U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 29 March 2012

BALCA Case No.: 2011-PER-00501
ETA Case No.: A-08154-57786

In the Matter of:

SUN MICROSYSTEMS, INC.,
Employer

on behalf of

AMIT BAKHRU,
Alien.

Certifying Officer: William L. Carlson
Atlanta National Processing Center

Appearances: Barbara Lutes, 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 30, 2008, the Certifying Officer (CO) accepted for processing Employer's Application for Permanent Employment Certification (ETA Form 9089) for the position of "software quality engineer." (AF 113-124).[1]

On January 26, 2009, the CO notified Employer that its ETA Form 9089 was selected for audit. (AF 109-112). Employer responded on February 18, 2009. (AF 38-108). On July 23, 2010, the CO denied certification. (AF 32-35). The CO denied certification of Employer's application on five grounds, one being that the geographic area of employment contained in the Notice of Filing did not match the geographic area of employment described in the ETA Form 9089 Section H, in violation of 20 CFR § 656.17(f)(4). Specifically, the Notice of Filing described the geographic area as Santa Clara, California, but the ETA Form 9089 also included "various unanticipated locations throughout the U.S." (AF 33). Employer requested reconsideration on August 20, 2010. (AF 3-31).

The CO issued a second denial on February 3, 2011, and forwarded the case to BALCA. (AF 1-2). On March 25, 2011, BALCA issued a Notice of Docketing. Employer filed a Statement of Intent to Proceed on April 8, 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 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 advertisements placed in newspapers of general circulation or in professional journals must "indicate the geographic area of employment with enough

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

specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity." 20 C.F.R. § 656.17(f)(4).

Employer has violated 20 C.F.R. § 656.17(f)(4) by including different geographical locations in the ETA Form 9089 than what was stated in their advertisements. Employer's ETA Form 9089 described the geographic area as Santa Clara, California, and, "various unanticipated locations throughout the U.S.," while the advertisement only stated Santa Clara. (AF 33). Employer argues that the position did not require travel, but language was included in ETA Form 9089 to "allow for participation in events outside of the employer's offices." (AF 8). Furthermore, they stated that "travel is an ancillary and purely optional requirement." However, this still violated § 656.17(f)(4). U.S. workers viewed a different geographic location than that listed on the ETA Form 9089. Thus, the advertisement did not clearly apprise U.S. workers of the geographic location for the job opportunity, even if the ETA Form 9089 did not mean that travel was required. If Employer had informed U.S. workers that the job included "various unanticipated locations throughout the U.S.," more U.S. workers may very well have applied. Some potential U.S. applicants may have been interested in the option of various locations, or the option to travel. 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.