U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 26 April 2013

BALCA Case No.: 2011-PER-02900
ETA Case No.: A-09079-34846

In the Matter of:

CISCO SYSTEMS, INC.,
Employer,

on behalf of

VIVEK NAKUL DOSHI,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Andrea N. Rush, Esq.
Fragomen, Del Rey, Bernsen & Loewy, LLP
Santa Clara, CA
For the Employer

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

Before: **Calianos, Geraghty, McGrath**
Administrative Law Judges

JONATHAN C. CALIANOS
Administrative Law Judge

DECISION AND ORDER
REVERSING 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."). For the reasons set forth below, we reverse the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On March 23, 2009, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Software Engineer." (AF 1, 116).[1] On April 3, 2009, the CO denied the application because the Employer did not notify potentially qualified laid-off U.S. workers of the job opportunity in violation of 20 C.F.R. § 656.17(k). (AF 112-14). On April 10, 2009, the Employer filed a Request for Reconsideration, stating that although there was a layoff, there was no potentially qualified U.S. worker for the position, and therefore notification was not required. (AF 99-111). On June 7, 2010, the CO issued an Audit Notification, requesting that the Employer provide certain information, including documentation of all the U.S. workers who were laid off by the employer, how the employer notified all its potentially qualified laid-off U.S. workers of the job opportunity, and the results of such notification and consideration. (AF 96-98). On July 9, 2010, the Employer submitted its response to the Audit Notification, which included a recruitment report that summarized its "layoff review." (AF 51-95).

On April 5, 2011, the CO denied the Employer's application because a laid-off U.S. worker was rejected for non-job related reasons. (AF 49-50). The CO noted that the Employer rejected the laid-off U.S. worker because he did not have the required skills in C++, Networking, Ethernet and IP, one or more L2/L3 forwarding protocols, or TCL/Expect Programming language. However, the CO found that the Employer "failed to identify the requirements of the previous position which the laid off U.S. worker held and why the laid off U.S. worker could not gain through reasonable on the job training the skills necessary to perform the job duties of this position." (AF 50). The CO cited 20 C.F.R. § 656.10(c)(9) as authority for his denial, which states that an employer must attest that "U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons."

[1] In this decision, AF is an abbreviation for Appeal File.

On May 4, 2011, the Employer filed a request for reconsideration, arguing that the lack of required special skills, including C++, Networking, Ethernet and IP, one or more L2/L3 forwarding protocols and TCL/Expect Programming language, was a lawful job-related reason to reject the laid-off U.S. worker. (AF 11-48). The Employer stated that the special skills are complex and sophisticated and "exceptionally difficult to grasp with only nominal or orientation training, and cannot be acquired within a reasonable period of on-the-job training." (AF 12). The Employer additionally argued that an inquiry into the position which the laid-off U.S. worker held is not relevant, and the focus of the inquiry should be whether the laid-off U.S. worker met the minimum requirements for the position. (AF 14). The Employer stated that it considered all titles within the family of jobs for Software Engineers, including Software Engineer, Software Quality Assurance Engineer and Software Development Engineer for the layoff analysis. (AF 14).

On September 15, 2011, the CO forwarded the case to BALCA for administrative review. (AF 1). The CO stated that although the Employer provided a written statement in its recruitment report detailing its consideration of the laid-off U.S. worker, it failed to provide any documentary evidence as corroboration. (AF 1). He stated that the Employer's mere assertion that the laid-off U.S. worker is not qualified is insufficient to prove a lawful rejection. (AF 1). The CO additionally pointed out that the Employer did not provide the specific job title of the laid-off worker, nor did it document how the requirements for the related position fail to transfer to the job opportunity identified in the application. The CO upheld his denial, stating that the Employer did not provide documentary proof clearly establishing a lawful rejection of the laid-off U.S. worker, in violation of 20 C.F.R. § 656.10(c)(9). (AF 1).

On January 3, 2012, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on January 11, 2012, and filed an appellate brief on February 15, 2012. The Employer argued in its brief that its recruitment report submitted with its audit response is sufficient to meet its burden of proof in responding to the layoff inquiry and establishing that the laid-off worker was rejected for lawful reasons. The Employer cited to *Matter of Gencorp*, 87-INA-659 (Jan. 13, 1988), which states that "where an employer is

required to prove . . . performance of an act and its results, written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation." The Employer also argued that providing a list of all relevant occupations of the laid-off workers goes beyond what is required by 20 C.F.R. § 656.17(k)(1), which only requires documentation that the employer "notified and considered all potentially qualified laid off . . . U.S. workers of the job opportunity . . . and the results of the notification and consideration."

The Employer also put forth a due process and fundamental fairness argument in its brief, asserting that the denial should be reversed because the CO did not specify what documentation was required to satisfy the layoff inquires in the audit notification, or in the denial letter. Without more specific instructions, the Employer contends that it had to reasonably decide how to best meet the request for information, and the application should not have been denied as the recruitment report was responsive to the request. The Employer argued that the CO's reference to "documentary evidence as corroboration" in its transmittal letter constituted a new reason for denial not previously addressed, and the Employer did not have adequate notice of what additional information or evidence was required to cure the deficiency and did not have an opportunity to rebut the findings.

The CO did not file a Statement of Position. On January 14, 2013, in response to this Panel's Order Requiring Certification on Mootness, the Employer certified that the job identified on the PERM application is still open and available and that the alien identified in the application remains ready, willing, and able to fill the position.

DISCUSSION

An important goal of the Immigration and Nationality Act is to prevent foreign workers from obtaining permanent employment in the United States unless there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work. *See* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.1(a)(1). Accordingly, when an employer files an application for permanent employment certification, it must certify that "[t]he job opportunity has been and is clearly open to any U.S. worker" and "the U.S. workers who applied for the job opportunity

were rejected for lawful job-related reasons." 20 C.F.R. § 656.10(c)(8), (9).

Furthermore, the regulations state in regard to employer layoffs:

> If there has been a layoff by the employer in the area of intended employment within 6 months of filing an application involving the occupation for which certification is sought or in a related occupation, the employer must document it has notified and considered all potentially qualified laid off (employer applicant) U.S. workers of the job opportunity involved in the application and the results of the notification and consideration.

20 C.F.R. § 656.17(k)(1).

Pursuant to section 656.24(b), the CO "makes a determination either to grant or deny the labor certification on the basis of whether or not: . . . (2) There is in the United States a worker who is able, willing, qualified, and available for and at the place of the job opportunity." When determining whether to grant or deny certification on this basis, the CO:

> [M]ust consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. For the purposes of this paragraph (b)(2)(i), a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.

20 C.F.R. § 656.24(b)(2)(i); *see also* 20 C.F.R. § 656.17(g)(2) ("[r]ejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers.").

In its ETA Form 9089, Section I.e.26, the Employer checked the box indicating that it had a layoff in the area of intended employment in the occupation of the job opportunity or a related occupation within 6 months of filing the application. (AF 119). As a result, the CO

required in his audit notification "documentation clearly establishing the following":

- The number of U.S. workers in the occupation or in a related occupation, that were laid off by the employer;
- How the employer notified all its potentially qualified laid-off U.S. workers of the job opportunity; and
- The results of such notification and consideration, including the number of hires and/or the number of the employer's laid off U.S. workers rejected, categorized by the lawful job-related reasons for such rejection.

(AF 98).

In response to this audit request, the Employer submitted a recruitment report, which included a "Summary of Layoff Review." (AF 71-72). The Employer stated in the recruitment report that it laid off one U.S. worker during the recruitment period in the occupation, or related occupation, for which certification is sought. (AF 71). The Employer asserted that it carefully reviewed the laid-off employee's qualifications and determined that he was not qualified for the position because he did not possess the minimum requirements to perform the job duties. (AF 71-72). Specifically, the Employer stated that the laid-off employee does not have the required special skills in "C++, Networking, Ethernet and IP, one or more L2/L3 forwarding protocols, or TCL/Expect Programming language" as required in its ETA Form 9089. (AF 71, 117). The Employer stated that "these skills are extremely sophisticated and complex, and cannot be learned through reasonable, on-the-job training offered for all Cisco roles." (AF 71).

The CO denied the application following the audit response because the Employer rejected a laid-off U.S. worker for non-job-related reasons, citing to section 656.10(c)(9), which states that employers must certify that "U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons." (AF 50). The CO had no basis for this conclusion. The Employer stated in its recruitment report that the laid-off employee did not meet the minimum requirements for the position—namely required special skills in "C++, Networking, Ethernet and IP, one or more L2/L3 forwarding protocols, or TCL/Expect Programming language." This certainly is a lawful, job-related reason for rejecting an U.S. worker. Thus, the CO's denial based on this reason is not warranted by the record.

In the denial letter, the CO also stated that the Employer failed to identify the requirements for the previous position held by the laid-off U.S. worker or explain why the laid-off U.S. worker could not gain through reasonable, on-the job training, the skills necessary to perform the job duties. These additional reasons for denial are likewise not warranted by the record. First the audit notification did not require the Employer to provide the specific requirements of the previous position held by the laid-off U.S. worker. Additionally, the Employer did state why reasonable on-the-job training was infeasible. Specifically the Employer asserted that special skills are "extremely sophisticated and complex, and cannot be learned through reasonable, on-the-job training offered for all Cisco roles." (AF 71).

On reconsideration, the CO upheld his denial, stating that although the Employer provided a written statement detailing the consideration of the laid-off U.S. worker, it failed to provide any documentary evidence as corroboration. The CO stated that the Employer's mere assertion, without documentary proof, that the laid-off U.S. worker is not qualified is insufficient to prove a lawful rejection. (AF 1). The CO raised the issue of a lack of documentary proof for the first time when transferring the case to BALCA.

If the CO was concerned about the sufficiency of the documentary evidence the Employer submitted during the audit process, it should have been raised at the time of denial, under section 656.20(b) for a substantial failure to provide required documentation, or under section 656.17(k)(1) for not documenting notification and consideration of all potentially qualified laid-off U.S. workers. However, the CO did not raise this issue in his denial letter, nor did he cite to these relevant provisions as authority for his denial. "An employer needs to know the basis for a denial in order to file a meaningful motion for reconsideration [and] thus . . . the CO must identify the section or subsection allegedly violated and the nature of the violation, when notifying the applicant of a denial." *Kay Mays*, 2008-PER-00011, PDF at 5 (Aug. 27, 2008). The CO's denial cannot be upheld on this new reason provided by the CO for the first time in his transmittal letter, because the Employer did not have an opportunity to rebut the reasons for denial provided by the CO, or supplement the record on reconsideration. *See Ornelas, Inc.*, 2009-PER-00246, PDF at 4 (June 23, 2009).

Because the reasons cited by the CO in his denial letter do not provide adequate authority to deny the application, we reverse the CO's denial of certification.

ORDER

It is **ORDERED** that the denial of labor certification in this matter is hereby **REVERSED** and we direct the Certifying Officer to **GRANT** labor certification in this case.

For the Panel:

Digitally signed by JONATHAN CALIANOS
DN: CN=JONATHAN CALIANOS, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

JONATHAN C. CALIANOS
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.