U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 June 2012

BALCA Case No.: 2011-PER-01064
ETA Case No.: A-07325-98006

In the Matter of:

GOLDMAN SACHS & CO.,
Employer

on behalf of

LIN YANYAN,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Martine Cuomo, Esq.
Fragomen, Del Rey, Bernsen & Loewy, LLP
New York, New York
For the Employer

Before: Sarno, Krantz, Malamphy
Administrative Law Judges

DECISION AND ORDER
AFFIRMING 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 December 13, 2007, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "financial analyst" (AF 485-96).[1] The Employer indicated on Section H.14 of ETA Form 9089 that "[p]rior experience must include utilizing FASB FIN49 netting. Prepare balance sheets in accordance with US GAAP. Perform P&L analytics for large company balance sheets in excess of $100 million. Any suitable combination of education, training or experience is accepted." (AF 487). The job description provided by the employer was substantially in keeping with the skills required on Section H.14 of ETA Form 9089, with the position requiring the analyst to be "[r]esponsible for all aspects of estimating, analyzing and reporting customer balances over 100,000 customer account [sic] with balances generally exceeding $90 billion." (AF 496).

On January 16, 2008, the CO sent Employer an Audit Notification Letter requesting that Employer provide certain information in accordance with 20 C.F.R. § 656.20. (AF 481-84). Employer responded on February 13, 2008. (AF 398-480). During a period of supervised recruitment, the Employer provided an expert opinion by a professor of finance detailing why the Employer had rejected without interviewing each of the thirty-five U.S. worker applicants for the position. (AF 123-138). *Inter alia*, the Employer rejected applicant G.B. Singh on the basis that he "does not show sustained experience in the field of customer account balancing, customer payables and receivables, and the netting of . . . customer account totals. . . . [H]is business experience is overly managerial, operational, and product-focused to be suitable for a niche analytical position." (AF 132). Despite his "substantial academic business credentials," he did not have the "narrowly focused" experience necessary for the position. *Id.*

The Employer also rejected applicant Mulrenan, who had Bachelor's and Master's Degrees in Business Administration; despite a "long and varied career in accounting and financial reporting,"

> only the [three years of] work in trade accounting and SOX compliance would be relevant to the instant position . . . . However, his work in trade accounting was focused upon individual trades and products, executed from the trading floor,

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

> rather than the high-value, ongoing customer account balances that are the focus of the Associate at Goldman. . . . [H]e appears to have gained an in-depth understanding of the application of GAAP. However, he does not appear to have gained experience in the utilization of FASB FIN 39, and shows no evidence of performing P&L analytics for large company balance sheets. (While his cover letter claims knowledge of "nuances of the FIN 39 netting language", [sic] there is no evidence that he actually put any such knowledge into practice in the course of his actual financial reporting and analytical duties.) . . . . Further, his lack of sustained experience in working with (and assessing) the high-value accounts and balances of investment banking customers would eliminate him from consideration.

(AF 136).

After the period of supervised recruitment, (AF 90-397), the CO denied the application on November 19, 2010, on the basis that the employer rejected U.S. workers for other than job related reasons.

> Specifically, despite the fact that the employer states in its ETA Form 9089 that it "will accept any suitable combination of education, training or experience," none of the thirty-five (35) applicants were contacted for an interview and two (2) potentially qualified U.S. applicants were rejected for lacking the job opportunity's requirements for special skills.

(AF 87).

The CO singled out applicants Singh and Mulrenan as being "able, willing, qualified, and available" for the position by virtue of being able to perform the job duties through "education, training, experience, or a combination thereof." (AF 88). *See* § 656.24(a)(2)(b). Both applicants were "rejected without being contacted for an interview and thereby not afforded the broader consideration necessary to explore and evaluate the suitability of his education, training, and experience. Where . . . there is a reasonable possibility the applicant may meet the job requirements, it is incumbent on the Employer to further investigate the U.S. applicant's qualifications." *Id.*

The Employer requested reconsideration on January 18, 2011, attempting to submit new evidence from a second expert detailing further the reasons for the rejection of applications Singh and Mulrenan. (AF 3-85).[2]

The CO again denied certification on April 5, 2011, forwarding the case to the Board of Alien Labor Certification Appeals ("BALCA") on April 12, 2011. BALCA issued a Notice of Docketing on June 21, 2011. The Employer filed a Statement of Intent to Proceed on June 30, 2011 and an appellate brief on August 3, 2011. The Employer argues that the CO ignored the Employer's required skill sets on ETA Form 9089 and "reduced the full set of requirements to merely a relevant degree and experience in a broadly similar sector." Second, "[w]here the Certifying Officer concedes an applicant lacks the stated requirements for the job, yet nonetheless concludes the applicant qualifies for the position based on a combination of education, training and experience, the burden shirts to the Certifying Officer who must clearly articulate how and why the applicant is capable for performing the job duties," and the CO failed that burden. Last, Employer argues they have no duty to interview candidates who fail to show on their resumes that they satisfy the major job requirements.

DISCUSSION

The CO's initial denial was proper, as the Employer failed to show that it had properly rejected applicants in keeping with its own hiring criteria on ETA Form 9089. This is not a case where the CO is questioning the business necessity of the Employer's requirements. This is a case where the Employer indicated skills required for the job on ETA Form 9089, and then rejected applicants who facially possessed those skills. As such, the Employer's arguments regarding the CO substituting his or her own hiring judgment for that of the Employer miss the

[2] The Employer attempted to introduce a more detailed expert opinion detailing why applicants Singh and Mulrenan are facially unqualified along with its request for reconsideration, stating that, as a matter of fundamental fairness, the Employer must be allowed rebuttal evidence where the CO's final determination was based on factual error. (AF 24). The applicable regulations at 20 C.F.R. § 656.24(g)(2)(i)-(ii) provide that the request for reconsideration may include only "[d]ocumentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or . . . that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed . . . ." Neither is the case here. As the CO's ruling was based on the Employer failing to reject applicants in keeping with its own provided job skills, *see* (AF 87), and the Employer had the opportunity during supervised recruitment in which to prove that no U.S. applicants complied with its job requirements (shown by its actual submission of such documentary evidence), fundamental fairness is not offended by barring additional evidence to the same effect.

point. In failing to even address how a "*combination* of education, training or experience" meant that applicants were unqualified, the Employer has failed its burden to prove that there are not U.S. applicants ready, willing, and able to take the position. *See* 20 C.F.R. § 656.1(a)(1). At issue before this Board, then, is whether the Employer properly showed that all U.S. applicants were not able to fill the position through a combination of education, training, or experience.

The CO may only certify permanent labor applications if there are not sufficient United States workers who are able, willing, qualified, and available at the time of the application. *See* 20 C.F.R. § 656.1(a)(1). The regulation at § 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.*

A CO cannot dismiss an employer's stated job requirements in the absence of a determination that the job requirements are unduly restrictive. *Concurrent Computer Corp.*, 88-INA-76 (Aug. 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 further investigation. *Adry-Mart, Inc,.* 88-INA-243 (Feb. 1, 1989) (en banc). The burden is on the employer to demonstrate that the resume alone shows that there is no reasonable possibility that that an applicant meets the job requirements. *Gorchev & Gorvchev Graphic Design*, slip op. at 2, 89-INA-118 (Nov. 29, 1990). Where the applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, even if the resume does not expressly state that he or she meets all the requirements, an employer bears the burden of further investigating the applicant's credentials. *Blessed Sacrament School*, 96-INA-52, slip op. at 3 (Oct. 29, 1997).

The CO made no finding that the Employer's job requirements were unduly restrictive. The key issue is thus whether the resumes of applicants Singh and Mulrenan clearly did not meet the minimum job requirements, enabling proper rejection by the Employer. The Employer's own requirements include management of over 100,000 customer accounts, with a total net worth of $90 billion, and use of FASB FIN39, performance in accordance with GAAP, and performance of P&L analytics for balance sheets in excess of $100 million. (AF 496, 487). The Employer

indicates that "any suitable combination of education, training or experience is accepted." (AF 487).

Deferring to the Employer's judgment that "any suitable combination of education, training or experience is accepted," (AF 487), it is apparent that they did not comply with their own requirements in good faith during the recruiting process. No candidate was interviewed, including two that facially met the employer's required skillset: a combination of education, training, or experience. Further investigation could have indicated that, for example, applicant Mulrenan's experience with most of the Employer's categories would not yield a suitable combination.

Mr. Mulrenan's cover letter indicates knowledge of "the nuances of . . . FIN 39," from working on the trading floor, as well as familiarity with GAAP. (AF 329). He has Bachelor's and Master's Degrees in Business Administration, and three years of experience in what the Employer concedes is a related field. (AF 136). By conceding that an applicant has significant relevant experience, significant education, and then not addressing how that combination would not meet the job requirements, the Employer failed to meet its burden to illustrate that Mr. Mulrenan did not comply with its own hiring criteria.

The Employer's expert does not even comment upon how applicant Mulrenan's education or training would be insufficient in combination with his experience, even if he is lacking "critical subdisciplinary experiential requirements." The summary statement at the beginning of the Employer's expert opinion that "[a]n applicant lacking (one or multiple) critical experience requirements cannot perform the job in a minimally competent way, and thus, could not reasonably be assumed to be potentially qualified," is insufficient in that it does not address how Mulrenan's unique combination, of education, training, or experience could qualify him. (AF 102).

The Employer has thus not shown that it has complied with its own skill requirement. Even if it had addressed the combination of education, training, and experience with regards to applicant Mulrenan, it failed its duty to further investigate the skills of a potentially qualified U.S. applicant. By not doing so, the Employer failed to adequately show that there were not U.S. workers able, willing, and qualified for the position. *See* § 656.1(a)(1).

Accordingly, we affirm the CO's denial of certification.[3]

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

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.

[3] Because we affirm denial on this ground, we do not address the other grounds for denial; specifically the application of Mr. Singh or whether the rejection of the other 35 applicants shows that there are not other qualified U.S. applicants for the position.