U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 April 2014

BALCA Case No.: 2011-PER-02969
ETA Case No.: A-09036-26164

In the Matter of:

PINELLAS ASSOCIATION FOR RETARDED CHILDREN,
Employer

on behalf of

MASAYO NAKAMURA,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Dimitar R. Michailov, Esq.
Capitol Immigration Law Group PLLC
Bethesda, MD
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: **Geraghty, Calianos, McGrath**
Administrative Law Judges

COLLEEN A. GERAGHTY
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 found at Title 20, Part 656 of the Code of

Federal Regulations ("C.F.R."). For the reasons set forth below, we reverse the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On February 24, 2009, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Assistant Accountant." (AF 1, 87).[1] On December 7, 2009, the CO sent the Employer an Audit Notification Letter, requiring the Employer to provide documentation establishing that the foreign worker had knowledge of Med Waiver, ICF/DD, EDI, and MIP Fund at the time of his hire. (AF 82-84). On December 23, 2009, the Employer responded to the Audit and attached a Personal Statement from the foreign worker stating that she had the required knowledge for the position. (AF 37-81).

On February 25, 2011, the CO issued a denial letter, denying the application because the Employer failed to provide sufficient evidence beyond the foreign worker's personal statement, that she acquired knowledge of Med Waiver, ICF/DD, EDI, and MIP Fund at the time of hire. (AF 35-36). The CO cited 20 C.F.R. § 656.20(b) as authority for denial, which states "a substantial failure by the employer to provide required documentation will result in the application being denied." (AF 36).

On March 22, 2011, the Employer requested reconsideration of the denial, arguing that the foreign worker's Personal Statement, signed under the penalty of perjury, was sufficient documentation. (AF 2-34). The Employer additionally submitted a letter signed by the Employer's Comptroller confirming at the time of hire the foreign worker met the job posting requirements. (AF 3).

On September 9, 2011, the CO forwarded the case to BALCA. (AF 1). In the CO's transmittal letter, he stated that the Employer did not provide a notarized affidavit, certifications, licenses, or any other substantive proof that the foreign worker had obtained and had utilized the Employer's specific knowledge requirements at the time of hire. He found that the Employer's mere assertion does not establish the necessary qualifications. He upheld his denial pursuant to 20 C.F.R. § 656.20(b).

On January 5, 2012, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on January 18, 2012. The Employer filed a Position Statement on February 16, 2012, expanding upon its arguments made on reconsideration. The CO did not file a brief. On January 6, 2014, in response to this Panel's Order Requiring Certification on Mootness, the Employer certified that the job identified on the PERM application is still open and available and that the alien identified in the PERM application remains ready, willing, and able to fill the position.

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

DISCUSSION

The PERM regulations require an employer seeking to apply for permanent labor certification on behalf of an alien to file a complete ETA Form 9089. 20 C.F.R. § 656.17(a). The requirements for the job opportunity listed in an employer's ETA Form 9089 "must represent the employer's actual minimum requirements for the job opportunity." 20 C.F.R. § 656.17(i)(1). If a foreign worker is currently employed by his sponsoring employer, in order to determine whether the job requirements listed in the application represent the actual minimum requirements, the CO "will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer." 20 C.F.R. § 656.17(i)(3). The employer cannot require potential applicants to have more experience than that of the alien at the time of his hire. *Id.*

Here, the Employer's application indicated that the job opportunity required an Associate's degree in Accounting Technology and "[k]nowledge of programming, communications, operations & system computerization; Med Waiver & ICF/DD; EDI; MIP Fund." (AF 87-88). The ETA Form 9089 stated that the foreign worker, Masayo Nakamura, who currently is employed by the Employer, has the required Associate's degree in Accounting Technology. (AF 91). The ETA Form 9089 did not mention whether Ms. Nakamura had any knowledge of Med Waiver, ICF/DD, EDI, or MIP Fund. (*See* AF 91-93).

As a result, the CO requested that the Employer on audit "provide documentation to support that the foreign worker met the requirements [of knowledge in Med Waiver & ICF/DD; EDI; MIP Fund] at the time of hire." (AF 84). In response to the Audit the Employer submitted the following letter signed by the foreign worker:

> I self-studied to acquire knowledge of Med Waiver, also called the Home and Community Based Waiver, which is a funding source. It is designed to provide the Developmental Disabilities Program (DDP) clients who need institutional level care, adequate support to be able to remain in the home. I also learned Intermediate Care Facilities for the Developmentally Disabled (ICF/DD), Electronic Data Interchange (EDI), and MIP Fund-Accounting non-profit software before I applied for a position at Pinellas Association for Retarded Children (PARC) for the purpose of working for medical accounting related job in Florida and I knew these skills were very important.

(AF 61).

Additionally, the Employer on reconsideration submitted a letter in which it confirmed that at the time of hire, Ms. Nakamura met the requirements for the job opportunity of Assistant Accountant. (AF 6). The Employer indicated that Ms. Nakamura demonstrated her knowledge of all skills required at the interview and that Ms. Nakamura "self-studied" to acquire knowledge of Med Waiver, ICF/DD, EDI and MIP Fund.[2] (AF 6).

[2] Although pursuant to 20 C.F.R. § 656.24(g) this letter submitted on reconsideration would typically be barred from evidence because the Employer had an opportunity to submit the letter at the time of the audit, the CO appears to have considered the letter as evidence, and we can therefore consider it on appeal. 20 C.F.R. §§ 656.26(a)(4)(i), 656.27(c).

The CO determined that the letters provided on audit and reconsideration were insufficient documentation in response to the audit, and therefore denied the application pursuant to Section 656.20(b) for "a substantial failure by the employer to provide required documentation." 20 C.F.R. § 656.20(b). At issue is whether the letters provided by the foreign worker and the Employer were sufficient documentation of the foreign worker's qualifications as requested by the Audit.

We find that the Employee's submission of the signed letter from Ms. Nakamura in response to the Audit substantially complied with the Audit request, and the CO's denial under Section 656.20(b) is not warranted. In the Audit request, the CO instructed the Employer to "provide documentation" without any specification as to what types of documentation would suffice. It was not until the transmittal letter that the CO suggested that acceptable documentation would be "a notarized affidavit, certifications, licenses, or any other substantive proof that the Foreign Worker had obtained and had utilized the employer's specific knowledge requirements at the time of hire." (AF 1). The Employer did not have adequate notice of these acceptable forms of documentation. Furthermore, we note the requirement in the ETA Form 9089 did not require any "certifications" or "licenses" (which would be more easily documented), but merely knowledge of the identified programs/information. Furthermore, nothing in the audit required the foreign worker's statements to be notarized. Accordingly, we find that Employer complied with the audit as written, and its application cannot be denied for failure to submit specific types of documentation not identified in the audit.

Because we find that the Employer substantially complied with the Audit Request, the CO's denial pursuant to 20 C.F.R. § 656.20(b) is hereby reversed.

ORDER

It is **ORDERED** that the denial of labor certification in this matter is hereby **REVERSED** and the CO is directed to **GRANT** certification.

For the Panel:

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, MA

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.