

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 June 2010

BALCA Case No.: 2009-PER-00414
ETA Case No.: A-07197-56653

In the Matter of:

TRANS ATLANTIC SYSTEMS, INC.,
Employer,

on behalf of

ARUN KUMAR THOTA,
Alien.

Certifying Officer: William L. Carlson
Atlanta Processing Center

Appearances: Chandler B. Sharma, Esquire¹
Smith, White, Sharma, Yaskhi, Halpern & Ishar, LLP
Chicago, Illinois
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

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

¹ The Employer was formerly represented by Sanford A. Posner, Esquire, but appears to have changed attorneys after filing its request for review.

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

PER CURIAM. 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.

STATEMENT OF THE CASE

On July 16, 2007, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification on behalf of the Alien for a professional "Programmer" position. (AF 44-53).²

On September 11, 2007, the CO issued an Audit Notification, directing the Employer to provide evidence of recruitment and documentation to justify the business necessity of an experience requirement. (AF 40-43). The Employer submitted: a copy of the ETA Form 9089; a letter justifying business necessity; a recruitment report; a copy of the prevailing wage determination; a copy of the Notice of Filing; a copy of the job order; copies of newspaper advertisements; and evidence of its employee referral program. (AF 14-39).

On November 29, 2007, the CO denied certification, in part, because the Employer failed to provide adequate documentation to show that it advertised the job opportunity on its website and that it advertised the position on a job search website.³ (AF 10-12).

The Employer submitted a request for review on December 13, 2007. (AF 3-9). In this request, the Employer stated "Unfortunately, the employer did not keep a copy of

² In this decision, AF is an abbreviation for Appeal File.

³ The CO also indicated an additional ground for denial, but since we are affirming denial on the above-stated ground, we will not discuss the second ground here.

either posting. The signed recruitment report should be accepted as credible evidence that the employer fulfilled the requirements of the case.” (AF 4). The Employer further contended that, “due to an internal error, they failed to make a timely print out of the online postings. *Id.*

On August 4, 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 1-2). Specifically, the CO asserted that the Employer failed to provide adequate documentation of its website posting and its posting on a job search website. The CO contended that under the regulations the Employer can document these steps by providing dated copies of pages from the site that advertises the occupation.

BALCA issued a Notice of Docketing on August 17, 2009. The Employer filed a Statement of Intent to Proceed with the appeal on August 31, 2009, and an appellate brief on September 17, 2009. In regard to its website postings, the Employer stated that it “electronically posted the job offer on its website and the website of an independent job board. The employer so attested as it required at Exhibit II.” At Exhibit II, the Employer included a copy of its previously submitted recruitment report.

The CO filed an appellate brief on October 1, 2009, asserting that the Employer failed to provide evidence to document that it used its own website and a job search website as additional recruitment steps and that this is a valid reason for denial.

DISCUSSION

Under 20 C.F.R. § 656.17(e)(1)(ii), additional recruitment steps that an employer can utilize to advertise a professional occupation include: advertising the position on its own website, and advertising the position on a job search website other than its own. These steps can be documented by providing dated copies of pages from the sites that advertise the occupation involved in the application. 20 C.F.R. §§ 656.17(e)(1)(ii)(B) and 656.17(e)(1)(ii)(C).

The regulations require an employer to maintain supporting documentation of all recruitment steps taken and all attestations made in the application for labor certification. 20 C.F.R. §§ 656.17(a)(3), 656.17(e)(1). The regulation at 20 C.F.R. § 656.10(f) provides:

Copies of applications for permanent employment certification filed with the Department of Labor and all supporting documentation must be retained by the employer for 5 years from the date of filing the Application for Permanent Employment Certification.

The audit regulation at 20 C.F.R. § 656.20(b), provides, in pertinent part:

A substantial failure by the employer to provide required documentation will result in that application being denied under § 656.24 and may result in a determination by the Certifying Officer pursuant to § 656.24 to require the employer to conduct supervised recruitment under § 656.21 in future filings of labor certification applications for up to 2 years.

In the instant case, the CO properly found that the Employer failed to comply with the regulations by failing to provide adequate documentation that the offered position was advertised on the Employer's website and on a job search website. The Employer did not provide dated copies of either advertisement. In fact, the only supporting documentation that the Employer provided was a signed recruitment report. Standing alone, this report does not provide adequate documentation that it placed an advertisement on its website or on a job search website.⁴

The regulations stress the requirement to maintain supporting documentation no fewer than three times,⁵ and this requirement serves to preserve the integrity of the labor certification program. Under the regulations, if an employer cannot produce the supporting documentation, the application for labor certification will be denied. Since the Employer has not shown that it complied with the regulations, the CO properly denied labor certification.

⁴ See *Carlos Uy III*, 1994-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof).

⁵ See 20 C.F.R. §§ 656.17(a)(3), 656.17(e)(1), 656.10(f).

ORDER

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