U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 January 2013

BALCA No.: **2011-PER-02696**
ETA No.: A-08255-86181

In the Matter of:

GENERAL ELECTRIC CO. (GE HEALTHCARE),
Employer,

on behalf of

ADRIAN JEREMY KNOWLES,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Praveena Swanson, Esq.
New York, NY
For the Employer

Gary M. Buff, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Calianos, Geraghty, McGrath**
Administrative Law Judges

JONATHAN C. CALIANOS
Administrative Law Judge

DECISION AND ORDER
REVERSING 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 governing alien labor certification found at Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").

BACKGROUND

On March 13, 2009, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "MR Clinical Development Leader." (AF 94-101).[1] The CO did not conduct an audit, but instead denied the application on February 3, 2010, because the alternative requirements for the job opportunity listed in the Employer's ETA Form 9089 are not substantially equivalent to the primary requirements in violation of 20 C.F.R. § 656.17(h)(4)(i). (AF 91). Specifically, the CO stated:

> [T]he employer's alternative experience of any suitable combination of education, training and experience as a/an MR clinical Development Leader, MR Applications Product Manager, Clinical Scientist, Radiographer or as a MR Specialist, is not substantially equivalent to the employer's primary requirements of Bachelors Degree [sic] in Radiology, Biomedical Engg, Chemistry or Medical Tech. and 60 months of progressively responsible post-bachelor's experience and some experience with MR equipment, product and/or application development. The 'any suitable combination' statement does not specify the employer's minimum acceptable requirement, therefore the application is denied.

(AF 91). On March 3, 2010, the Employer requested the CO reconsider its application in a letter captioned "Employer's Request for Review of Denial Notice and Motion to Reopen." (AF 2). The Employer alleged that "the alternative minimum requirements are substantially equivalent to the primary requirements listed in H.4 and H.10, and that the Certifying Officer ("CO") misread [the] answers to questions H-8 and H-10 on Form ETA 9089, likely due to the Department of Labor's poorly drafted Form ETA 9089." (AF 3) (emphasis in original). The Employer further argues:

> "the Form indicates at H-8 that an alternate combination of education and experience is acceptable. H-8-B clarifies that the alternate combination of education and experience is acceptable in lieu of a **U.S. Bachelor requirement**. H-8-B does not indicate that the alternate combination of education and experience is acceptable in lieu of the required five years of experience."

(AF 3) (emphasis in original). Employer argues "nowhere in the PERM regulations does the Department of Labor specify that the experience requirement from Box H-10-A must be re-written in H-8-C where there are only alternative minimum education requirements, and not alternative minimum experience requirements." (AF 3). Furthermore, Employer cites 20 C.F.R.

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

§ 656.3 stating "if the employer is willing to accept work experience in lieu of a baccalaureate or higher degree, such work experience . . . must be stated on the application form." (AF 3) (citing definition of "professional occupation").

On September 6, 2011, the CO forwarded the case to BALCA. (AF 1). The CO reiterated the reasons for the denial of certification in his transmittal letter, stating: Employer's primary requirements are a Bachelor's Degree and sixty months of experience, while the alternative requirements "presented on the ETA Form 9089 show education and experience equivalent to a U.S. Bachelor's degree and no experience. Since the alternative experience requirements as listed on the ETA Form 9089 are not substantially equivalent to the primary requirements, the [CO] has determined this reason for denial valid . . . ." (AF 1).

The Board issued a Notice of Docketing on December 16, 2011. The Employer filed a Statement of Intent to Proceed on December 28, 2011. On January 31, 2012, the Employer filed its Brief. The CO did not file an appearance or a brief in this case. On September 12, 2012, the Employer certified via email that the job identified in the PERM application was still open and available and that the alien identified in the PERM application was ready, willing, and able to fill the position.

DISCUSSION

Employers may include alternative job requirements in addition to the primary job requirements listed in their ETA Form 9089, provided the alternative requirements are "substantially equivalent to the primary requirements of the job opportunity for which certification is sought." 20 C.F.R. § 656.17(h)(4)(i).

The Employer identified the primary applicant requirements for the position of "MR Clinical Development Leader" in ETA Form 9089 Sections H-4 though H-7 and H-12 through H-14, including subparts. (AF 94-95). Employer's primary education requirement is a Bachelor's degree in "Radiology, Biomedical [Engineering], Chemistry or Medical Tech." (AF 94-95). Experience as a MR Clinical Development Leader is not required as a prerequisite to employment, but "[s]ixty months of progressively responsible post-bachelor's experience [including] some experience with MR equipment, product and/or application development," is required. (AF 95).

The Employer identified the position's alternative job requirements in Sections H-8 through H-10, and Section H-14, including subparts. (AF 95). Employer accepts a suitable combination of education, training, or experience as equivalent to its primary requirement of a U.S. Bachelor's Degree. (AF 95). Employer's alternate experience requirement of "[s]ixty months of progressively responsible post-bachelor's experience [including] some experience with MR equipment, product and/or application development," is the same as its primary experience requirement. (AF 95).

The CO's determination that "[t]he alternative requirements listed in Item H-8 of the ETA Form 9089 are not substantially equivalent to the primary requirements listed in groups Items H.4 and H.10," reveals a misunderstanding of Employer's application for certification. (AF 91). In his denial letter, the CO defined Employer's alternative requirements as "any suitable combination of education, training and experience as a/an MR Clinical Development Leader, MR Applications Product Manager, Clinical Scientist, Radiographer or as a MR Specialist." (AF 91).

The CO incorrectly treated Employer's alternative minimum *education* requirements as satisfying Employer's alternative requirements for *employment*, ignoring Employer's stated experience requirements from Item H-14. (AF 95). Employer's notation in Item H-10 and H-14 clearly indicates that all applicants for employment are required to have a minimum of sixty months of progressively responsible post-bachelor's experience, regardless of whether the applicant possesses the required bachelor's degree or satisfies the alternative education equivalent through an acceptable combination of education, experience, and training. (AF 95). As such, Employer's primary and alternative education and experience requirements are substantially similar.

Thus, for the reasons stated above, we reverse the CO's finding that the Employer's alternative education and experience requirements were not substantially equivalent to its primary education and experience requirements.

ORDER

It is **ORDERED** that the denial of labor certification in this matter is hereby **REVERSED** and we direct the Certifying Officer to **GRANT** labor certification in this case.

For the Panel:

JONATHAN C. CALIANOS
Administrative Law Judge

BOSTON, MASSACHUSETTS

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.