

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 April 2008

BALCA Case No.: 2008-PER-00004
ETA Case No.: C-06073-96622

In the Matter of:

EPI LIMITED PARTNERSHIP,
Employer,

on behalf of

CESAREO HUERTA GUZMAN,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Louis M. Piscopo, Esquire
Attorney at Law
Anaheim, California
For the Employer

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

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

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.¹ The following decision is based on the record upon which the Certifying Officer (CO) denied certification and the Brief of the Certifying Officer, filed on November 23, 2007. 29 C.F.R. § 656.27(c) (2005).

STATEMENT OF THE CASE

On March 17, 2006, EPI Limited Partnership ("Employer") filed an Application for Permanent Employment Certification on behalf of the Alien for a "Small Apartment Complex Manager" position. (AF 18). The SOC/O*NET code provided was 11-9141.00, which corresponds to the occupational title "Property Manager." The job duties were described as:

Live-in and on-site manager for multi-unit complex. Show complex to prospective tenants and explain tenancy terms. Complete lease forms. Collect rents and maintain accounting and computer records. Investigate and remedy all tenant complaints and maintenance requests. Monitoring complex and determining need and extent of services/repairs required. Make general repairs including minor electrical, plumbing and carpentry. Obtain bids from outside contractors and oversee repairs. Purchase building and maintenance supplies and equipment. Maintain records of labor and material cost for operating complex and issue cost reports to owner.

(AF 27). The Employer required that the applicant have a minimum educational level of a high school degree and 24 months of experience in the job offered. (AF 19). The offered wage was \$15.62 per hour. (AF 18).

On March 23, 2006, the CO denied certification on two grounds, one of which was that the Employer had improperly treated the occupation as a nonprofessional occupation for the purposes of recruitment under 29 C.F.R. § 656.17(e) and was in

¹ The final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 77326, and are applicable to permanent labor certification applications filed on or after March 28, 2005. The regulations were amended on June 21, 2006, 71 Fed. Reg. 35522, and May 17, 2007, 72 Fed. Reg. 28903.

violation of § 656.17(e)(1)(ii).² The CO explained that the title “Property Manager,” which corresponds to the SOC/O*NET code on the ETA Form 9089, is a professional occupation according to Appendix A of the Preamble to 20 C.F.R. Part 656 (“Appendix A”). (AF 16).³ Thus, the CO concluded that additional recruitment efforts should have been made in accordance with 29 C.F.R. § 656.17(e)(1) because the application was for a professional occupation.

The Employer filed a motion for reconsideration on April 7, 2006. (AF 5-13). The Employer argued that since it was not requiring a college degree for the position of “Small Apartment Complex Manager” the position was not a professional occupation that requires professional recruitment. (AF6). The Employer asserted that the O*NET Summary Report for SOC 11-9141.00, Property Manager, provides that most of these occupations require a four-year bachelor’s degree, but some do not. The Employer pointed out that the instant position did not require a four-year degree. Moreover, the Employer explained that it used the SOC/O*NET code for Property Manager because it was the only job title available in the SOC/O*NET that closely resembled its “Small Apartment Complex Manager” title.

On October 5, 2007, the CO denied reconsideration. (AF 1-2). The CO reiterated that the Employer listed the SOC/O*NET code for Property Manager, which is found in Appendix A and is deemed therein a professional occupation. The CO determined that the SOC/O*NET code listed on the ETA Form 9089 was appropriate for the job duties described and that the Employer had not conducted the required recruitment for a professional occupation. (AF 1). As a result certification was denied. The matter was forwarded to BALCA on October 9, 2007 and a Notice of Docketing was issued on October 19, 2007. The Employer submitted a Brief in Support of Appeal to BALCA on November 16, 2007, and the CO provided a brief on November 23, 2007.

² The CO also raised an issue under Section 656.17(e)(A), concerning whether the job order placed with the SWA serving the area of intended employment was completed more than 180 days prior to submitting the application.

³ Appendix A was not published in the Code of Federal Regulations, but is found in the Federal Register at 69 Fed. Reg. at 77377-77384.

DISCUSSION

1. Professional Occupations Require Additional Recruitment Steps

Where the application for permanent labor certification involves a professional occupation, the sponsoring employer is required to attest to having placed a job order with the SWA, and to having run print advertisements under the regulatory criteria found at 20 C.F.R. § 656.17(e)(1)(i). The regulations also require that the employer conduct three additional recruitment steps from a list of ten options (job fairs, an employer web site, a job search web site other than the employer's, on-campus recruitment, a trade or professional organization, a private employment firm, an employee referral program with incentives, a campus placement office, a local ethnic newspaper, or radio and television advertisements). 20 C.F.R. § 656.17(e)(1)(i). The employer must fill in the three additional recruitment steps in Section C #13 through #21 on the ETA Form 9089 to show that the additional steps were completed. *Big Apple Educational Center*, 2007-PER-00026 (May 16, 2007).

2. Positions Listed on Appendix A Are Deemed to Be Professional Occupations

In the instant case the Employer argued that it was not requiring a bachelor's degree and therefore the job should not be considered a professional occupation. However, where a position is listed on Appendix A, it is considered to be a professional occupation, and the regulatory history of the PERM regulations indicates that an employer cannot avoid classifying a position as an Appendix A professional occupation on the ground that it is not requiring that the applicant have a bachelor's or higher degree.

Appendix A of the Preamble to 20 C.F.R. Part 656 provides an extensive list of professional occupations, which are defined as "occupation[s] for which the attainment of a bachelor's or higher degree is a usual educational requirement." 20 C.F.R. § 656.3

(2005); *see also* ETA, *Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States* [“PERM”]. 20 C.F.R. Part 656, 69 Fed. Reg. 77326, 77346 (Dec. 27, 2004). In the preamble to the final PERM regulations, the Employment and Training Administration (“ETA”) stated that “the primary purpose of the list of occupations [in Appendix A] is to provide employers with the necessary information to determine whether to recruit under the standards provided in the regulations for professional occupations or for nonprofessional occupations.” 69 Fed. Reg. at 77346. Appendix A was based on efforts by the Bureau of Labor Statistics (“BLS”) to describe the educational requirements of occupations in the *Occupational Outlook Handbook*. 69 Fed. Reg. at 77346. The BLS had a difficult time describing the requirements because “for most occupations, there is more than one way to qualify for a job. For example, registered nurses may obtain their training in bachelor’s degree or hospital diploma programs. The challenge was to determine the training category that best reflects the typical conditions and the preference of most employers.” 69 Fed. Reg. at 77346.

Thus, under the regulatory scheme, while Appendix A is made up of jobs customarily associated with the attainment of a bachelor’s or higher degree, that educational level is not mandatory for a job to be considered a professional occupation.

In the instant case the Employer does not dispute that the SOC/O*NET code it entered on the ETA Form 9089 is found in Appendix A. The Employer does not dispute that the SOC/O*NET code for Property Manager was the closest match to the title for the job offered. Additionally, the Employer does not dispute that it did not conduct the additional recruitment steps required for a professional occupation. Thus, we affirm the CO’s denial of certification on the basis that the Employer failed to properly recruit for a professional occupation, as required under 20 C.F.R. § 656.17(e)(1).

3. *A Prevailing Wage Determination Does Not Govern Whether Professional Recruitment Requirements Apply*

The Employer also argued that it received a Prevailing Wage Determination (PWD) from the California Employment Development Department (“EDD”) for the position offered on July 22, 2005, which was valid through the calendar year in which it was issued. The PWD stated that there was no college degree required for the position and also stated that only two years of experience was required for the position. (Employer’s Brief at 2). However, PWD’s do not govern recruitment requirements, and there is nothing in the regulations that binds the CO to any statement or actions by the local job service in its review of an application. *Peking Gourmet*, 1988-INA-323 (May 11, 1989); *Aeronautical Marketing Corp.*, 1988-INA-143 (Aug. 4, 1988).

4. *Summary*

ETA published Appendix A to describe the occupations that are considered professional occupations. When an occupation appears on Appendix A, the regulations require an employer to recruit using the professional recruitment standard, regardless of whether the employer has required a bachelor’s degree or higher degree for its particular position. In the instant case, the job offered by the Employer appeared on the list of occupations in Appendix A and therefore the Employer was required to recruit using the professional recruitment standard. Since it did not, labor certification was properly denied.

ORDER

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

For the panel:

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JOHN M. VITTON
Chief 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.