

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 12 December 2011**

**BALCA Case No.: 2010-PER-01060**  
ETA Case No.: C-08093-38429

*In the Matter of:*

**ENERDEL, INC.,**  
*Employer*

*on behalf of*

**MANABU TANAKA,**  
*Alien.*

Certifying Officer: William Carlson  
Atlanta Processing Center

Appearances: Jenifer M. Brown, Esquire  
Ice Miller LLP  
Indianapolis, Indiana  
*For the Employer*

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

Before: **Colwell, Johnson and Vittone**  
Administrative Law Judges

**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**  
**REVERSING CERTIFYING OFFICER**  
**AND GRANTING 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 April 11, 2008, the Certifying Officer (“CO”) accepted for processing the Employer’s Form 9089 Application for Permanent Employment Certification for the professional position of “Battery Engineer.” (AF 123, 127-137).<sup>1</sup> In Section H-d of the Form 9089, the Employer listed four forms of additional professional recruitment for the position: a posting on the Employer’s web site, a posting with a job search web site, an advertisement with its employee referral program, and an advertisement with a local newspaper. (AF 131). Following an audit, the CO denied the application on the sole ground that the Employer’s web site posting did not identify the job location in violation of 20 C.F.R. § 656.17(f)(4). (AF 33-34).

On June 1, 2010, the Employer requested review of the denial. (AF 1-32). The Employer stated that it conducted four additional recruitment steps, rather than the three that are required under the regulations, and argued that the regulation at 20 C.F.R. § 656.17(f)(4) is specific to print advertisements and that it was an error to apply that regulatory requirement to the Employer’s web site advertisement. The Employer also argued that the location of employment was clearly available on the Employer’s web site and the Employer fully disclosed the geographic area of employment. The Employer presented documentation to show that the Employer’s location was available on its “Contact Us” page and that at the time of the recruitment in this matter, the Employer had only one location.

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

The CO forwarded the Appeal File to BALCA, and BALCA issued a Notice of Docketing on August 20, 2010. The Employer filed a Statement of Intent to Proceed and an appellate brief, reiterating the arguments made in the request for review. The CO filed a letter requesting that the Board affirm the denial, but did not file a legal brief.

## **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 an employer can utilize to advertise a professional position is to advertise the position on the employer's website. 20 C.F.R. § 656.17(e)(1)(ii)(B). The use of the employer's website as a recruitment medium can be documented by providing dated copies of pages from the site that advertised the occupation involved in the occupation. 20 C.F.R. § 656.17(e)(1)(ii)(B).

All advertisements placed by employers in fulfillment of the additional recruitment steps, including website advertisements, must comply with the content requirements listed in Section 656.17(f). *Credit Suisse Securities*, 2010-PER-103 (Oct. 19, 2010). In *Credit Suisse Securities*, a panel found that regulatory requirements that the position in the labor application must clearly be open to U.S. workers, that the employer must recruit U.S. workers in good faith, and that the CO can only certify the application if there are no available U.S. workers to perform the position implicitly require that all advertisements placed by an employer must have the purpose and effect of apprising U.S. workers of the job opportunity. Slip op. at 8. The Board found that in order for U.S. workers to know about the job opportunity, the advertisements placed to fulfill the additional recruitment steps must contain the basic information required by Section 656.17(f). Section 656.17(f)(4) provides that an advertisement must indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity.

Here, the Employer's advertisement that it placed on its own website did not include the geographic location of the job opportunity. (AF 114). Nevertheless, the

Employer conducted four additional recruitment steps to advertise the job opportunity in this application, listed four additional recruitment steps on its ETA Form 9089, and submitted documentation of all four recruitment steps with its audit response materials. (AF 112-121). Even though the Employer's advertisement on its own website did not comply with the regulations, the Employer conducted three additional recruitment steps that are in compliance with the regulations. Therefore, the Employer need not rely on its website advertisement in order to establish compliance with the requirement that an employer conduct three additional recruitment steps when advertising for a professional occupation.<sup>2</sup> As the CO did not find any deficiency with the other three additional recruitment steps, we find that the CO improperly denied certification.

## **ORDER**

**IT IS HEREBY ORDERED** that the Certifying Officer's denial of Employer's application for labor certification in the above-captioned matter is **REVERSED** and **REMANDED** for certification.

For the panel:

A

**WILLIAM S. COLWELL**

Associate 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:

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<sup>2</sup> We recognize a potential issue of whether it is an undue burden on the CO to review alternative forms of reported additional professional recruitment to determine if an employer had at least three that conformed to the regulations. Because the issue was not briefed, however, we do not reach it.

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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.