U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 June 2012

BALCA Case No.: 2010-PER-01149
ETA Case No.: A-07338-01006

In the Matter of:

DIVERSE LYNX, LLC,
Employer

on behalf of

VAID , VIKAS,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Mamatha N. Rao
HR Executive, Diverse Lynx, LLC
Los Angeles, CA
For the Employer

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

Before: **Colwell, Johnson, and Vittone**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF LABOR 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 20 C.F.R. Part 656.

BACKGROUND

On December 5, 2007, the Certifying Officer ("CO") accepted for processing the Employer's Application for Permanent Labor Certification on behalf of Vikas Vaid, for the position of "Programmer Analyst." (AF 105-117).[1] On January 10, 2008, the CO notified the Employer that its application for labor certification had been selected for audit. (AF 100-104). The Employer responded to the CO's audit notification on February 6, 2008. (AF 39-99).

Upon review of the documentation received, the CO denied the Employer's application finding that the Employer's application was deficient on four grounds. (AF 35-38). One ground for denial was that the recruitment report revealed that U.S. applicants were rejected for unwillingness to travel, which exceeds the requirements listed on the ETA Form 9089. (AF 36). The CO found that this violated the conditions of employment as outlined in Section N of ETA Form 9089. Per 20 C.F.R. § 656.10(c)(9), the employer must certify that "U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons."

The Employer filed a request for reconsideration/review on February 2, 2010. (AF 3-34). The CO denied the Employer's request for reconsideration and transferred the appeal file to the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). (AF 1-2). On August 18, 2010, BALCA issued a "Notice of Docketing and Order Requiring Submission of Statement of Intent to Proceed." The CO submitted a Statement of Position on October 7, 2010.

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

DISCUSSION

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. § 656.17(e). To conduct recruitment in good faith, an employer "must take steps to ensure that it has lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications." *East Tennessee State University*, 2010-PER-38, slip op. at 12 n.ll (Apr. 18, 2011) (quoting *Compression, Inc.*, 2002-INA-102, slip op. at 10-11 (Aug. 27, 2003)). Thus, an employer must attest that U.S. workers who applied for the job were rejected only for lawful job-related reasons. 20 C.F.R. § 656.10(c)(9); Section N-9 of the ETA From 9089. The employer must 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. § 656.17(g)(1).

In this case, the Board is asked to decide whether the Employer had lawful, job-related reasons for rejecting two of the U.S. workers who applied for the position. We find that the Employer improperly rejected these applicants for having conflicts with a travel requirement for the job opportunity that was not listed as a job requirement on the ETA Form 9089.

As part of the Employer's audit response it submitted a recruitment report which provides the names of eight U.S. workers who applied for the job opportunity and the reasons why they were not hired. (AF 86). The Employer's recruitment report states in part that one U.S. worker was not hired because he was looking for a position with minimal travel and the other U.S. worker was unwilling to travel if required. However, under Section H-11 of the ETA Form 9089, the Employer provided the job duties for this job opportunity and there is no mention of a travel requirement. (AF 107). The CO concluded based on this documentation that the Employer rejected the U.S. workers for unlawful reason.

It its request for reconsideration, the Employer admitted that the job opportunity had a travel requirement that should have been listed on ETA Form 9089. (AF 3-4). The Employer stated that the travel requirement was part of the recruitment effort and the candidates were

screened based on this requirement. The Employer noted that this travel requirement was listed on the SWA Job Order, the Notice of Posting, and the Employee Referral Program; however, it was not listed in the newspaper, company website, and internet ads. The Employer stated that it decided not to give all the details in these advertisements but still considered all the applicants. The Employer avers, therefore, that the omission was a harmless error that did not affect recruitment and at most should be considered a typographical error.

Per 20 C.F.R. § 656.17(i)(1), the job requirements as described on the ETA Form 9089, must represent the employer's actual minimum requirements for the job opportunity. *See Olatonkunbo B. Cole*, 2008-INA-68 (Aug. 25, 2009). Therefore, the added travel requirement used to evaluate applicants unlawfully excluded U.S. workers who met the minimal requirements of the position as listed on the ETA Form 9089. While the Employer argues that not including the travel requirement on the ETA Form 9089 was harmless error, the fact that the Employer rejected two U.S. workers based on the travel requirement fully supports the CO's conclusion that the Employer's error was not harmless.

ORDER

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

For the panel:

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WILLIAM S. COLWELL
Associate Chief 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.