

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 05 August 2015**

**BALCA No. 2011-PER-01754**  
ETA No. A-08309-02132

*In the Matter of:*

**HOFFMAN ENCLOSURES INC.,**  
**d/b/a**  
**PENTAIR TECHNICAL PRODUCTS,**  
*Complainant,*

*on behalf of*

**BRONDO GARCIA, JUAN FRANCISCO,**  
*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearances: Renée Mueller Steinle, Esquire<sup>1</sup>  
Leonard, Street and Deinard, PA  
Minneapolis, Minnesota  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Vincent C. Costantino, Senior Trial Attorney  
United States Department of Labor  
Office of the Solicitor  
Employment and Training Legal Services  
*For the Certifying Officer*

Before: Paul R. Almanza, *Administrative Law Judge*; Stephen R. Henley,  
*Acting Chief Administrative Law Judge*; and Paul C. Johnson, Jr.,  
*District Chief Administrative Law Judge*

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<sup>1</sup> Ms. Steinle filed a Form G-28 entry of appearance before the Board. A different attorney from Leonard, Street and Deinard represented the Employer before the Certifying Officer.

## **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 is sponsoring the Alien for permanent employment in the United States for the professional position of “Director of Operations.” (AF 13-24).<sup>3</sup> The Employer reported on its ETA Form 9089 application that the location where the work would be performed was in Pharr, Texas. (AF 14). The Employer reported on the Form 9089 that it used the *San Antonio Express* (the “*Express-News*”)<sup>4</sup> for its first Sunday newspaper advertisement. (AF 16).<sup>5</sup> The Certifying Officer (“CO”) denied certification on the ground that the *Express-News* is circulated in San Antonio, Texas and not the area of intended employment, Pharr, Texas, in violation of 20 C.F.R. § 656.17(e)(1)(i)(B)(1). (AF 11-12).<sup>6</sup>

The Employer requested review or reconsideration of the denial, arguing that the *Express-News* is, in fact, circulated in Pharr, Texas. (AF 2-10). The Employer provided an affidavit from the Employer’s Director of Human Resources, Michael Bauman. (AF 7-9). Mr. Bauman stated that he was responsible for recruiting for the position at issue, and the Employer had selected *Express-News*<sup>7</sup> “because, based upon communications with the circulation department of the Express News, we understood that the Express News circulates throughout south Texas, including the city of Pharr, Texas (where the job opportunity is located) and as far

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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.”

<sup>4</sup> Although the record generally refers to the San Antonio newspaper as *The San Antonio Express*, a review of the newspaper’s website confirms that its name is *The San Antonio Express-News*. See [www.expressnews.com](http://www.expressnews.com) (last visited June 3, 2014).

<sup>5</sup> The Employer’s second Sunday newspaper advertisement was in *The Monitor* (AF 16-17), and was not challenged by the CO. The regulation refers to “newspaper” in the singular in requiring advertisements to be placed in “the newspaper of general circulation in the area of intended employment....” and thus the regulations do not appear to contemplate a situation where more than one newspaper is circulated in the area of intended employment and the newspapers are equally appropriate given the employment at issue and the workers likely to apply for the job. See 20 C.F.R. §§ 656.17(e)(1)(i)(B)(1). Under the circumstances of this case, we decline to find that the Employer violated this regulation by placing one advertisement in *The Monitor* and the other in the *Express-News*. We also conclude from the CO’s failure to challenge the advertisement in *The Monitor* that the CO concluded that newspaper is a newspaper of general circulation in the area of intended employment.

<sup>6</sup> The CO also cited 20 C.F.R. § 656.17(e)(2)(ii)(A), which states a similar rule regarding placement of newspaper advertisements for non-professional positions.

<sup>7</sup> Mr. Bauman stated that the Employer placed two Sunday advertisements for the position in the *Express-News*. We note that the Employer only reported one Sunday advertisement in the *San Antonio Express* on the Form 9089. See n. 5, *supra*.

south as Brownsville, Texas.” (AF 7-8). Mr. Bauman stated that the Employer “chose the Express News as the largest metropolitan area newspaper with general circulation in Pharr in order to reach the largest number of able, willing, qualified and available U.S. workers living throughout south Texas who would be likely to apply for this job opportunity. Because the Express News circulates throughout south Texas, including the substantial metropolitan population of San Antonio, we believed it would be the newspaper likely to reach the most U.S. workers.” (AF 8). Mr. Bauman additionally noted that the position at issue is a professional position requiring substantial skill and experience, and fluency in the Spanish language. Thus, the Employer “utilized the Express News because we wanted to test the largest pool of available U.S. workers from which we could draw candidates, given that the significant knowledge and experience requirements for the position were likely to limit the number of qualified candidates.” (AF 8).

In addition, the Employer’s attorney, Daniel L. Palmquist, stated in the motion for reconsideration that he personally had contacted the *Express-News* upon receipt of the CO’s denial to verify that the paper circulates in the Pharr, Texas area. Mr. Palmquist stated that the circulation department verified that newspaper circulates in Pharr. The attorney argued that the Employer’s newspaper selection was in compliance with the regulations, as it is “one of general circulation as defined by the regulations, (20 C.F.R. 656.17(e)(1)(i)(B)(1) and 20 C.F.R. 656.3) because it reaches U.S. workers within normal commuting distance of the place (address) of employment.” (AF 3).

The CO reconsidered, but found that the reason for denial of certification was valid. (AF 1). The CO acknowledged the Employer’s argument on reconsideration that it fulfilled the mandatory newspaper requirement through the *Express-News* due to its wide circulation, but found that San Antonio is four hours away from Pharr, well outside normal commuting distance. In denying the application, the CO did not address whether the *Express-News* was the “most appropriate” newspaper in which to place the advertisement; the CO’s sole basis for denial was that, by placing an advertisement in the *Express-News*, the “[E]mployer failed to advertise the job opportunity in the area of intended employment.” (AF 1; *see also* AF 6).

On appeal, the Employer filed a statement confirming its intention to pursue the appeal, but did not file an appellate brief. The CO filed a letter stating that a brief would not be filed, and requesting that the Board affirm the denial based on the record.

## **DISCUSSION**

When an employer files an application for permanent alien employment certification for a professional position, it must attest to having placed print advertisements for the position. One option for an employer’s mandatory print advertisements for a professional position is “[p]lacing an advertisement 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 and most likely to bring responses from able, willing, qualified, and available U.S. workers.” 20 C.F.R. § 656.17(e)(1)(i)(B)(1).

As outlined above, the Employer reported using the *Express-News* for its first Sunday newspaper advertisement, and the CO's denial was based solely on the fact that San Antonio and Pharr are not close to each other and thus that an advertisement in the *Express-News* was not an advertisement in the area of intended employment. Because the CO did not base the denial on a conclusion that the *Express-News* was not the "most appropriate" newspaper in which to place the advertisement, we need not address that issue. Instead, we focus on whether the Employer met the regulatory requirement to advertise the job opportunity in a "newspaper of general circulation in the area of intended employment."

In denying the application because one of the two newspapers in which the Employer placed advertisements was published in a city four hours away from the area of intended employment, without considering whether that newspaper was circulated in the area of intended employment, the CO improperly conflated the issues of where a newspaper is published and where it is circulated. Whether or not San Antonio is outside the normal commuting distance from Pharr would only be relevant if the *Express-News* were only available in San Antonio and not in Pharr. If that were the case, the CO could appropriately conclude that a newspaper that is not circulated in the area of intended employment could not be the "most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, willing, qualified, and available U.S. workers." But as the Employer has submitted uncontroverted evidence that the *Express-News* is a newspaper of general circulation in Pharr, this record establishes that the *Express-News* is not only available in Pharr, but that it is a newspaper of general circulation in Pharr. Accordingly, because the *Express-News* is a newspaper of general circulation in the area of intended employment, the fact that it happens to be published in San Antonio is of no legal consequence.

When, as here, a single area of intended employment is served by more than one newspaper, regardless of where each newspaper is published, and each of those newspapers is available to and reaches substantially the same audience, the CO's task should not be deciding which paper reaches the most people, but rather whether the newspaper in which the required advertisements were placed reaches the intended audience and thus is "a newspaper of general circulation in the area of intended employment." So, for example, if the area of intended employment is Trenton, New Jersey, whether *The New York Post* is more "appropriate" than *The Trenton Times* because it has more readers is irrelevant. Similarly, if the area of intended employment is Charlottesville, Virginia, a city served both by *The Charlottesville Daily Progress* and *The Washington Post*, and if the employer advertised a prospective job in the *Post*, the CO should not deny an application simply because the *Post* is published in Washington, D.C. (over a two hour commute from Charlottesville), but rather the CO should focus on whether the *Post* reaches the intended audience in the Charlottesville area and thus is "a newspaper of general circulation in the area of intended employment."

An Employer satisfies the regulatory requirement if it advertises a job opportunity in "a newspaper of general circulation in the area of intended employment." Nothing in the regulations requires an Employer to use the newspaper with the highest circulation in the area of intended employment, nor does anything in the regulations require an Employer to use a newspaper published closest to the area of intended employment. Here, the *Express-News* is a newspaper of general circulation in Pharr, the area of intended employment. That this newspaper is published

in San Antonio or may have fewer readers in Pharr than *The Monitor*<sup>8</sup> is of no legal import. Simply put, it matters not that San Antonio, the hometown of the *Express-News*, is a four hour commute from Pharr.

Because the Employer satisfied the requirements of 20 C.F.R. § 656.17(e)(1)(i)(B)(1) in placing an advertisement in the *Express-News*, the CO erred in denying certification on the grounds that the city where this newspaper is published is a four hour commute from Pharr, the area of intended employment. We note again that the issue raised by the CO in this matter was whether the Employer placed a newspaper advertisement in the area of intended employment, and that, because the CO did not base the denial on a conclusion that newspaper used was not the “most appropriate” newspaper in which to place the advertisement, we have not considered that question. This decision is limited to the precise facts of this case.

### **ORDER**

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED** and the CO is directed 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  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

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<sup>8</sup> The record does not contain information about the circulation rates in Pharr of the two newspapers at issue. Accordingly, it is unclear whether *The San Antonio Express-News* or *The Monitor* (or any other newspaper, for that matter), sells more copies in Pharr.

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.