



Issue Date: 21 January 2016

BALCA Case No.: 2012-PER-00130
ETA Case No.: A-09118-42086

In the Matter of:

PINNACLE TECHNICAL RESOURCES, INC.,
Employer,

on behalf of

RALLAPALLI, VENKATA SIVA RAMA KRISHA,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Vaman B. Kidambi, Esquire
Kidambi & Associates, P.C.
Bridgeport, Connecticut
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and
Larry S. Merck, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

PER CURIAM. This matter arises under § 212(a)(5)(A) of 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 Form 9089 *Application for Permanent Employment Certification* sponsoring the Alien for permanent employment in the United States for the position of “Technical Recruiter.” (AF 168-177).¹ The only job requirement listed on the Form 9089 was a

¹ In this Decision, “AF” is an abbreviation for “Appeal File.”

Bachelor's degree in Business Administration. (AF 169-170). The job duties were described as follows:

Recruit qualified IT professionals across platforms and skills backgrounds for multiple positions; Screen candidates for application development. Interview candidates and perform orientation/training of all new candidates. Maintain client contacts database.

(AF 170).

The Certifying Officer ("CO") issued an Audit Notification. (AF 164-167).

One of the items included in the audit response was the State Workforce Agency ("SWA") job order placed by the Employer. The job order correctly stated the job title, location, rate of pay, and education requirement. However, the job description did not match the job duties stated on the Form 9089. Specifically, the SWA job order stated:

Job Description

Analyze, coordinate payroll and process benefits, new hire process, employment verification, unemployment claims, time entry/time sheet management. Manage Visa/Green Card Application process, legal issues compliance (ADA, EEO, FMLA, OSHA, etc.). Work directly with Director of Operations.

(AF 90).

Following review of the Employer's audit response, the CO denied certification on several grounds, one of which was that the SWA job order contained duties that exceeded the job duties listed on the ETA Form 9089. The CO cited the regulation at 20 C.F.R. § 656.17(f)(6) as the basis for the denial. (AF 26-29).

The Employer filed a motion for review/reconsideration. (AF 3-25). The Employer argued that its advertisements were standardized and compliant with the regulations. Citing an FAQ on the Office of Foreign Labor Certification website² and the "PERM" regulations, the Employer noted that advertisements are only required to demonstrate a "logical nexus" between the job opportunity on the Form 9089 and the advertisement. The Employer argued that none of its advertisements were vague or broadly written, and that none of the advertisements contained duties that exceeded the job requirements listed on the Form 9089. The Employer did not specifically address the fact that the description of the job duties on the Form 9089 departed significantly from the description of the job duties on the Form 9089.

The CO reconsidered, but found that the "expansion" of the job duties on the SWA job order was a valid ground for denial of certification. The CO stated that 20 C.F.R. § 656.17(f)(6) requires that advertisements not contain any job requirements or duties which exceed the job requirements listed on the Form 9089. The CO also noted: "Further, by including job duties not listed on the ETA Form 9089 a potentially qualified U.S. worker may not receive or read the

² See www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!187 (visited Feb. 25, 2015).

content of the job order due to the job duties entered in the profile, artificially excluding U.S. workers who may be interested in the position as listed on the Form 9089.” (AF 1).³

On appeal, the Employer filed a statement arguing that it had complied with the spirit and letter of the regulations in that it had provided a description of the vacancy, the name of the employer, the geographic area of employment, and the means to contact the employer, all of which “may be sufficient to apprise potentially qualified applicants of the job opportunity.” (Employer’s Jan. 31, 2012 “Statement of Intent to Proceed” at 1). The Employer also argued that “the ‘additional job duties’ on the job order were not required to be specifically enumerated on the ETA Form 9089 because there is a logical nexus between the job duties posted on the job order and the duties on the ETA Form 9089. Both job descriptions are substantially comparable to one another. It is clear that the[] employer did not intend to artificially exclude U.S. workers who might have been interested in the position listed on the ETA Form 9089.” *Id.*

The CO did not file an appellate brief.

DISCUSSION

As the CO noted, there was a significant divergence between the job duties set out on ETA Form 9089 and the job duties described on the job order. The CO cited 20 C.F.R. § 656.17(f)(6) as the regulatory basis for the denial of certification. That regulation states:

(f) *Advertising requirements.* Advertisements placed in newspapers of general circulation or in professional journals before filing the *Application for Permanent Employment Certification* must:

* * *

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

The denial cannot be sustained because § 656.17(f)(6) only applies to advertisements placed in newspapers of general circulation or in professional journals. It does not regulate the content of SWA job orders. *See Symantec Corp.*, 2011-PER-1856 (July 30, 2014) (en banc) (decision regarding application of § 656.17(f) to additional professional recruitment steps); *Fidelus Technologies*, 2011-PER-1635 (June 11, 2015) (applying *Symantec* to SWA job orders).

³ The other grounds for denial were later explicitly withdrawn by the CO. (AF 1).

ORDER

Because the regulation cited by the Certifying Officer does not support the denial of certification, we **REVERSE** the CO's denial of certification and return the matter to the CO with a direction to **GRANT** certification. 20 C.F.R. § 656.27(c)(2).⁴

Entered at the direction of the panel by:

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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.

⁴ This decision should not be construed as authorizing employers to place SWA job orders whose job descriptions do not accurately reflect the job described on the Form 9089. Rather, this decision is limited to holding that the 20 C.F.R. § 656.17(f)(6) cannot support the denial of certification based on a deficiency in a job order because § 656.17(f)(6) does not apply to job orders.