U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 October 2012

BALCA Case No.: 2011-PER-02325
ETA Case No.: A-08337-10385

In the Matter of:

BOTTOMLINE TECHNOLOGIES,
Employer

on behalf of

GEORGE, DENNIS,[1]
Alien.

Appearances: Gunnar A. Sievert, Esquire
Chin & Curtis, LLP
Boston, Massachusetts
For the Employer

Before: Colwell, Johnson and Vittone
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This matter arises under the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the implementing regulations at 20 C.F.R. Part 656.

BACKGROUND

The Employer filed a labor certification application sponsoring the Alien for the professional position of "Webseries Application Developer." (AF 151-165).[2] The Employer

[1] On the Form 9089 application, Section J, the Alien's first name is spelled "Dennnis." The documents issued by the Certifying Officer use this spelling. However, all other references to the Alien in the Appeal File show his name as "Dennis" including the signature line for the Alien on the Form 9089.

indicated on the Form 9089 that it had advertised the job under its employee referral program from September 30, 2008 to November 3, 2008. (AF 155). The Certifying Officer ("CO") audited the application. (AF 147-150). In its audit response, the Employer's HR Manager signed a recruitment report in which she stated that, in addition to the mandatory print advertisements, the Employer had taken the following recruitment steps:

1. Bottomline's web site from September 30, 2008 to October 13, 2008 (inclusive).

2. America' Job Exchange (AJE), a job search website other than the Company's web site from September 30, 2008 to October 14, 2008 (inclusive).

3. Employee referral program since September 30, 2008.

(AF 108). The audit response documentation of the employee referral program consisted of a one page document entitled "881 Employee Referral Program." (AF 145). The document describes an incentive program for which employees, excluding executive officers and hiring managers, are eligible for a $1,000 payment should an individual referred by the employee be hired within six months of the referral. This document is not dated. Nor is there any identifying information on the document showing that it was a Bottomline publication.

The audit response also included printouts from the Employer's own website, www.bottomline.com, indicating that the position of WebSeries Application Developer had been posted on September 30, 2008, October 13, 2008 and October 14, 2008. (AF 137-144). None of these web postings make any specific reference to the job referrals being eligible under the employee referral program. The audit response also included a signed Form 9089 attesting, inter alia, to the use of the employee referral program for recruitment from September 30, 2008 to November 3, 2008.

The CO denied certification on three grounds related to the adequacy of the documentation of the use of the employee referral program as an additional recruitment step for a professional occupation. (AF 61-63). Specifically, the CO found that (1) the Employer had "failed to provided dated copies of employer notices or memoranda advertising the program and specifying the incentives offered" as required by 20 C.F.R. § 656.17(e)(1)(ii)(G); (2) the documentation provided failed to identify the name of the employer as required by 20 C.F.R. § 656.10 (attestation that the job is clearly open to U.S. workers) and 20 C.F.R. § 656.17(f)(6) (requirement that advertisement "name the employer"); (3) the documentation provided failed to identify the job location as required by 20 C.F.R. § 656.10 (attestation that the job is clearly open to U.S. workers) and 20 C.F.R. § 656.17(f)(4) (requirement that advertisement indicate the geographic area of employment). (AF 61-64).

The Employer filed a request for reconsideration by the CO. (AF 3-60). The Employer argued that its documentation of the use of its employee referral program was sufficient under the BALCA panel decisions in *Sanmina-Sci Corp.*, 2010-PER-697 (Jan. 19, 2011) and

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

Clearstream Banking, S.A., 2009-PER-15 (Mar. 30, 2010). Several exhibits were attached to the Employer's request for reconsideration:

Exhibit A contains a printout of the cover page of Bottomline Technologies' company handbook and what is identified in the attorney's index as page 48 of that handbook where the employee referral program is described. We note that this page is in a different format than the employee referral program documentation provided with the audit response. (AF 14, 15-18).

Exhibit B contains printout of the cover page of Bottomline Technologies' company handbook with a table of contents showing that "policy number 881" is the description of the employee referral program, a letter from the Employer's CEO contained in the handbook, and an index referring to the employee referral program as being at "881" of the handbook. (AF 14, 20-32).

Exhibit C is the employee acknowledgement form signed by the Alien on December 22, 2006, acknowledging his responsibility to read and understand the policies contained in the company handbook. (AF 14, 33-34).

Exhibit D is a copy of the recruitment report. (AF 35-37). This exhibit appears to be identical to the recruitment report submitted with the audit response. The Employer's attorney's index of exhibits indicates that the purpose of this exhibit is to show that the Employer's HR Manager confirmed in the recruitment report the existence of the company's employee referral program as an additional recruitment step "since September 30, 2008." (AF 14).

Exhibit E is a signed copy of the Form 9089. (AF 38-53). The Employer's attorney's index of exhibits indicates that the purpose of this exhibit is to show that the Employer's HR Manager attested in Section I.d.19 that the Employer's employee referral program was in effect from September 30, 2008 to November 3, 2008. (AF 14).

Exhibit F consists of copies of the website advertisement for the Webseries Application Developer position posted on Bottomline's company website in the "Careers" section from September 30, 2008 to October 13, 2008. (AF 14, 54-59). These documents are essentially the same documents submitted with the audit response.

The Employer argued in the reconsideration request that the company handbook put its employees on notice that the Website Application Developer position was eligible for a referral award. In addition, the Employer argued that its recruitment report statement that the employee referral program had been used, together with the attestation of the Employer in the Form 9089 as to the use of the program showed that the plan was in effect within the relevant period of recruitment. Moreover, the Employer argued that its documentation of the website advertisement, together with the Notice of Filing posted at the worksite, put its employees on notice of the availability of the job opportunity.

In regard to the CO's findings that the documentation of the employee referral program needed to include the company name and the job location on the specific page of the handbook where the referral plan is printed, the Employer argued that this finding was illogical. The

Employer argued that it is the advertisements themselves that are required to include the company name and the location of the job rather than the discrete page from the employee handbook that describes the employee referral program.

The CO reconsidered but concluded that the grounds for denial were valid. (AF 1-2). The CO conceded that the Employer's documentation specified the incentives offered, but found that the documentation did not verify that the program was in effect during the recruitment period for the Employer's PERM application, and that the documentation did not confirm that the employees were on notice of the job opening at issue as specified in DOL's "frequently asked questions."[3] The CO also found that as part of the recruitment effort, the employee referral program documentation must meet the content requirements for print advertisements set forth in 20 C.F.R. § 656.17(f). Thus, the CO found that "[s]ince the recruitment conducted through the ERP [employee referral program] failed to identify the name of the employer and the job location" these reasons for denial were valid.

On appeal, the Employer provided a letter confirming its intention to pursue the appeal. Although this letter indicated that an appellate brief would be filed, the Board has no record of the filing of such a brief by either the Employer or the CO.

DISCUSSION

The regulation

When an employer sponsors an alien for permanent alien labor certification for a professional position conducted under the basic recruitment process described in 20 C.F.R. § 656.17, the employer is required to conduct both basic recruitment using print advertisements and other mandatory recruitment steps, and to engage in at least three additional recruitment steps from a list of alternates stated in the regulations. One alternate is the use of an employee referral program with incentives. The regulation states that use of such a program "can be documented by providing dated copies of

[3] This is evidently a reference to an August 3, 2010 FAQ posted by the Employment and Training Administration on the Office of Foreign Labor Certification website. This FAQ states:

> **What documentation can an employer provide to evidence its use of an employee referral program with incentives as one of the mandatory three additional recruitment steps for a professional occupation?**
>
> Pursuant to 20 CFR 656.17(e)(4)(ii)(G), an employer can document its use of an employee referral program with incentives by providing dated copies of its notices or memoranda advertising the program and specifying the incentives offered as well as other appropriate documentation. In addition to establishing the existence of a referral program, employers must document that its employees were aware of the vacancy for which certification is being sought through means such as a posting on the employer's internal web site. The Notice of Filing provided to satisfy § 656.10(d) shall not be sufficient for this purpose.

www.foreignlaborcert.doleta.gov/faqsanswers.cfm#profno5 (visited Oct. 9, 2012)

employer notices or memoranda advertising the program and specifying the incentives offered." 20 C.F.R. § 656.17(e)(1)(ii)(G).

The record for review

In the instant case, the documentation provided by the Employer with its audit response of the use of the employee referral program was poorly presented. The actual description of the program was a single page without a date and without any kind of marking to identify where it came from. Although the recruitment report made a reference to the use of the employee referral program "since September 30, 2008," this minimal identification of the date of the program located in the portion of the audit response dedicated to the audit response placed a burden on the CO to stitch together the information and conclude that the Employer credibly documented the use of the employee referral program for recruitment for the position that is the subject of this labor certification application.

The Employer provided additional documentation with its request for reconsideration that helps considerably in establishing the Employer's use of the employee referral program. The additional pages from the employee handbook identify the audit response material as having come from that handbook. The signed acknowledgement from the Alien of receipt of the handbook shows that the handbook was in existence long before the recruitment in this case and shows that at least the Alien was on notice of the existence of the employee referral program.

Under the evidentiary limitations found in 20 C.F.R. § 656.24(g)(2), the CO could have refused to consider the additional documentation submitted for the first time with the motion for reconsideration. *See, e.g., Bamm Inc.*, 2010-PER-1180 (Dec. 13, 2011). In ruling on reconsideration, however, the CO did not explicitly rule on whether he would consider the additional documentation. *Compare Research Triangle Institute International*, 2011-PER-186 (Feb. 29, 2012), slip op. at n.2 (CO clearly stated that he did not consider documentation first submitted on reconsideration). In the ruling on reconsideration, the CO discussed the Employer's statement that the employee referral program came from its company handbook. The fact that the "881" policy came from the company handbook was not evident when viewing only the audit response materials. Thus, it appears that the CO did, in fact, consider the additional information provided by the Employer when ruling on reconsideration. Thus, we find the additional documentation submitted with the Employer's motion for reconsideration was within the record upon which certification was denied, and is therefore within the record that the Board must consider on appeal. *See* 20 C.F.R. § 656.27(c); *see also Clearstream Banking S.A.*, 2009-PER-15, slip op. at 5 (Mar. 30, 2009) (where a reasonable interpretation of the CO's ruling on reconsideration suggested that he actually reviewed the documentation submitted on reconsideration, the panel found that it was within the record upon which certification was denied).

The Sanmina-Sci Corp. decision

In *Sanmina-Sci Corp.*, 2010-PER-697 (Jan. 19, 2011), the panel set out a three part test to determine whether an employer has adequately documented its employee referral program. The panel held that an employer must minimally be able to document that (1) its employee referral program offers incentives to employees for referral of candidates, (2) that the employee referral program was in effect during the recruitment effort the employer is relying on to support its labor certification application, and (3) that the Employer's employees were on notice of the job opening at issue. *Sanmina-Sci,* slip op. at 5. This test has been adopted by other panels of the Board. *See, e.g., Kohler Co.*, 2011-PER-722 (June 14, 2012); *Nav Consulting*, 2011-PER-437 (May 24, 2012).

In the instant case, the CO conceded on reconsideration that the Employer's employee referral program offered incentives. Although it could have been better presented, we find that the combination of the Employer's signed attestation as to the dates of the use of the program on the Form 9089,[4] the HR manager's statement in the recruitment report that the program was in effect during the beginning of the recruitment for this position, and the documentation indicating that the referral program policy was part and parcel of the company handbook when the Alien signed the acknowledgement of receipt of the handbook, document that the program was in effect during the relevant recruitment period. *See Marlabs, Inc.*, 2010-PER-1581 (Mar. 22, 2012) (citing *AQR Capital Management*, 2010-PER-323 (Jan. 26, 2011), for the proposition that the body of evidence contained within the employer's audit response materials may be considered to evaluate whether the employee referral program was in existence at the time of recruitment). Moreover, the website advertisements and the posted notice of filing show that the Employer's employees were on notice of the job opening at issue. Thus, we find that when the documentation provided with the audit response in considered together with the supplemental documentation provided with the Employer's motion for reconsideration, the preponderance of the evidence meets the *Sanmina-Sci* criteria for a minimal showing under the regulations of the use of an employee referral program as a professional recruitment step.[5]

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[4] In *Marlabs, Inc.*, 2010-PER-1581 (Mar. 22, 2012), this panel held that "an employer may not rely solely on the attested dates in the Form 9089 as its documentation for the dates that an employee referral program was in effect." However, it is one factor to consider together with other documentation of record.

[5] What the Employer's documentation does not show is that it actively promoted the job under the employee referral program. In dicta in *Clearstream Banking, S.A.*, 2009-PER-15 (Mar. 30, 2010), the panel noted that "regulatory language seems to permit this recruitment option to be a passive form of recruitment that requires little to no active solicitation of applications by the employer." *Clearstream*, slip op. at 6, n.3. In dicta in *Sanmina-Sci*, the panel found that "requiring an employer to link the existence of the employee referral program with the PERM recruitment is necessarily implicit…." *Sanmina-Sci*, slip op. at 5 n.4. The *Sanmina-Sci* panel declined, however, to squarely rule on the passive verus active recruitment issue as it had not been briefed by the parties. In *Goldman, Sachs & Co.*, 2011-PER-578 (Jan. 20, 2012), the panel held that despite dicta in *Clearstream* suggesting that passive recruitment might be permissible under this recruitment step "some demonstration of a connection between the employee referral program and the recruitment efforts is required." *Goldman*, slip op. at 4. *To the same effect Blackrock Financial Management*, 2010-PER-1490 (Jan. 20, 2012). As in *Clearstream* and *Sanmina-Sci*, however, we do not reach this issue as it was not the ground cited by the CO for denying certification and was not briefed by the parties on appeal.

Employer's name and location of job as elements of employee referral program documentation.

The CO also denied certification on the ground that the documentation of the employee referral program did not state the employer's name or the location of the job opportunity as required by the regulation at 20 C.F.R. §§ 656.10, 656.17(f)(1) and (f)(4). It is not clear what the CO meant by this ground for denial, but is the advertisement that the employee sees that needs to display the name and location of the job. In the instant case, the advertisements used to promote the job on the Employer's website clearly included the Employer's name and the location of the job in Portsmouth, New Hampshire. Perhaps the CO was looking for this information to be on the employee handbook description of employee referral program itself, but that is not a reasonable or realistic expectation.[6]

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

For the panel:

Digitally signed by WILLIAM COLWELL
DN: CN=WILLIAM COLWELL, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

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.

[6] The Employer can be faulted for not indicating with its audit response materials that the description of the employee referral program came from its company handbook. But this was not the ground for denial cited by the CO, and even if it was, it was cured by the additional documentation that the CO considered on reconsideration.

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.