U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 May 2014

BALCA Case No.: 2012-PER-00038
ETA Case No.: A-10312-30494

In the Matter of:

KENTROX, INC.,
Employer

on behalf of

RAMAN, VIKRAM,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Robert H. Cohen, Esquire
Porter Wright Morris & Arthur LLP
Columbus, Ohio
For the Employer

Before: **Rosen, Bergstrom and Krantz**
Administrative Law Judges

DECISION AND ORDER GRANTING CERTIFICATION

This matter involves an appeal of the denial by an Employment and Training Administration, Office of Foreign Labor Certification, Certifying Officer ("CO") of permanent alien labor certification 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 20 C.F.R. Part 656.

BACKGROUND
TIMELINESS OF REQUEST FOR RECONSIDERATION/REVIEW

The initial question in this matter is whether the Employer timely requested reconsideration of the CO denial of certification.

The denial letter was dated July 1, 2011, was addressed to the Employer in care of its attorney, and was copied directly on the Employer. The address of the attorney used on the Audit Notification matches the address reported on the Form 9089. (AF 101, 180).[1]

By letter dated September 6, 2011, the Employer requested reconsideration by the CO and review by the Board of Alien Labor Certification Appeals (BALCA). (AF 1-100). A FedEx US Airbill indicated that the request for reconsideration/review was placed for shipment with FedEx on September 6, 2011. (AF 100).[2] The Employer argued that the request for reconsideration/review should be considered timely because "the Employer did not receive the decision until after counsel submitted an inquiry to the PLC Help Desk on August 10, 2011." (AF 1). The Employer supported this contention with affidavits from the Employer's former counsel, current counsel, and the Employer's contact (its Director of Human Resources). (AF 93-96). The Employer also provided a copy of relevant email communications in August 2011 (AF 97-98), and a copy of the mailing envelope used by the Atlanta National Processing Center (ANPC) to mail a copy of the denial letter with a postmark of August 11, 2011. (AF 99). The Employer cited in support of its argument the BALCA panel decision in *Michael K. Rosner*, 2011-PER-197 and -825 (June 2, 2011). The Employer's counsel received the copy of the denial letter on August 15, 2011. (AF 96).

The CO declined to process the Employer's request for reconsideration. In a Memorandum transmitting the Appeal File to BALCA, the CO recited the facts surrounding the issuance of the denial letter and the issuance of the copy of denial letter following the Employer's status inquiry, but did not provide any analysis of those facts or the Employer's argument as to why it should be considered to have timely filed its request for reconsideration, other than to note that the ANPC had not received any return mail relating to the denial. Rather, since the original denial was dated July 1, 2011, and the Employer did not post-mark its request for reconsideration until 67 days later on September 6, 2011, the CO found that the request for reconsideration was not timely.

On appeal, the Employer filed an Appellate Brief reiterating and expanding on the arguments made in the motion for reconsideration as to why the request for reconsideration/review should be considered timely. The CO did not file an Appellate Brief.

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

[2] The Atlanta National Processing Center's date/time stamp is illegible. (AF 1).

DISCUSSION
TIMELINESS OF REQUEST FOR RECONSIDERATION/REVIEW

The CO apparently sent the denial letter by regular mail, and has presented no proof of actual delivery of the denial letter by the Employer or its attorney. The CO's apparent reason for not believing that the Employer did not receive the original denial letter is that the ANPC did not receive any returned mail on this mailing.

The CO is not entitled to a presumption of delivery of mail sent by the ANPC in the absence of proof of its internal mailing procedures. *See Gentis Inc. v. USDOL*, No. 2:09-cv-05490-LP, slip op. at 9-10 (E.D.Pa. Jan. 11, 2011) (proof of internal mailing procedures required to invoke presumption). *See also Gentis, supra* slip op. at 10 (where only regular mail used, the presumption of delivery is weak); *Youth Soccer Alliance, LLC*, 2011-PER-1349 (Sept. 18, 2012); *Michael K. Rosner*, 2011-PER-197 (June 2, 2011); *Terry Stuckey & Associates, Inc.*, 2011-PER-146 (May 29, 2011); *Cumberland Food Market*, 2011-PER-87 (May 1, 2011); *22 E. 41St Street Corp. / O'Casey's*, 2009-PER-402 (Jan. 7, 2011) (presumption of delivery is rebuttable); *Vincheer Fashion, Inc.*, 1998-INA-24, slip. op. at 5 (Sept. 23, 1998). (same). The fact that the CO did not receive any returned mail relating to the original denial letter is not in itself proof that the law firm or the Employer received the letter.

Even if the CO was entitled to a presumption of delivery, it is only a weak presumption, and we find that it was rebutted by the affidavits of the Employer's current and former attorneys' and its Director of Human Resources, and the documentation of the August 2011 email correspondence. We also note that circumstantial evidence of a lack of a motive to fail to respond to the Audit Notification is relevant. *See DGN Technologies Inc.*, 2012-PER-1208 (Mar. 20, 2013) (citing *Santana Gonzalez v. United States*, 506 F.3d 274, 278 (3d Cir. 2007) for the proposition that circumstantial evidence, such as lack of motive to fail to respond to government instruction, may support rebuttal of presumption of delivery). We have reviewed the entire record. It is clear that the Employer was endeavoring to respond promptly to the ANPC and CO's directives. It is unlikely that the Employer would have completely failed to respond to denial letter if it had been received.

Accordingly, we find that the time period for requesting for reconsideration/review must be equitably tolled until the date that the Employer actually received the copy of the denial letter on August 15, 2011. Because the Employer filed its request for reconsideration/review within 30 days of actual receipt of the copy of the denial letter, we find that it was timely filed.

BACKGROUND
ACTUAL MINIMUM REQUIREMENTS ISSUE

The Employer is sponsoring the Alien for permanent employment in the United States for the position of "Software Engineer." (AF 179-190). When the Employer filed its Form 9089 PERM application, it indicated that the job opportunity required 24 months of experience in the occupation of software engineer, software developer, or a related occupation. (AF 181). In the portion of the Form 9089 application in which an employer is required to list the experience that qualifies the Alien for the position, the only experience listed was the Alien's work for the sponsoring Employer beginning August 1, 2005 as a Software Engineer.

The CO audited the Employer's application. (AF 175-178). In addition to the standard directive to submit recruitment documentation, the Audit Notification specified three subjects for special attention in the Employer's audit response. One of those subjects became the basis for the CO's denial of certification – the fact that the Alien gained his qualifying experience while working for the sponsoring employer in a job that appeared to be identical to the job opportunity for which labor certification was being sought. The CO gave the Employer three options for responding to this finding: (1) document that the position in which the alien gained the qualifying experience is not substantially comparable to the job offered; and/or (2) document that it is no longer feasible to train a worker to qualify for the position; and/or (3) document that the Alien gained the qualifying experience with a different employer. (AF 177).

When the Employer submitted its audit response (AF 103-174), it chose to document infeasibility to train. (See attorney's cover letter to audit response at 103-104). The Employer's documentation was in the form of a September 1, 2010 letter authored by the Employer's Vice President of Engineering. (AF 162).

On July 1, 2011, the CO issued a denial letter. (AF 101-102). The sole ground for denial was that the Employer failed to prove in its audit response that the experience the alien acquired with the Employer was acquired in a position that was substantially dissimilar to the one currently being offered. The CO's denial letter did not discuss, or even acknowledge, the Employer's infeasibility-to-train argument and evidence.

The Employer thereafter filed its request for reconsideration/review. (AF 1-100). Because the CO did not consider the request to be timely, he did not evaluate the merits of the request. In the request, the Employer argued that "[b]ased on the reasons for the denial provided in the written decision, it is clear that the analyst either ignored the evidence presented by the Employer in its audit response, or misinterpreted the applicable regulation." (AF 7). The Employer argued that the regulation does not require an employer to prove both dissimilarity of the jobs and infeasibility to train, but only one or the other. (AF 7).

DISCUSSION
ACTUAL MINIMUM REQUIREMENTS ISSUE

The regulation at 20 C.F.R. §656.17(i) requires an employer to state its actual minimum requirements for the position. In the instant case, the fact that the Alien gained all of his qualifying experience with the sponsoring Employer caused the CO to question whether the requirement of 24 months of experience in the occupation of software engineer, software developer, or a related occupation, was the Employer's actual minimum requirement. In other words, it appeared that the Employer was willing to hire the Alien without such experience, and was thus treating the Alien more favorably than U.S. workers.

Where the issue is the alien having gained the necessary experience while working for the sponsoring employer, the regulations provide two means for avoiding denial of the application based on a failure to state the actual minimum experience requirement. One is documentation that the alien gained the experience while working for the employer in a position not substantially comparable to the position for which certification is being sought. The other is that documentation that it is no longer feasible to train a worker to qualify for the position. 20 C.F.R. § 656.17(i)(2)(i) and (ii). In the instant case, the Employer chose the infeasibility-to-train option.

The "infeasibility-to-train" provision has been addressed by several BALCA panels under the PERM regulations. *See Teitel Bros, Inc.*, 201-PER-304 (Mar. 11, 2011); *Burger King #642*, 2010-PER-1524 (Aug. 17, 2011); *Beth Bayer Consignment*, 2010-PER-135 (Feb. 7, 2011); *Peacock Ridge*, 2011-PER-372 (May 24, 2012); *Your Employment Service Inc.*, 2009-PER-151 (Oct. 30, 2009). Each of those panels relied on caselaw decided under the similar regulation found in the pre-PERM regulations. Under the pre-PERM caselaw, it was held that an employer must sufficiently document a change in circumstances to demonstrate infeasibility. *See Rogue and Robelo Restaurant and Bar*, 1988-INA-148 (Mar. 1, 1989) (en banc). The employer's burden of establishing why it is not now feasible to offer the same favorable treatment to U.S. applicants was characterized as heavy. *58th Street Restaurant Corp.*, 1990-INA-58 (Feb. 21, 1991); *Fingers, Faces, and Toes*, 1990-INA-56 (Feb. 8, 1991). Documentation must show more than just inefficiency. *Admiral Gallery Restaurant*, 1988-INA-65 (May 31, 1989) (en banc). And a mere contention that the employer is experiencing growth in business does not meet the standard for a change in circumstances sufficient to establish the infeasibility of training a U.S. worker. *Farbell Electronics*, 1994-INA-59 (Apr. 28, 1995). A review of the pre-PERM caselaw indicates that the Board required concrete documentation to support assertions made, and that the Board was generally skeptical about claims of infeasibility to train. But the burden was not insurmountable. In *Avicom International*, 1990-INA-284 (July 31, 1991), for example, the employer showed that a change in its corporate ownership and reduction in its workforce left the alien as the sole remaining employee with the knowledge and training required of an electronics engineer.

In the instant case, the Employer presented a statement from its Vice President of Engineering, Mark Tinker, in response to the audit notification that addressed both the business necessity of its educational and experience requirements, and the infeasibility to train a new worker for the instant position. The Alien had gained his experience while working as an

Associate Software Engineer and Software Engineer at the Employer. The Employer produces a suite of remote site management software products that provide 24-7 on-site monitoring systems relating to protection against theft, timely identification of problems, and advance notification concerning network and equipment failure. Over one million of the Employer's products have been deployed in carrier and enterprise networks. The Employer needs the Software Engineer to have a master's degree and two years of experience because of the very complex analytical requirements of the job, which include full lifecycle implementation of projects; understanding of the business needs of clients; design, testing and implementation of applications; and support for implemented applications. Mr. Tinker enumerated several specific examples of the position's challenges, such as understanding packet loss and network congestion, performance and scalability issues, design and implementation of collection systems for hundreds of thousands of alarms and measurements from remote site appliances. The position also involves guidance and mentoring of more junior team members. Mr. Tinker stated that the Alien had become well-versed in the company's site management products during his tenure. (AF 160-162). Specifically as to the infeasibility of training, Mr. Tinker explained that the company was in the midst of a "critical product maturation phase" for the next three years, and would be releasing new software updates and releases every six to nine months on its remote site management products. He stated that the Alien's contributions to the product maturation phase were critical. According to Mr. Tinker, the Software Engineer "must have extensive knowledge of the software and how it has evolved to be able to contribute in a meaningful and timely way to regular update and release schedule." Mr. Tinker stated that in the fast-paced environment of software development, there is not time to train a new Software Engineer. Mr. Tinker stated that if he was to hire a Software Engineer with simply a Master's degree and no applicable experience, the software development phase would stall. He stated that it would take at least two years to catch up to the stage the product is currently at, and that with a six to nine month release cycle, "there is just not enough time to provide training or allow even an experienced Software Engineer to attain the level of specific product structure knowledge necessary to perform at the required level." (AF 162). Associated with Mr. Tinker's statement were fact sheets on several of the Employer's site management and security products. (AF 163-168). The Employer argued in its appellate brief that Mr. Tinker's statement was entitled to considerable evidentiary weight because it was made by a person with knowledge of the facts. (Employer's brief at 11).

It is clear from reviewing Mr. Tinker's statement that he is intimately knowledgeable about the Employer's products and business needs. His statement makes a credible presentation on the Employer's need to keep the Alien on during product maturation and frequent product updates and releases because it would take two years to train someone to the Alien's level of competency and specific product knowledge, during which time software development would stall. Mr. Tinker also credibly presented the argument that the six to nine month release cycle created too fast a pace to permit training or even to allow an experienced Software Engineer to attain the necessary specific product structure knowledge. Although the Appeal File contains no documentation directly supporting Mr. Tinker's statement, his statement was thorough and specific, and was obviously written by a person with firsthand knowledge about whether training for the position that is the subject of the labor certification was feasible given the Employer's business situation. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc), USDOL/OALJ Reporter at 2-3 ("[W]here an employer is required to prove the existence of an employment practice or the performance of an act and its results, written assertions which are reasonably

specific and indicate their sources or bases shall be considered documentation. This is not to say that a certifying officer must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve."). Under the facts of this specific case, we find that the Employer's documentation of infeasibility to train warrants application of Section § 656.17(i)(2)(i).

ORDER

Based on the foregoing, **IT IS ORDERED** that labor certification is **GRANTED**. This matter will be returned to the Certifying Officer for issuance of the certification.

For the panel:

Digitally signed by Dana A. Rosen
DN: CN=Dana A. Rosen,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Newport News, S=VA, C=US
Location: Newport News VA

DANA ROSEN
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. 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.