U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 23 July 2013

BALCA Case No.: 2011-PER-00955
ETA Case No.: A-08129-49929

In the Matter of:

SIEMENS WATER TECHNOLOGIES CORP.,
Employer

on behalf of

MARTIN ARNOLD SMITH,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Timothy M. Nelson, Esq.
Fragomen, Del Rey, Bernsen & Loewy LLP
Matawan, NJ
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: **McGrath, Geraghty, Calianos**
Administrative Law Judges

TIMOTHY J. MCGRATH
Administrative Law Judge

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."). For the reasons set forth below, we affirm the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On August 8, 2008, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Field Service Engineer." (AF 1, 110).[1] On March 17, 2009, the CO sent the Employer an Audit Notification Letter requesting that the Employer provide certain information in accordance with 20 C.F.R. § 656.20. (AF 105-08). On April 17, 2009, the Employer responded to the Audit, providing explanations to the CO's specific audit reasons and attaching documentation of its various recruitment steps. (AF 12-104).

On September 2, 2010, the CO denied the application. (AF 10-11). The Employer's response to the audit request explained the primary worksite address in the ETA Form 9089 is the same as the foreign worker's address because the job opportunity affords the Field Service Engineer to work from home and travel to various client sites as needed. (AF 10). The CO concluded, after reviewing the documentation, the employer did not offer the condition to work from home to U.S. workers. (AF 10). As a result, the CO denied the application pursuant to 20 C.F.R. § 656.17(f)(7), which states that advertisements must not "contain wages or terms and conditions of employment that are less favorable than those offered to the alien," and 20 C.F.R. § 656.10(c)(8), which requires employers to attest "[t]he job opportunity has been and is clearly open to any U.S. worker." (AF 10).

On September 29, 2010, the Employer filed a Request for Reconsideration. (AF 2-9). The Employer argued there is no regulation that requires advertisements to indicate that the geographic location is a home office. (AF 4). The Employer relied on the minutes from the Department of Labor's ("DOL's") March 15, 2007 Stakeholders Liaison Meeting to support its position that the recruitment was properly conducted based on the worksite address indicated on the ETA Form 9089. (AF 4). Additionally, the Employer stated it complied with 20 C.F.R. § 656.17(f) because the ad "did not contain terms and conditions of employment that are less favorable than those offered to the alien." (AF 5) (emphasis in original). It concluded "there is no regulatory prohibition from using a home address in recruitment efforts." (AF 5).

On March 25, 2011, the CO denied reconsideration and forwarded the case to the Board of Alien Labor Certification Appeals ("BALCA") for administrative review. (AF 1). The CO

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

upheld his denial under 20 C.F.R. §§ 656.10 and 656.17(f)(7), stating: "Not informing U.S. workers they would work from home, rather than from employer's headquarters or offices, artificially excludes potentially qualified U.S. applicants from applying for the job opportunity." (AF 1).

On May 25, 2011, BALCA filed a Notice of Docketing, and on June 8, 2011, the Employer submitted its Statement of Intent to Proceed and its Statement of Position. Its Statement of Position reiterated its arguments made on reconsideration. On March 26, 2013, this Panel issued an Order Requiring Certification on Mootness. On April 12, 2013, in response to the Order, the Employer certified that the job identified in the application is still open and available on the same terms and that the alien identified in the application remains ready, willing, and able to fill the position.

DISCUSSION

PERM is an attestation-based program. 20 C.F.R. § 656.10(c). Among other attestations, an employer must attest that the job opportunity listed in the application for permanent employment certification has been and is clearly open to U.S. workers. 20 C.F.R. § 656.10(c)(8). Accordingly, an employer filing an application for permanent alien labor certification is required to conduct certain recruitment steps and make a good-faith effort to recruit U.S. workers prior to filing its application. Advertisements placed as part of the recruitment process must meet certain content requirements as outlined in 20 C.F.R. § 656.17(f). For instance, the advertisements must "[n]ot contain wages or terms and conditions of employment that are less favorable than those offered to the alien." 20 C.F.R. § 656.17(f)(7). Additionally, advertisements must "indicate the geographic area of employment with enough 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).

The following response to a Frequently Asked Question ("FAQ") on the Office of Foreign Labor Certification's website clarifies what geographic information needs to be included in advertisements:

> **Does the job location address need to be included in the advertisement?**
>
> No, the address does not need to be included. However, advertisements must indicate the geographic area of employment with enough specificity to apprise

> applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity. Employers are not required to specify the job site, unless the job site is unclear; for example, if applicants must respond to a location other than the job site (e.g., company headquarters in another state) or if the employer has multiple job sites.

OFLC Frequently Asked Questions and Answers, http://www.foreignlaborcert.doleta.gov /faqsanswers.cfm (last visited June 26, 2013).

In the Employer's ETA Form 9089, Section H.1-2, the primary worksite for the job opportunity was in The Woodlands, Texas. (AF 110). The Alien's street address in Section J was the same as that listed for the primary worksite. (AF 113). In the Audit Request, the CO required a detailed explanation indicating the reason the foreign worker currently resides with the employer. (AF 107). In response, the Employer explained the address listed in Section H.1-2 (primary worksite) is the alien's private residence and the applicant works from his residence and travels to various client sites as needed. (AF 12). The Employer also submitted its recruitment materials with its audit response, all of which listed Houston, Texas as the location for the job opportunity. (*See* AF 62-102).

The Employer argues that it was not required to indicate in its advertisements the location was a home office. In support of its position, the Employer provided a copy of the minutes from the DOL's March 15, 2007 Stakeholders Liaison Meeting, which state in relevant part:

> 19. If an employer requires an employee to work from home in a region of intended employment that is different from the location of the employer's headquarters (i.e. work is required to be performed in a designated county or state that differs from the employer's headquarters), please confirm that the prevailing wage determination and recruitment can take place in the location of the employee's region of intended employment. Please confirm that the notice of posting under this circumstance should be posted at the company's headquarters.
>
> *If the 9089 form shows the worksite at a designated location other than headquarters, the PWD and recruitment would be for the worksite. AILA note: this issue essentially requires a strategy decision. The PERM form can state that the worksite is the home office, in which case the PWD and recruitment can be for the area of the home office, but the fact that the worksite is the same as the foreign national's home address will be picked up by the PERM system and the case will likely be audited. This can then be addressed in the audit response and should not be a problem, if the case is otherwise approvable. Alternatively, the PERM form can state that the worksite is the headquarters office, but then the PWD and recruitment must be done for that location.*

. . . .

21. For purposes of completing ETA-9089, if an employee works from home, what address should be identified in H.1 and H.2 –the actual home address of the employee or the address of the employer's headquarters or office from which the employee is based/paid?

Please see answer to number 19 above.

(AF 21-22). The Employer's reliance on these minutes is misplaced. The minutes demonstrate that the Employer did not err in conducting its recruitment in the area where the alien resides or by listing the alien's address as the primary worksite in Section H.1-2 of the ETA Form 9089. However, the meeting minutes are silent as to what geographic location should be included in advertisements where the applicant would work from home. These minutes provide no guidance on the content of the advertisements.

We find that the geographic location listed on the advertisements, "Houston, TX," represents a condition of employment that is less favorable than that offered to the alien. An applicant reading the advertisements would be under the impression that he or she was restricted to working in Houston, Texas. In contrast, the alien was given the option to work from his residence, which did not necessarily have to be in Houston, and which greatly expanded the potential geographic location of employment. Listing the location as Houston, Texas suggested to potential U.S. applicants that the job location was less flexible than it actually was. *See JDA Software, Inc.*, 2011-PER-02661, PDF at 2 (Sept. 27, 2012). There is no indication that the job has to be performed specifically in Houston. In fact, the Employer indicated that it has customers throughout North America and the position requires both domestic and international travel. (AF 40-41, 52-53). This suggests that the geographic location of the job opportunity was not as restrictive as the Employer led potential applicants to believe. *Juniper Networks*, 2011-PER-00841, PDF at 3 (Sept. 20, 2012). It appears that the only reason Houston, Texas was advertised as the geographic location is because that is where the alien was currently residing. *Id.* We find that the Employer's advertisement was unduly restrictive, misleading, and could have prevented potential U.S. applicants from applying for the job opportunity. *Id.*; *JDA Software, Inc.*, 2011-PER-02661 at 2.[2]

[2] Although not cited by the CO, we note the geographic location in the advertisements also violates Section 656.17(f)(3) and (4), as it is not specific enough to apprise applicants of where they would have to reside to perform

Based on the foregoing, we affirm the CO's denial of certification pursuant to 20 C.F.R. §§ 656.10(c) and 656.17(f)(7), because the location, Houston, Texas, in the Employer's advertisements represented a condition of employment that was less favorable than that offered to the alien.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED.**

For the Panel:

Digitally signed by TIMOTHY MCGRATH
DN: CN=TIMOTHY MCGRATH, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

TIMOTHY J. MCGRATH
Administrative Law Judge

Boston, MA

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the job. Applicants do not appear to be required to reside in or around Houston, as suggested by the advertisements, and they can work from wherever their residence is located. Stating that the location is Houston, Texas is not specific enough to apprise applicants of where they could reside. Furthermore, the Employer's recruitment documentation did not indicate to potential applicants that the job requires travel which, as indicated in the Employer's audit response, is an important component of the job. The Employer's failure to include its travel requirements in its advertisements also violates Section 656.17(f)(3) and (4).

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.