



Issue Date: 07 April 2010

In the Matter of:

XPEDITE TECHNOLOGIES, INC.,

Employer,

on behalf of

PEDDI RAJU KANUMURI,

Alien.

BALCA Case No. 2010-PER-00100

ETA Case No. A-07215-63363

and

MOHANA RAO BONDADA,

Alien.

BALCA No. 2010-PER-00101

ETA No. A-07215-63179

and

RAMA RAO YADLAPALLI,

Alien.

BALCA No. 2010-PER-00105

ETA No. A-07223-65285

Certifying Officer: William L. Carlson
Atlanta Processing Center

Appearances: Iqbal S. Ishar, Esquire
Sharma, Yaskhi & Ishar, LLP¹
New York, New York
For the Employer

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

¹ The name of the law firm appears to have changed from Yaskhi, Ishar, Chow & Reddy, LLP to the name listed above after the Employer filed its Motion to Reconsider.

Before: **Colwell, Johnson and Wood**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

PER CURIAM. These appeals arise 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.”). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

The following Statement of the Case is based on the Appeal File for Peddi Raju Kanumuri, 2010-PER-00100, which is representative of the Appeal Files in all of the cases. The applications are nearly identical in regard to the issues raised and dealt with by the CO in the denial letters and letters of reconsideration, as well as the evidence and argument presented by the Employer in the requests for reviews. “AF” is an abbreviation for “Appeal File,” and refers to the file for 2010-PER-00100.

STATEMENT OF THE CASE

On August 15, 2007,² the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification on behalf of the Alien for a “Senior Programmer Analyst” position. (AF 187-197). For the job duties of the position, the Employer listed “Design, develop, plan, coordinate and implement advance software module components in complex computing environment.” (AF 189). For specific skills or other requirements, the Employer required: C++, ASP, COM/DCOM, Scripting, Win NT/2000/98, UNIX, Oracle, and VB. *Id.*

² The dates for when each application was filed, as well as the dates for the subsequent filings and letters by the CO and Employer vary. As there are no issues related to timeliness of recruitment or submission of documents, the variations in dates among the cases is immaterial to our decision. The dates shown refer to the dates for the lead case, 2010-PER-00100.

On October 10, 2007, the CO issued an Audit Notification, directing the Employer to provide evidence of recruitment. (AF 185-186). The CO received the Employer's response to the Audit Notification on November 7, 2007, which included the requested documentation. (AF 42-184).

On December 16, 2008, the CO denied certification for multiple reasons. (AF 39-41). The reasons which remain issues on appeal are: (1) the Notice of Filing did not contain the location of the job opportunity; and (2) the Employer did not provide adequate documentation of the mandatory print advertisements as requested.³ (AF 40). Regarding the print advertisements, the Employer did not provide legible copies of the tear sheets. *Id.*

The Employer submitted a Motion to Reconsider on January 8, 2009. (AF 3-38). In its cover letter, the Employer asserted that it was submitting enlarged, legible copies of its newspaper advertisements. In the attached newspaper advertisements, the Employer required the same basic requirements listed on the ETA Form 9089, and additionally, stated that travel was required. (AF 27-30).

On November 13, 2009, the CO issued a letter of reconsideration, finding that the Employer did not overcome all of the deficiencies indicated in the determination letter. (AF 1). The CO stated that although the Employer did provide legible copies of its newspaper advertisements with its request for review, these advertisements contained additional job requirements not listed on the ETA Form 9089. Specifically, the newspaper advertisements stated that travel was required for the position.

BALCA issued a Notice of Docketing on December 1, 2009. The Employer filed a Statement of Intent to Proceed on December 14, 2009, but did not file an appellate brief.⁴ The CO filed a brief on January 25, 2010, asserting that, "[t]he employer's

³ Since we are affirming the denial on this ground, we do not reach the issue concerning the geographic location on the Notice of Filing.

⁴ The Employer did not file a Statement of Intent to Proceed for BALCA cases 2010-PER-00101 or 2010-PER-00105. However, since the same issues are relevant to all three cases, we are including these cases in this decision. Further, it appears that the Employer changed its address since filing its PERM application, as we received a letter from the new occupant stating that Xpedite was no longer situated at that address.

addition of new job requirements, i.e. travel, in its advertisements was improper as it was not also listed on the ETA Form 9089 (see AF, 187-197) and was a violation under 20 C.F.R. § 656.17.”

DISCUSSION

Under 20 C.F.R. § 656.17(e), most sponsoring employers are required to attest to having conducted recruitment prior to filing the application. Among other requirements, applications involving both professional and non-professional occupations normally require the sponsoring employer to attest to having placed two print advertisements in a newspaper of general circulation in the area of intended employment most appropriate to the occupation. 20 C.F.R. § 656.17(e)(1)(i)(B) and 656.17(e)(2)(ii). The regulations at 20 C.F.R. § 656.17(f)(7) state that advertisements placed in newspapers of general circulation or in professional journals must “not contain wages or terms and conditions of employment that are less favorable than those offered to the alien.”

In the instant case, the newspaper advertisements contained a requirement for travel, which was not listed on Form ETA 9089. Since the Employer did not include the travel requirement as a requirement for the position on ETA Form 9089, the Employer’s conditions of employment in its newspaper advertisement were less favorable than those offered to the Alien, in violation of 20 C.F.R. § 656.17(f)(7). *See also Noll Pallet & Lumber Co.*, 2009-PER-00082 (Dec. 16, 2009) (certification denied where the newspaper advertisements contained a requirement for criminal and background checks, which were not listed on Form ETA 9089).

Accordingly, we affirm the CO’s denial of certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matters is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

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.