U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 July 2012

BALCA Case No.: 2011-PER-01000
ETA Case No.: A-09252-63437

In the Matter of:

JP Morgan Chase & Co.,
Employer

on behalf of

Shubhi Anand,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Jenny Nieves, Esquire
Fragomen, Del Rey, Berensen & Loewy, LLP
New York, NY
For the Employer

Before: Sarno, Bergstrom, Malamphy
Administrative Law Judges

DECISION AND ORDER
VACATING 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.").

BACKGROUND

On June 22, 2009 the Certifying Officer ("CO") sent the employer a Notification of Supervised Recruitment in Future Filings letter. (AF 195-198)[1]. On September 2, 2009, the Employer sent a Response to Notification of Supervised Recruitment in Future Filings letter and an Application for Permanent Employment Certification. (AF 176-194). From March of 2010 through October of 2010 the Employer and the CO engaged in the back and forth of supervised recruitment. (AF 19-175)

On November 15, 2010, the CO denied the application because the employer rejected U.S. workers for other than lawful job-related reasons per 20 C.F.R. § 656.24. (AF 16-18).

On December 14, 2010 the Employer requested reconsideration. (AF 3-15). The employer states the U.S. workers were lawfully rejected because the candidates do not have the required education, training, or experience for the offered position.

On April 4, 2011 the CO affirmed denial citing 20 C.F.R. § 656.24(b)(2)(i). (AF 2). The CO states he must consider a U.S. worker qualified if the worker has a combination of the required attributes, and the worker is able to perform the duties as customarily performed by others similarly employed. The CO also cites 20 C.F.R. § 656.21(e)(4) which allows a worker to acquire skills through reasonable on-the-job training. Lastly, the CO states two U.S. workers were rejected for lacking skills that the employer did not list on ETA Form 9089. Per 20 C.F.R. § 656.17(i)(1), the job requirements described on the application must represent the employer's actual minimum requirements and additional requirements cannot be the basis for a lawful job-related reason for rejecting a U.S. worker.

The CO forwarded the case to BALCA on April 6, 2011 and BALCA issued a Notice of Docketing on June 1, 2011. The Employer filed a Statement of Intent to Proceed on June 8, 2011 and submitted a Statement of Position on July 15, 2011. The employer contends the CO incorrectly determined two U.S. workers had a suitable combination of education, training, or experience to necessitate an interview. The employer cites three *en banc* decisions supporting the employer's determination that the U.S. workers were not qualified nor entitled to interviews.

The CO did not file a Statement of Position.

DISCUSSION

The regulation at 20 C.F.R. § 656.17(h) states the job requirements must be those normally required for the occupation unless adequately documented as arising from business necessity. To establish a business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner. *Id.*

At issue is the employer's list of specific requirements on ETA Form 9089. The following skills are central to the dispute: "Proficiency in Excel or Access,…understanding of databases (Lotus Notes and SharePoint), must have experience liaising with a technology team to develop/update product enhancement tool, databases and work flow engines…" (AF 201). The CO argues the U.S. workers have a combination of education, training and experience equivalent to the employer's requirements and were rejected for lacking skills that were not listed on ETA Form 9089, a violation of C.F.R. § 656(i)(1).(AF 2)

In its appeal the employer only addresses the requirements it did list on ETA Form 9089 in support of rejecting the U.S. applicants, though not entirely accurately. ETA Form 9089 specifies proficiency in Excel *or* Access and an understanding of Lotus Notes *and* SharePoint. (AF 201) The employer's appeal, however, claims a requirement in both Excel and Access. Applicant Simpson does have experience in Excel (AF 76), however, the employer correctly argues the U.S. applicants Macry and Simpson do not have proficiency in Lotus Notes and SharePoint. (AF 75-76, 142-143) The employer states these skills are indispensable for the offered position. Additionally, the employer argues it is not feasible for a candidate to acquire skills through on the job training. For these reasons the U.S. applicants did not warrant an interview.

The employer states a CO cannot dismiss an employer's stated job requirements in the absence of a determination that the job requirements are unduly restrictive. *In re Concurrent*

Computer Corp., 88-INA-76 (August 19, 1988) (*en banc*). Where there is no finding of unduly restrictive requirements an applicant, whose resume shows he or she clearly does not meet the minimum requirements for the job, may be rejected without any further investigation. *Adry-Mart, Inc*,. 88-INA-243 (February 1, 1989) (*en banc*). Lastly, the Board has held an employer may reject a candidate on the sole basis of a resume that does not meet the minimum requirement. *In re Anonymous Management*, 88-INA-672 (September 8, 1988) (*en banc*).

The key issue is whether or not the employer's stated requirements are established as a business necessity. The employer claims the U.S. applicants are not qualified. The CO claims the U.S. applicants have a combination of skills that meet the position's minimum requirements, and could acquire Access and SharePoint skills while on the job. ETA Form 9089 asks for the job's duties, whether those requirements are normal for the position, and whether there are additional specific skills required. If the requirements are not normal, which the employer indicated in this case, then the employer must be prepared to provide documentation demonstrating the job requirements are supported by business necessity. (AF 215).

In its Appeal and Request for Reconsideration the employer reiterates that it believes the two U.S. candidates were properly rejected for lacking the requisite skills. The Lotus Notes and SharePoint requirements were listed in ETA Form 9089. In its Recruitment Report the employer submitted an explanation, "Business Necessity for the Required Experience and Skills", detailing why it requires an understanding of Lotus Notes and SharePoint. The employer uses Lotus Notes and SharePoint for local databases. This understanding is imperative in order for the Senior Marketing Associate to help develop databases for managing tickets, gathering client information, preparing briefs and managing event databases. (AF 27). Additionally, the employer explained that it was not feasible, in the financial industry, to conduct on the job training. The employer stated it is normal to ensure applicants are able to perform all of the duties of a Senior Marketing Associate at the time of hire. To do otherwise would jeopardize the employer's economic well-being. (AF 27).

The employer explained why the job requirements were a business necessity and why on the job training was not feasible in its Recruitment Report. The CO did not contend the requirements were unduly restrictive. The employer showed the U.S. applicants did not have the

required skills for the position as listed on ETA Form 9089. Per *Concurrent Computer Corp*., supra, the CO cannot dismiss the employer's stated requirements and substitute his judgment for the employer's. These facts eliminate CO's basis for denial. Accordingly, we vacate the CO's denial of certification.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **VACATED** and remanded for processing.

For the Panel:

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DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR./AMJ/jcb
Newport News, Virginia

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.