

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 17 August 2015**

**BALCA Case No.: 2011-PER-01576**  
ETA Case No.: A-08284-94865

*In the Matter of:*

**SDG POST OAK, LP**  
*d/b/a*  
**RDG + BAR ANNIE,**  
*formerly*  
**CAFE ANNIE II, LTD.,<sup>1</sup>**  
*Employer*

*on behalf of*

**ARROYO, ELIDIO,**  
*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearances: Helene N. Dang, Esquire  
FosterQuan, LLP  
Houston, Texas  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Vincent C. Costantino Senior Trial Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: Stephen R. Henley, *Acting Chief Administrative Law Judge*; Morris D. Davis, *Administrative Law Judge*; and Larry S. Merck, *Administrative Law Judge*

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<sup>1</sup> The Employer filed the application that is the subject of this decision under the name Café Annie II, Ltd., but notified the Certifying Officer during supervised recruitment that the company name had changed.

## **DECISION AND ORDER** **DIRECTING GRANT OF CERTIFICATION**

**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 at 20 C.F.R. Part 656.<sup>2</sup>

### **BACKGROUND**

The Employer filed a Form 9089 *Application for Permanent Employment Certification* sponsoring the Alien for permanent employment in the United States as a Line Cook. (AF 182-193).<sup>3</sup> Following an audit, the Certifying Officer (“CO”) issued a Notification of Supervised Recruitment. (AF 135-138). The Employer submitted a proposed advertisement to the Atlanta National Processing Center (“ANPC”). After communication back and forth, the text of the advertisement for supervised recruitment was agreed upon and the ANPC issued a Recruitment Instructions Letter. (AF 116-119). The Employer was instructed to place the approved advertisement in *The Beaumont Enterprise*, both in print and online. (AF 116).

After the recruitment was completed and the Employer submitted a Recruitment Report, the CO denied the certification on a single ground—that the online job advertisement through Hotjobs/Monster.com erroneously listed the experience requirement as “1-2 years” in the caption above the text advertisement—whereas the approved draft advertisement and the Form 9089 stated the minimum experience requirement as six months as a line cook or six months of related experience in restaurant food preparation. The CO wrote: “Upon further research of the experience field of www.hotjobs.com, the employer had the option of choosing less than 12 months of experience required in the experience filed. While the employer listed the correct number of months of experience in the ‘duty requirement field’, the employer failed to select ‘less than 12 months’ experience in the experience requirement field.” The CO cited as regulatory authority for the denial 20 C.F.R. § 656.21(b)(2)(v), which states that the advertisement must “[s]ummarize the employer’s minimum job requirements, which can not exceed any of the requirements entered on the application form by the employer[;]” 20 C.F.R. § 656.21(b), which states that “[t]he advertisement must be approved by the Certifying Officer before publication, and the CO will direct where the advertisement is to be placed[;]” and 20 C.F.R. § 656.17(f)(6), which states that advertisements must “[n]ot contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089.” (AF 26).

The Employer requested reconsideration (AF 13-24) arguing that the body of the text of the hotjobs.com advertisement contained all of the correct information and fully met the regulations at 20 C.F.R. § 656.17(f). The Employer replied to the CO’s contention that the Employer and its counsel had the option of choosing the range required experience for the

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<sup>2</sup> “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

<sup>3</sup> In this Decision, “AF” is an abbreviation for “Appeal File.”

advertisement header with a letter from the Advertising Director for *The Beaumont Enterprise*. The Advertising Director said, in pertinent part:

To Whom It May Concern:

The ad ran online on Tuesday, November 18, 2010 for the Beaumont Enterprise on Monster Hotjobs for 13 days displayed a posted years of experience of 1 -2 years instead of the required 6 months. The agency, FosterQuan [i.e., the Employer's law firm], did not have a chance to review the posting until 12 days after it published online and did not receive notification from Monster that the ad was live. FosterQuan was also not aware of the fact that Monster displayed 1 -2 years of experience required versus the printed ad which displayed 6 months required. Due to the limitations of our system feed which does not allow us to send the specific years of experience requirement of 6 months, the information appeared incorrect on the Monster Hotjobs posting. Our system allows us to select ranges yearly increments.

(AF 9). The Employer stated that *The Beaumont Enterprise* partnered with Monster and HotJobs to list the online advertisement, and argued that the Advertising Director's letter showed that the publisher was "the one that automatically selected the advertisement header without the employer's or legal counsel's knowledge and consent." (AF 14). The Employer blamed the publisher's system feed for the listing of 1-2 years of experience in the online advertisement's header, and stated that "the exact draft PERM advertisement, as approved by the DOL, was submitted to the publisher for posting...." *Id.* The Employer noted that the header and the text of the advertisement appeared on the same online page, and that any person wanting to learn the details of the job would merely need to look to the middle of the page to see the actual text of the advertisement to learn that only six months of experience is required. The Employer cited the panel decision in *Dr. Deza's Dental Office*, 2010-PER-113 (Feb. 11, 2011), in support of its request for reconsideration.

The CO reviewed the Employer's request for reconsideration and on June 3, 2011, determined that the reason for denial was valid. (AF 1-2). In his denial, the CO explained that an employer conducting supervised recruitment is provided specific directions for the placement of its mandatory advertisements and the employer is responsible for ensuring all advertisements conform to the CO's instructions. The CO asserted that the website which powered the online advertisement allows the employer to preview an advertisement prior to approval and publication, but this Employer failed to do so. The CO also stated that due to the excess experience requirement in the profile/heading of the advertisement, a potentially qualified U.S. worker may not read further, and this could have a chilling effect on applicants and discourage or artificially exclude U.S. workers minimally qualified for the position.

On appeal, neither party submitted an appellate brief. The Employer indicated that it would rely on the materials submitted with the Request for Reconsideration.

## DISCUSSION

The regulation governing supervised recruitment directs advertising the job opportunity “in a newspaper of general circulation or in a professional, trade, or ethnic publication, and any other measures required by the CO.” 20 C.F.R. § 656.21(b). The regulation further states that “[t]he advertisement must be approved by the Certifying Officer before publication, and the CO will direct where the advertisement is to be placed.” *Id.* In addition, the advertisement must, among other requirements “[s]ummarize the employer's minimum job requirements, which can not exceed any of the requirements entered on the application form by the employer...” 20 C.F.R. § 656.21(b)(2)(v).

In the instant matter, the CO directed the Employer to “[p]lace the employer’s approved draft advertisement in *The Beaumont Enterprise*, both in print and online, for three (3) consecutive days, including a Sunday, within fifteen days of the date on this [Recruitment Instructions] letter.” (AF 117). The Employer complied with this directive. However, the Appeal File indicates that unbeknownst to the Employer, when *The Beaumont Enterprise* advertisement division placed the online advertisement with its job search partner Monster/HotJobs.com, the communication feed between the newspaper and the online service did not allow the newspaper to specify six months of experience for the header information field. That header experience field therefore was listed as a requirement of 1-2 years of experience without the Employer’s knowledge.<sup>4</sup> The actual advertisement text correctly stated the experience requirement as stated in the draft advertisement approved by the CO. The question before this panel, therefore, is whether the CO’s denial of certification for the error in header was warranted.

Initially, we note that the CO provided no documentation to support his findings that (1) that the Employer had the option of selecting less than 12 months of experience for the Monster/HotJobs.com header, and (2) the Employer could have previewed the online advertisement and therefore had the error corrected before publication. The Employer, in contrast, presented documentation from the newspaper showing that the Employer had no control over the header information and no opportunity to preview the online advertisement prior to publication. We find that the preponderance of the evidence in this case is that the Employer did not have the opportunity to preview the online advertisement before it was run. And, we note that the Employer was under a directive by the CO to place the advertisement within 15 days of the Recruitment Instructions letter. The evidence of record compels findings that (1) the Employer did not chose the header information for the online advertisement, and (2) the Employer’s agent did not have a chance to review the online advertisement until 12 days after it was published.

We find that the Employer complied with the supervised recruitment instructions. It placed both print and online advertisements with the exact approved language in *The Beaumont Enterprise*. The actual text of the advertisement as run online was correct in regard to the

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<sup>4</sup> The copies of the hotjobs.com advertisement in the Appeal File are illegible in the experience field in the caption above the text of the advertisement. (AF 10, 23, 58). The Employer, however, in its argument on reconsideration clearly conceded that that the caption stated that the required experience was 1-2 years.

experience requirement. It was only the header information added by Monster/HotJobs.com without the Employer's knowledge that added the erroneous information about the experience requirement. This circumstance is similar to the facts of *Dr. Deza's Dental Office*, 2010-PER-113 (Feb. 11, 2011), in which the search results page listed the employer's name as confidential, whereas the actual advertisement properly included the employer's name. In *Dr. Deza's Dental Office*, the panel recognized a difference between a search results page and the page with the actual advertisement reached by clicking a link on the search result. Essentially, the panel found that the search results page was not part of the advertisement, and that under the precise circumstances of that case, fundamental fairness dictated that it would be unwarranted to uphold the denial.

Here, the Monster/HotJobs.com header was not part of the advertisement as placed by the Employer. The text beneath the header captioning contained the correct information as agreed upon with the CO—"needs 6 months exp. as a line Cook, or 6 months related exp. in related restaurant food preparation. Any suitable combination of education, experience and training is acceptable." (AF 58). We further note that the newspaper advertisements, the notice of filing, and the posting with the Texas State Workforce Agency all correctly described the experience requirement. (AF 35-50, 55-57, 61).

Even if the Employer could be held responsible for failing to check the online advertisement after it had been run, in the context of this particular case, we find that the error was not sufficient to reasonably conclude that job seekers would have been discouraged from applying for the job. As the Employer noted, the header and text of the advertisement appeared on the same page. The text of the advertisement, correctly identifying the experience requirement, was in the middle of the page and easily visible.

In *Lam Garden Chinese Restaurant*, 2008-PER-14 (Dec. 17, 2007), the panel held that the PERM regulations do not limit discretion to take into account errors introduced by the SWA. The panel wrote:

Here, it was an error by the SWA in neglecting to take into account the short length of February that caused the job order to be a day short. Although it is possible that the one day shortfall in the SWA job order may have resulted in a U.S. applicant or applicants being overlooked, the possibility that the deficiency materially affected the recruitment is not great. The CO did not raise any other deficiencies concerning the application, and there is no evidence that the Employer was seeking to deceive the CO or to avoid compliance with the regulatory requirements. Rather, the Appeal File contains the Employer's attorney's letter to the SWA that expressly requested a job order of 30-days duration. Under these precise circumstances, we find that the CO abused his discretion in refusing to grant certification upon reconsideration. We limit the ruling in this case to the precise circumstances presented.

*Id.* at 5.

We find that the principles enunciated in *Dr. Deza's Dental Office* and *Lam Garden Chinese Restaurant* are instructive for resolution of the instant appeal. The Employer placed a compliant online advertisement pursuant to the CO's instructions, and the header added to the advertisement by the publisher was not part of that advertisement. Although it is possible that a job seeker may have looked at the erroneous header to the advertisement and stopped reading, the possibility that the header materially impacted the supervised recruitment results is unlikely.<sup>5</sup> Under the facts of this particular case, we find that it would be fundamentally unfair to deny certification based on a circumstance that could not reasonably be found to be under the Employer's ability to prevent or cure, and where the chances are remote that the error materially impacted on the recruitment effort or the CO's ability to adjudicate the application.

Because the CO raised no other issues with the supervised recruitment in this matter, we find that certification is warranted.

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<sup>5</sup> The panel is aware of a line of decisions that hold that an error in recruitment provides grounds for denial of certification, even if employer was not to blame for the error. But under the *Lam Garden Chinese Restaurant* analysis, those cases may be viewed as finding that the CO did not abuse his discretion in declining to overlook an error introduced by an entity other than the CO; see, e.g., *Latona's Specialty Foods, LLC*, 2011-PER-967 (June 25, 2012) (panel found that the CO did not abuse his discretion in refusing to overlook an error introduced by the SWA concerning the wage, given the special scrutiny given by the statute and regulation to wage rates), or may be distinguished on the facts, see, e.g., *Omsree Inc.*, 2011-PER-1617 (Nov. 27, 2012) (panel affirmed denial where the newspaper was allegedly responsible for omission of job location; in that case the advertisement was actually wrong, whereas in this case the advertisement was actually correct). Moreover, those cases usually arose in the context of recruitment under the basic process rather than supervised recruitment. In supervised recruitment, the employer has less control over the identity of the recruitment sources and the timing of the advertisements. The nature of supervised recruitment involves a bit of back and forth between the employer and the CO, and may heighten the need to take into account recruitment problems beyond the control of an employer.

We also note a line of decisions supportive of our decision where the Board declined to affirm a denial where the technology involved unavoidably caused the recruitment error or failed to reasonably alert the employer that it could achieve the intended job descriptor. See, e.g., *Cognizant Technology Solutions of US Corp.*, 2011-PER-1697 (Nov. 29, 2012) (panel declined to affirm denial where employer had entered its actual minimum requirements into the job order request system, and that there was no way for the employer to have avoided the system's automatic conversion of the experience requirement into a pre-determined range); *Deer Ridge Inc.*, 2014-TLN-13 (Mar. 5, 2014) (H-2B case in which SWA website was driven by text blocks and drop down menu selections that did not allow the employer to insert all required information); *J & J Pine Needles, LLC*, 2015-TLN-2 (Nov. 14, 2014) (employer actually provided all of the required information in the job order request form, and there was no indication that any of the provided information would not transfer to the posted SWA job order).

## **ORDER**

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **VACATED** and that the CO is **DIRECTED** under 20 C.F.R. § 656.27(c)(2) to **GRANT CERTIFICATION**.

Entered at the direction of the panel by:

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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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  
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 en banc 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.