

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 16 May 2007

BALCA Case No.: 2007-PER-00019
ETA Case No.: A-05185-11335

In the Matter of:

MK ENTERPRISE GROUP INC.
AND
GRABOO INC.,

Employer,

on behalf of

ISRAEL MARCOLINO RODRIGUES,
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
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

DECISION AND ORDER

PER CURIAM. 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 Employer – a software developer -- filed its application for alien employment certification on July 7, 2005 for the position of Web Developer/Translation of Web Content.² (AF 26-37). The CO denied the application on October 31, 2005 on the ground, *inter alia*, that the Employer failed to advertise the position in the Sunday edition of a newspaper of general circulation as required by 20 C.F.R. § 656.17(e). (AF 12-13).

The Employer filed a motion for reconsideration on November 10, 2005. (AF 3-11, 14-25). In the motion, the Employer alleged that it did use Sunday editions. Attached to the motion are copies of two print advertisements from The Times Ledger, dated Thursday, June 16, 2005 and Thursday, June 23, 2005. (AF 9-10). A handwritten note states "Both Classifieds runs [sic] for 7 days." (AF 11). Attached to the motion is a revised Form 9089, showing these revised dates for the advertisements. (AF 17-18).³

The CO denied reconsideration on February 22, 2007 on the ground that the area of intended employment – New York City – has several newspapers with Sunday editions, and that The Times Ledger "is a weekly newspaper, published and distributed on Thursdays." Moreover, the CO found that The Times Ledger only covers the borough of Queens, and therefore was not a paper of general circulation for the entire area of intended employment.

¹ The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

² Although the CO did not raise the issue of unduly restrictive job requirements, we note that the Form 9089 application stated a requirement of being able to speak fluent English and Portuguese. (AF 28). The print advertisements supplied in the motion for reconsideration stated a job requirement of fluency in English, Portuguese and Spanish. (AF 9, 10) One Craigslist advertisement stated a job requirement of fluency in English, Portuguese and Spanish. (AF 7). Another Craigslist advertisement was a bit ambiguous, but suggested that the applicant needed to be fluent in English, Portuguese and Spanish/German/French/Italian. (AF 6). *See* 20 C.F.R. § 656.17(f)(6) (advertisements must not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089); 20 C.F.R. § 656.17(h)(2) (foreign language requirements must be based on business necessity).

³ The original Form 9089 showed that the first advertisement was run on May 24, 2005 in the Bayside Times - The Times Ledger, while the second advertisement was run on the Craigslist web site on May 25, 2005. (AF 29-30)

The CO then forwarded the case to BALCA. BALCA issued a Notice of Docketing on February 28, 2007. The CO filed an Appellate Brief urging that the CO's denial be affirmed. The Employer did not file a brief or statement of position.

DISCUSSION

Under 20 C.F.R. § 656.17(e), most sponsoring employers are required to attest to having conducted recruitment prior to filing the application. Among other requirements, applications involving both professional and non-professional occupations normally require the sponsoring employer to attest to having placed two print advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity. 20 C.F.R. § 656.17(e)(1)(i)(B) and 656.17(e)(2)(ii). Although the two-Sunday publication requirement has certain exceptions,⁴ they are not applicable to the instant application.

Because the Employer did not file an appellate brief or statement of position, the CO's findings that The Times Ledger is a weekly newspaper, published and distributed on Thursdays, and that it is only circulated in the borough of Queens, stand unrebutted. Moreover, the copies of the print advertisements provided with the Employer's motion for reconsideration support the CO's finding that the classified advertisements were published on Thursdays. Based on the record before us, we find that the Employer's print advertisements were deficient both because they were not published on a Sunday and because they were not published in an available newspaper of general circulation in the area of intended employment. *See* 20 C.F.R. § 656.3 (definition of area of intended employment). Accordingly, the CO properly denied certification.

⁴ *See* 20 C.F.R. §§ 656.17(e)(1)(i)(B)(2) and 656.17(e)(2)(ii)(B) (rural areas without Sunday newspaper editions available); 20 C.F.R. § 656.17(e)(1)(i)(B)(4) (one Sunday newspaper publication can be substituted with publication in a professional journal where the offer involves a professional job requiring experience and an advanced degree, and a professional journal would normally be used to advertise such a job opportunity).

ORDER

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

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

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.