsideration.

Twenty C.F.R. § 656.24(g)(2) provides that an employer’s request for reconsideration may include only:

- (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
- (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of § 656.10(f).

The modified application submitted with the Employer’s request for reconsideration does not fall either of these two categories. Moreover, the PERM regulations explicitly prohibit an employer from modifying its application once it has been filed. 20 C.F.R. § 656.11(b). Accordingly, the CO’s refusal to consider the modified application was proper, and our review of

the CO's determination is limited to the record upon which the CO based his denial, *i.e.*, the ETA Form 9089 filed on December 19, 2007 and the audit response materials submitted on February 21, 2008.

Notice of Filing

The regulations require that an employer filing an application for permanent labor certification must provide notice to the employer's employees at the facility or location of employment. 20 C.F.R. § 656.10(d)(1)(ii). The NOF must contain the information required for advertisements under Section 656.17(f). 20 C.F.R. § 656.10(d)(4). Section 656.17(f)(6) and (7) provides that an advertisement must:

(6) Not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089; and

(7) Not contain wages or terms and conditions of employment that are less favorable than those offered to the alien.²

The Employer's ETA Form 9089 states that the job opportunity is located in Edison, New Jersey, and does not include any travel requirements. (AF 139). The Employer's NOF states the location of the job opportunity as "Middlesex County, NJ and other unanticipated locations in USA." (AF 61). Traveling to unanticipated locations in the U.S. is a both a job duty that exceeds the duties listed on the ETA Form 9089, and a term of employment that is less favorable than the terms offered to the foreign worker. Accordingly, the Employer's NOF did not comply with Sections 656.17(f)(6) and (7), and the CO properly denied certification.

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

² The CO's January 26, 2010 denial cited 20 C.F.R. § 656.17(f)(7) as the regulatory basis for denial, while the CO's July 14, 2010 denial cited 20 C.F.R. § 656.17(f)(6) as the basis for denial. (AF 1-2; 21-23). Both of these regulations are applicable, and we find that both denial letters provided the Employer with adequate notice about the regulatory bases for the denial.

ORDER

IT IS ORDERED that the denials of labor certification in these matters are 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 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.