

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 February 2012

BALCA Case No.: 2010-PER-01637
ETA Case No.: A-07347-04710

In the Matter of:

TARGET POINT MEDIA, LLC,
Employer

on behalf of

MUNOZ, LUIS FERNANDO,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Thomas J. Rodgers
General Manager
Target Point Media, LLC
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 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

The Employer filed an Application for Permanent Employment Certification for the position of “Business Development Specialist.” (AF 161-182).¹ The SOC/O*Net Code was identified in the Form 9089 application for the prevailing wage determination as 19-3021.00, Skill Level II. (AF 162). The job requirements included a master’s degree in business administration or equivalent plus two years of experience, or a bachelor’s degree in business administration plus five years of experience. (AF 162-163). Following an audit of the application, the Certifying Officer (“CO”) denied certification because the advertisements run in the South Florida Sun-Sentinel and the South Florida Business Journal stated the job title as “Business Development VP” instead of “Business Development Specialist.” (AF 25-28).² The CO found that this discrepancy was a violation of the regulations at 20 C.F.R. § 656.10 and 20 C.F.R. § 656.17(f)(3).

The Employer requested reconsideration. (AF 3-24). The Employer argued that the job titles were substantially equivalent and that a prospective reader would have easily identified the job. The Employer noted that the term “VP” is also convenient, takes less space in an advertisement, and is commonly used in advertisements. The Employer argued that the term “VP” is “generally a best known job title and more appealing than ‘Specialist’ attracting that way more U.S. workers/applicants.” The Employer also argued that its intent was to get as many candidates as possible to apply. (AF 5). The Employer also argued that the occupation listing in O*Net for the occupation 19-3021.00 uses the generic title “Marketing Research Analyst” which includes other job titles such as: “*Market Research Analyst, Market Analyst, Project*

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

² The CO also cited a third reason for denial, which is no longer at issue.

Manager, Market Research Consultant, Client Service and Consulting Manager, Market Research Manager, Product Line Manager, Business Development Specialist, Client Services Vice President, Communications Specialist, and other similar.” (AF 6) (emphasis as in original). The Employer argued that there was no actual mismatch in the occupational titles and that the job was clearly open to U.S. workers.

On reconsideration, the CO affirmed his denial, finding that the Employer had not indicated the actual job opportunity offered on the Form 9089 in its advertisements as required by the regulation at 20 C.F.R. § 656.17(f)(3). (AF 1). On appeal, the Employer filed an appellate brief reiterating the arguments made in the motion for reconsideration.³ The CO filed a letter arguing that the job titles in the advertisements did not apprise job seekers of the opportunity because the job title was “significantly” different than the job title found in the Form 9089.

DISCUSSION

The regulation at 20 C.F.R. § 656.10(c)(8) requires the petitioning employer to attest that the job opportunity has been and is clearly open to any U.S. worker. The regulation at 20 C.F.R. § 656.17(f)(3) requires that print advertisements “[p]rovide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought.”

The CO’s original denial, decision on reconsideration, and letter brief on appeal, all contained no analysis of the Employer’s arguments. For the CO, the job titles were different, and that was the end of the matter. But the Employer has made reasonable arguments as to why its advertisements did not, in fact, misrepresent the job opportunity.⁴

³ The Employer included an organizational chart with its appellate brief to show that the incumbent for the position for which labor certification is sought would report directly to the head of the company. The Board, however, may not consider evidence that is first filed with an employer's appellate brief. The regulation at 20 C.F.R. § 656.27(c) limits BALCA's review to the record that had been available to the CO.

⁴ We are not persuaded, however, by the Employer’s argument that it is more convenient to use the two letter abbreviation “VP” in advertisements. Mere convenience is not a ground for using a different job title in the advertisement from the job title identified in the Form 9089.

We have carefully reviewed the Employer's job description in the Form 9089, the applicable O*Net occupational summary, and the advertisements placed by the Employer. (AF 149-154). The O*Net Summary Report for the occupational classification, - Market Research Analysts, 19-3021.00, does, as the Employer argues, include a broad range of job titles, some of which use the term "vice president" as a descriptor.

An FAQ response posted on the Office of Foreign Labor Certification website answers the question "1.What level of detail regarding the job offer must be included in the advertisement?" as follows:

Employers need to apprise applicants of the job opportunity. The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity. An advertisement that includes a description of the vacancy, the name of the employer, the geographic area of employment, and the means to contact the employer to apply may be sufficient to apprise potentially qualified applicants of the job opportunity.

www.foreignlaborcert.doleta.gov/faqsanswers.cfm#adcont1 (visited Aug. 22, 2011). One of the main points of the FAQ response is that there needs to be a "logical nexus" between the advertisement and the position listed on the Employer's application. Here, there is such a nexus, and we do not find that the change in the title of the job caused the job not to be clearly open to U.S. workers, or to fail to describe the position with sufficient specificity to apprise U.S. workers of the job opportunity.⁵

⁵ Our decision is limited to the precise facts and arguments presented in this appeal. In general, we would anticipate that use of a job title in print advertisements different from the job title identified in the Form 9089 would place a difficult burden on the employer to establish why the different titles did not violate the regulations.

We note a potential issue of whether the Employer's job description in the Form 9089 was accurate because its use of "VP" in the print advertisement suggests a management position, whereas the use of "Specialist" in other media, such as the Notice of Filing, possibly suggests a non-management position. This potential issue, however, was not raised by the CO or briefed on appeal, and although the

Accordingly, based on the record and arguments made before us, we find that the CO's denial of certification must be reversed.

ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED** and that the application will be returned to the CO for issuance of labor certification.

For the panel:

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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:

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.

Board has the discretion to direct the CO on remand to consider an issue not previously considered, we decline to do so in this case. *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (en banc).