



Issue Date: 26 January 2011

BALCA Case No.: 2010-PER-00323
ETA Case No.: A-07257-75464

In the Matter of:

AQR CAPITAL MANAGEMENT,
Employer,

on behalf of

RAJESH ARJUNAN,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Samantha Brooks Weidenbaum, Esquire
Berry Appleman & Leiden LLP
Atlanta, Georgia
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: **Johnson, Rae and Vittone**
Administrative Law Judges

PAUL C. JOHNSON, JR.
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 20 C.F.R. Part 656.

BACKGROUND

On September 14, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Junior Trading Systems Developer.” (AF 117-129).¹ The Employer indicated that its three additional recruitment steps to advertise this professional position were to advertise the position on a job search website, advertise with a local newspaper, and advertise with its employee referral program from July 10, 2007 to August 10, 2007. (AF 121). The CO audited the Employer’s application, and as documentation of the Employer’s employee referral program with incentives, the Employer submitted the following notice of its program:

Employee Referral Program – Policy:

Some of our best hires have come as a direct result of an employee referral. The AQR Employee Referral Program has been designed to provide current AQR employees with monetary rewards for their referral of candidates that are hired and employed for at least ninety (90) days. The employee that made the referral will receive a one time monetary reward of \$5000 for an Administrative role and \$10,000 for a Non-Administrative role. If you would like to submit someone for consideration please send the individual[?]’s resume to HR2@aqr.com or to anyone in the HR department, we will direct it to the appropriate hiring manager. The referral must represent the candidate’s first introduction to AQR (this means that the candidate was not previously submitted by a recruiter or another employee) in the last nine (9) months in order for the employee to be eligible for the reward. All AQR employees, except Vice President levels and above, and managers with hiring authority over the referred candidates, are eligible to refer candidates.

(AF 110). This notice was not dated. (AF 110). Additionally, the Employer’s audit response materials contained a recruitment report that showed that it received 49

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

applications for the position, and that 45 applicants had learned about the position through the Employer's employee referral program. (AF 76-90).

On March 30, 2009, the CO denied certification on the ground that the Employer failed to provide adequate documentation of its employee referral program with incentives because it did not provide dated copies of its notices or memoranda advertising the program and specifying the incentives offered.² (AF 29-31). The Employer requested reconsideration, arguing that its employee referral program is an ongoing and continuous recruitment tool and that each new hire is provided a copy of the memorandum describing the program. (AF 2-28). The Employer stated that to ensure that employees are aware of the continual availability of the employee referral program, the Employer circulates the notice to its employees every six months. The Employer also submitted an email from the Employer's Human Resources department, dated March 17, 2008, to demonstrate that the Employer continually notifies its employees of the program. The Employer also argues that its employee referral program achieves the PERM recruitment goal, as evidenced by the large number of resumes that it received through the employee referral program for the position in the Employer's application. (AF 4).

DISCUSSION

The PERM regulations require that an employer filing an application for permanent alien labor certification for a professional position conduct three additional recruitment steps. One of the additional recruitment steps that an employer can use to advertise for a professional position is an employee referral program with incentives. 20 C.F.R. § 656.17(e)(1)(ii)(G). The employer can document this recruitment step "by providing dated copies of the employer notices or memoranda advertising the program and specifying the incentives offered." 20 C.F.R. § 656.17(e)(1)(ii)(G).

A BALCA panel recently held that the purpose of providing a dated copy of the program is to establish that the employee referral program was in existence at the time of the recruitment for the position that is the subject of the labor certification application.

² The CO also listed one other ground in its denial letter, but indicated in its transmittal letter that it accepted the Employer's information and that this basis was not at issue on appeal. (AF 1).

Sanmina-Sci Corporation, 2010-PER-697, slip. op at 4-5 (Jan. 19, 2011). The BALCA panel further found that in order for an employer to adequately demonstrate its compliance with § 656.17(e)(1)(ii)(G), it must be able to document that (1) its employee referral program offers incentives to employees for referral of candidates, (2) that the employee referral program was in effect during the recruitment effort the employer is relying on to support its labor certification application, and (3) that the Employer's employees were on notice of the job opening at issue. *Id.* at 5.

We find that the Employer has provided evidence in support of each of these elements. The Employer submitted a copy of its employee referral program that specified the incentives offered. Although the notice of the employee referral program that was provided with the Employer's audit response materials was not dated, there is substantial evidence contained within the Employer's audit response materials demonstrating that the employee referral program was in existence at the time that the Employer conducted recruitment related to this application. The Employer's recruitment report shows that it received 45 applications for this position as a result of its employee referral program. Therefore, it is evident that the Employer's employee referral program was in effect during the recruitment effort the employer is relying on to support its labor certification and that the Employer's employees were on notice of the job opening.

Given that more than 90% of the applications that the Employer received for this position learned of the position through the employee referral program, the employee referral program was by far the Employer's most effective recruitment tool. To find that the Employer failed to adequately document this recruitment step when there is substantial evidence of the employee referral program's existence and effectiveness, simply because the notice was not dated, would elevate form over substance and lead to an absurd result. *See generally HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc); *Subhashini Software Solutions*, 2007-PER-43, 44 and 46 (Dec. 18, 2007).

Based on the foregoing, we find that the Employer's documentation is sufficient to establish that it used its employee referral program as a method of recruiting U.S.

workers for the occupation that is the subject of this application for permanent labor certification, and therefore, reverse the CO's finding.

ORDER

Based on the foregoing, **IT IS ORDERED** that the labor certification is hereby **GRANTED**.

For the panel:

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PAUL C. JOHNSON, JR.
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.