U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 April 2016

BALCA Case No.: 2012-PER-01339

ETA Case No.: A-10278-23256

In the Matter of

Erik Sussman

Employer

on behalf of

Ashley Alexander O'Kurley

Alien

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Robert Coleman
Managing Partner, CLU, ChFC
Erik Sussman (John Hancock Financial Network)
Miami, Florida
For the Employer

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

Before: DALY, ROMERO, and PRICE
Administrative Law Judges

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

PER CURIAM.

1. Nature of Appeal. 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.). Employer submitted an Employment and Training Administration (ETA) Form 9089 application for a permanent alien certification. The Certifying Officer (CO) denied Employer's application, and Employer submitted a request for reconsideration pursuant to 20 C.F.R. § 656.26. At issue is whether Employer's ETA Form 9089 represented the actual minimum requirements for the position as required by 20 C.F.R. § 656.17(i)(1). Specifically, Employer contends it rejected all U.S. workers who applied for the position for lawful, job-related reasons.

2. Procedural Background and Findings of Fact.

(a) On September 24, 2010, the CO accepted for filing Employer's ETA Form 9089, Application for Permanent Employment Certification, for an International Financial Planner position at Erik Sussman (Employer) located in Miami, Florida. Employer indicated the position was a professional occupation. (AF 107-115) [1]

(b) Employer's Form 9089 provided the following specific requirements for the position: "an economics background; CFP(R) certification; FINRA licenses 6, 63, 65, or equivalent; FL Life & Health (2-15); and an insurance license." (AF 109)

(c) On October 28, 2010, the CO sent Employer a letter stating Employer's ETA Form 9089 could not be processed without additional information. Specifically, the CO requested Employer submit proof of its federal employer identification information (FEIN), the business entity's corporate existence, and the Employer's physical location. Employer responded with the requested documentation on November 15, 2010. (AF 106; 93-104)

(d) On December 20, 2010, the CO sent an Audit Notification letter to Employer. The CO explained the Department of Labor was "unable to determine if potentially qualified U.S. workers who applied for the job opportunity were rejected for lawful, job-related reasons." The CO requested Employer provide resumes and applications for all U.S. workers who applied for the position described in ETA Form 9089. (AF 89-92)

(e) Additionally, the CO requested Employer submit a recruitment report with the following information for each rejected U.S. worker: the date Employer contacted the U.S. worker; the date Employer interviewed the U.S. worker; if appropriate, the reasons Employer did not interview the U.S. worker; the specific lawful, job-related reasons Employer rejected the U.S. worker; and how the U.S. worker was informed he or she did not qualify for the job opportunity. The CO also requested Employer include records documenting how Employer contacted each applicant, either by phone, email, or mail. (AF 91)

[1] References to the Appeal File are by the abbreviation AF and page numbers.

(f) Employer submitted a written recruitment report with the additional recruitment documentation requested in the CO's Audit Notification letter. [2]

(g) In relevant part, Employer's written recruitment report stated it considered Ms. Cynthia Kravitch, a U.S. worker, for the position. However, Employer specifically declared it did not hire Ms. Kravitch because a "background check on the applicant included a disclosure that resulted from a customer complaint at her previous employer."[3] (AF 36)

(h) On July 15, 2011, the CO denied certification. The CO explained that "a customer complaint at a previous employer does not have a bearing on the qualifications of the U.S. worker to perform the job opportunity as listed in section H of the ETA Form 9089." The CO determined that Employer's rejection of this applicant was not for a lawful, job-related reason, in violation of 20 C.F.R. § 656.10(c). (AF 8-9)

(i) Employer submitted a request for reconsideration on August 1, 2011, pursuant to 20 C.F.R. § 656.26. Contrary to Employer's written recruitment report submitted in response to the CO's Audit Notification letter, Employer's request for reconsideration stated it did not "immediately reject" Ms. Kravitch based on the former customer complaint. Employer also claimed it did not "immediately reject" Ms. Kravitch although she lacked a Series 65 license and CFP certification, which ETA Form 9089 listed as requirements. Employer stated Ms. Kravitch did not return telephone calls and was no longer interested in the position. Other than attaching a copy of the CO's denial letter, Employer submitted no other documentation to support these assertions in its request for reconsideration. (AF 3-7)

(j) On February 17, 2012, the Atlanta National Processing Center forwarded the matter to the Board of Alien Labor Certification Appeals (BALCA) for administrative review.[4] In the CO's denial of Employer's request for reconsideration, the CO explained that pursuant to 20 C.F.R. § 656.17(i)(1), the job requirements set forth in ETA Form 9089 must represent the employer's "actual minimum requirements." Employer's ETA Form 9089 did not list passing a background check without any prior customer complaints as a requirement for the position. The CO stated "these preconditions exceed the requirements obligatory of the foreign worker on the ETA Form 9089" and "rejecting a U.S. worker for not having an unstated job requirement is not a lawful job-related reason for rejection."[5] (AF 1)

(k) BALCA issued a Notice of Docketing on July 6, 2012. Employer filed a Statement of Intent to Proceed on July 20, 2012.

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[2] The CO received Employer's response to the Audit Notification letter on January 20, 2010. (AF 10-89)
[3] In total, Employer's recruitment report declared it considered six U.S. workers for the position. However, the only rejected U.S. worker at issue is Ms. Kravitch. (AF 35-38)
[4] Under 20 C.F.R. § 656.24(g)(4), "[t]he Certifying Officer may, in his or her discretion, reconsider the determination or treat it as a request for review under § 656.26(a)."
[5] The CO determined denial of labor certification was also proper because Employer failed to comply with the newspaper advertisement requirements pursuant to 20 C.F.R. § 656.17(f)(6). (AF 1)

(l) On August 21, 2012, Employer filed a Statement of Position, which it later supplemented by letter on November 19, 2014. [6] In this filing, Employer asserted Ms. Kravitch did not meet the position requirements because she did not possess the Series 65 license or a CFP credential. Employer claimed that a background check was "implicit for anyone currently employed or seeking employment as a financial services professional." Employer also stated it conducted a background check on the Alien and, thus, the requirements did not exceed "the requirement obligatory of the foreign worker." Employer also noted its former attorney used a "template" and only provided "cursory information on each applicant" when submitting Employer's written recruitment report.

(m) On February 5, 2016, BALCA entered an Order Requiring Certification on Mootness, which required Employer to certify whether: (1) The job identified in the PERM Application is still open and available on the same terms set forth in the Application; and (2) The alien identified in the PERM Application to fill the position is ready, willing and able to fill the position should the decision below be overturned. On February 26, 2016, Employer certified the facts required by the order.

3. <u>Applicable Law and Analysis</u>.

Under section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(5)(A), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

> (1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and
> (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

20 C.F.R. § 656.1.

An employer bears the burden of proof to establish eligibility for labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). The PERM process is exacting and designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over dialogue to better serve the public interest overall, given the resources available to administer the program. *HealthAmerica*, 2006-PER-1 (July 18, 2006)(en banc). The PERM regulations require an employer applying for permanent labor certification on behalf of the alien to file an ETA

[6] Employer provided the following additional evidence, not presented to the CO, with its Statement of Positon: emails to and from Ms. Kravitch discussing the position requirements; a timeline detailing Ms. Kravitch's recruitment; a copy of the requirements of the Certified Financial Planner Board of Standards, Inc., which states that a background check is obligatory to hold the CFP credential; documents from the Financial Regulatory Authority (FINRA), which state background information be readily available on those working in the financial services industry, including information about prior employment and disciplinary history; and Ms. Kravitch's publically available FINRA record.

Form 9089. 20 C.F.R. § 656.17(a). The employer must ensure it submits a complete application to the CO. 20 C.F.R. § 656.11(b).

(a) *Actual Minimum Requirements for Job*. The job requirements listed on the application must represent the employer's actual minimum requirements for the job opportunity, and the employer must not have hired workers with less training or experience for the job opportunity. 20 C.F.R. § 656.17(i)(1)-(2). The purpose of this requirement is to address the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *Your Employment Service Inc.*, 2009-PER-151 (Oct. 30, 2009) *citing ERF Inc., d/b/a Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990). Further, an employer is required to certify that the "U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons." 20 C.F.R. § 656.10(c)(9).

Employer's ETA Form 9089 made clear the position required an economics background, CFP certification, and current FINRA and other insurance licenses. The position described in ETA Form 9089 contained absolutely no mention of a requirement to successfully pass a background check that did not reveal any past customer complaints lodged against the applicant. However, Employer accessed a background check conducted on Ms. Kravitch, a U.S. worker. Employer also conducted a background check on the Alien, which plainly illustrated that Employer considered a background check as a prerequisite for the job. Employer's recruitment report, prepared in direct response to the CO's Audit Notification, unambiguously declared Employer rejected Ms. Kravitch for the position because a "background check on the applicant included a disclosure that resulted from a customer complaint at her previous employer." Based on Employer's unequivocal declaration, Employer clearly imposed an additional requirement for the position that it failed to include in its ETA Form 9089 and rejected a U.S. worker for failing to meet an unstated requirement for the position.

Employer contends that a background check was an "implicit" requirement for employment in the financial services profession. Employer also asserts that "not listing an implicit industry standard as an explicit requirement on ETA Form 9089 does not discriminate against U.S. workers."

The regulations distinctly and unambiguously demand an employer's application represent the "actual minimum requirements" for the position described in ETA Form 9089. Employer's contention that a background check is, as a practical matter, an "implicit" requirement in the financial services profession does not excuse its absence as a requirement on the application. To this very point, a recent BALCA ruling rejected an employer's argument that a job requirement was "implicit" from ETA Form 9089. *See New York City Dep't of Educ.*, 2012-PER-03049 (Dec. 21, 2015)(affirming the CO's denial of labor certification stating "[w]e are not convinced that any requirements may be implied under the strict PERM process. . . . Even though certification in specific subjects may be obvious in the context of the Employer's business, it is not administratively feasible for the CO to investigate the circumstances of each employer's business.").

Consequently, we conclude Employer's ETA Form 9089 failed to include the actual minimum requirements for the position in its application for labor certification. As a result, Employer's rejection of Ms. Kravitch based on her background check, a requirement not listed on the ETA Form 9089, does not qualify as a lawful job-related reason in this matter.

(b) *Employer's Request for Reconsideration*. An employer is entitled to request reconsideration of a denial of labor certification. A CO will consider additional documentation submitted with an employer's request for reconsideration only if the employer did not have the opportunity to submit it previously and if it was maintained to support the application for labor certification. 20 C.F.R. § 656.24(g)(4)(i)-(ii); *see also Denzil Gunnels d/b/a Gunnels Arabians*, 2010-PER-628 (Nov. 16, 2010). The PERM regulations restrict BALCA's review of a denial of labor certification to evidence that was part of the record upon which the CO's decision was made. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c); *Eleftheria Restaurant Corp.*, 2008-PER-143 (Jan. 9, 2009); *5th Avenue Landscaping, Inc.*, 2008-PER-27 (Feb. 11, 2009).

In its request for reconsideration, Employer claimed it did not "immediately reject" Ms. Kravitch based on the past customer complaint. In sum, Employer asserted that citing the background check as the specific lawful, job-related reasons it rejected Ms. Kravitch was the erroneous result of "template" language used by its attorney in response to the Audit Notification. Employer further declared the actual reasons it did not employ Ms. Kravitch were because she did not possess a Series 65 license or CFP credential and thus failed to satisfy the job requirements. Employer also suggested Ms. Kravitch was no longer interested in the position. Employer reiterates this argument in the "Statement of Position" it submitted well after its request for reconsideration. Employer included additional documentation to support contentions made in its Statement of Position. This documentation was obviously not part of the record when the CO made a decision on the ETA Form 9089 as supplemented by Employer's recruitment report.

Employer's revised justification for not hiring Ms. Kravitch conflicts with its specific declaration in its written recruitment report, which unambiguously stated Ms. Kravitch was rejected based on the past customer complaint revealed in the background check. Of particular importance, Employer failed to direct the CO to any evidence in the written recruitment report, or elsewhere, to support the revised justification in its request for reconsideration. Employer also did not allege it lacked the opportunity to previously submit other applicable evidence.

Employer's post hoc argument that its ETA Form 9089 accurately represented the actual minimum requirements for the position and Ms. Kravitch was, in reality, rejected for lawful, job-related reasons is premised only upon documentation and argument submitted after the CO's decision. Accordingly, we conclude the CO properly denied certification based on the record as it existed at the time of his decision.

4. **Ruling and Order**. Employer's ETA Form 9089 failed to represent Employer's actual minimum requirements for the job opportunity as required by 20 C.F.R. § 656.17(i)(1). Employer failed to meet the burden of establishing it lawfully rejected a U.S. worker who applied for the position. We affirm the CO's decision. Denial of the labor certification in this matter is **SO ORDERED**.

For the Panel:

Digitally signed by Tracy A. Daly
DN: CN=Tracy A. Daly,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Covington, S=LA, C=US
Location: Covington LA

TRACY A. DALY
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 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 the Board's 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 400N
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.