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: 29 July 2013

BALCA Case No.: 2011-PER-02614
ETA Case No.: A-08246-83442

In the Matter of:

CHABAD LUBAVITCH CENTER,
Employer

on behalf of

NORMAN J. FRANK,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Roni P. Deutsch
Law Office of Roni P. Deutsch
Encino, CA
For the Employer

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

Before: **McGrath, Geraghty, Calianos**
Administrative Law Judges

TIMOTHY J. McGRATH
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 Title 20, Part 656 of the Code of

Federal Regulations ("C.F.R."). For the reasons set forth below, we reverse the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On September 3, 2008, the CO accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Translator." (AF 58).[1] On September 17, 2008, the CO denied certification stating "Section I of ETA Form 9089 indicates the occupation is non-professional. However the SOC[2] for occupation listed on the application is found on the list of Professional Occupations from Appendix A of the Preamble to 20 C.F.R. 656. Because the required recruitment process was not conducted, the application is denied." (AF 70).

The Employer requested reconsideration on September 25, 2008 arguing the offered position of "Translator" is not found on the list of professional occupations and therefore the employer's response that the application was for a non-professional position is correct, and the recruitment was appropriate. (AF 52-67). Having apparently accepted the Employer's arguments on reconsideration, the CO sent the Employer a Request For Information on April 4, 2011, and the Employer provided the requested information on May 26, 2011. (AF 44-51). On June 1, 2011, the CO sent the Employer an audit notification requesting documentation in accordance with 20 C.F.R. § 656.20. (AF 40-43). The Employer submitted the requested documentation on June 29, 2011, including its job order placed with the State Workforce Agency ("SWA"). (AF 11-39).

On July 11, 2011, the CO issued a second denial letter, stating that the job order contained job requirements which exceeded the job requirements listed on the Employer's ETA Form 9089 in violation of 20 C.F.R. § 656.17(f)(6) of the regulations. (AF 9-10). Specifically, the job order posted at the New York State work force agency[3] contains an experience requirement of "Mid Career (2-15 years)" whereas the ETA Form 9089 only required 24 months experience. (AF 10).

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[1] In this decision, AF is an abbreviation for Appeal File.
[2] SOC stands for Standard Occupational Classification.
[3] The job order was posted at www.americasjobexchange.com.

On August 4, 2011, the Employer requested reconsideration. (AF 2-8). The Employer argued that the regulatory authority relied on by the CO for the denial of labor certification applies only to advertisements and not job orders placed with the SWA. (AF 2). The Employer argued that the regulation section pertaining to job orders does not contain the same content requirements as those for advertisements. (AF 2). The Employer additionally argued that the SWA job order form has the following experience options: Intern, Entry Level (0-2 years), Mid-Career (2-15 years), or Senior (15+ years). (AF 2). The Employer explained: "given that the offered position requires not less than two years of experience, it was automatically listed under Mid-Career (2-15 years)" and the Employer had no control over the automatic listing. (AF 3).

On August 26, 2011, the CO forwarded the case to BALCA. (AF 1). The CO upheld his denial on the basis that "the job order is one part of the recruitment effort used by the employer to test the labor market and must therefore contain the same information required of advertisements set forth in . . . 20 C.F.R. §[] 656.17(f)." (AF 1). The CO acknowledged the Employer's argument that the experience field of the job order only allowed pre-determined experience levels, but the CO countered that the job order form also contained a "free form field in which the employer had the opportunity to specify its actual minimum requirements." (AF 1).

BALCA issued a Notice of Docketing on December 6, 2011, and the Employer filed a Statement of Intent to Proceed on December 20, 2011. Neither the Employer nor the CO filed appellate briefs in this matter. On September 6, 2012, the Employer certified via e-mail that the job identified in the PERM application was still open and available and that the alien identified in the PERM application remains ready, willing and able to fill the position.

DISCUSSION

An employer filing an application for permanent labor certification is required to conduct certain recruitment steps prior to filing its application. One of the mandatory recruitment steps is the placement of a job order with the SWA serving the area of intended employment for a period of 30 days. 20 C.F.R. §§ 656.17(e)(1)(A),(2)(i). The start and end dates of the job order entered on the application serve as documentation of this step. *Id.*

The regulations further provide content requirements at 20 C.F.R. § 656.17(f) for "advertisements placed in newspapers of general circulation or in professional journals." Under this section, such 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(f)(6).

The CO denied the Employer's application because its SWA job order contained job requirements which exceeded the job requirements listed in its ETA Form 9089 in violation of Section 656.17(f)(6). Section H.6 of the Employer's ETA Form 9089 indicated that it requires 24 months of experience in the position offered. (AF 73). In comparison, the Employer's SWA job order submitted with its audit materials stated that the position requires "Mid Career (2-15 years)" experience. (AF 31). The CO's denial is appropriate if subsection 6 of Section 656.17(f) applies to job orders, as the requirements in the job order exceeded the requirements in the ETA Form 9089. *See CCG Metamedia, Inc.*, 2010-PER-00236 (Mar. 2, 2011) ("Stating a range of experience in the recruiting materials that goes above the minimum experience requirements stated in the application inflates the job requirements in the job advertisements, and does not accurately reflect the Employer's attestations on the ETA Form 9089. Moreover, it is in violation of the regulations.").

However, as argued by the Employer, Section 656.17(f), "Advertising Requirements" does not refer to job orders. While job orders are clearly part of the overall recruitment process and are a form of advertisement, the Employment and Training Administration ("ETA") expressly limited Section 656.17(f) to "advertisements placed in *newspapers of general circulation or in professional journals*." Job orders do not fall within these two enumerated categories of advertisements. Furthermore, when looking at the overall structure of the PERM regulations, it appears the ETA purposely omitted language stating that the requirements of Section 656.17(f) apply to job orders. For example, under Section 656.10(d) requiring employers to post a Notice of Filing, the ETA added subsection 4 which explicitly states "the notice must contain the information required for advertisements by § 656.17(f)." 20 C.F.R. § 656.10(d)(4). Thus, although notice of filings would not normally be categorized as "newspaper" or "professional journal" advertisements, the ETA expressly stated it intended

Section 656.17(f) to apply to notice of filings as well. The ETA did not include such language in the section addressing job orders.

Looking at Section 656.17(e)(2) of the regulations provides further insight into the ETA's intent. This section addresses the two mandatory recruitment steps employers must conduct for nonprofessional occupations: a job order and two advertisements in a Sunday edition of a newspaper. The structure of this section is significant:

> (2) *Nonprofessional occupations.* If the application is for a nonprofessional occupation, the employer must at a minimum, place a job order and two newspaper advertisements within 6 months of filing the application. The steps must be conducted at least 30 days but no more than 180 days before the filing of the application.
>
> > (i) *Job Order.* Placing a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application serve as documentation of this step.
> >
> > (ii) *Newspaper advertisements.*
> >
> > > (A) Placing 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.
> > >
> > > . . .
> > >
> > > (D) The advertisements must satisfy the requirements of paragraph (f) of this section.[4]
>
> (f) *Advertising requirements.*
>
> . . .

Clearly subsection (D) requires the advertisements discussed in the prior subsection to comply with the advertising requirements of Section 656.17(f). Job orders are contained within the same regulation, yet the ETA chose not to require job orders to comply with Section 656.17(f) as it did with newspaper advertisements. If the ETA intended the advertising

[4] The mandatory requirement steps for professional occupations under Section 656.17(e)(1) are structured the same as for non-professional occupations, in that a subsection specifically applies Section 656.17(f) to newspaper advertisements, but there is no complementing subsection applying Section 656.17(f) to job orders.

requirement of Section 656.17(f) to apply to job orders, it could have easily stated so in subsection (i). We are unwilling to write such a requirement into the regulation.

BALCA, in a recent en banc decision, *A Cut Above Ceramic Tile*, 2010-PER-00224 (Mar. 8, 2012), held that based on a reading of the plain language of the PERM regulations, an employer is not required to submit a copy of its job order as proof of the recruitment step, because the regulations state "the start and end dates of the job order entered on the application serve as documentation of this step." In its analysis, the Board contrasted the regulatory language used for job orders in Section 656.17(e)(2)(i) with the language used for newspaper advertisements in Section 656.17(e)(2)(ii). The Board stated "unlike SWA job order regulations, the regulations governing placement of a newspaper advertisement provide that 'documentation of this step can be satisfied by furnishing copies of the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper.'" *Id.* at 6. The Board went on to state "this distinction is one of relevance. While the PERM regulations clearly require an employer to be able to provide proof of publication of its newspaper advertisement, the regulations do not require an employer to be able to provide proof of publication of SWA job order." *Id.* at 6.

In support of its regulatory interpretation, the Board in *A Cut Above Ceramic Tile* quoted the Supreme Court, stating where Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion o[r] exclusion." *Id.* at 7 (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983)). The same analysis from *A Cut Above Ceramic Tile* regarding documentation of job orders, is equally applicable here. The ETA included language in Sections 656.17(e)(2)(ii)(D), 656.17(e)(1)(i)(B)(3), and 656.10(d)(4) applying the content requirements of Section 656.17(f) to newspaper advertisements and notice of filings, but omitted such language in Section 656.17(e)(2)(i) addressing job orders. It can only be reasoned that the omission with regard to job orders was intentional as the ETA obviously knew how to incorporate the advertising requirements of Section 656.17(f) when it so desired as demonstrated

by the three occasions where the requirements were specifically made applicable.[5] There is nothing in the regulatory history which suggests that the ETA intended Section 656.17(f) to apply to job orders despite the omission of such a requirement in the regulations. Lastly, we acknowledge that the outcome of this decision causes some concern as job orders play an important role in the recruitment of U.S. workers, and the process would certainly be enhanced if the advertising requirements of Section 656.17(f) applied to job orders. However, given that the regulations contain many specific requirements of employers filing Applications for Permanent Employment Certification, and almost strict liability for failure to comply with the delineated regulatory obligations, we are unwilling to add an additional, unwritten mandate for applicants. That power rests solely with the ETA to amend the regulations to ensure a result that more effectively aligns with the purpose of the regulations.

Thus, we hold based on the plain and unambiguous language of the regulations that the content requirements of 20 C.F.R. § 656.17(f) do not apply to job orders placed with the applicable SWA.[6] Therefore, because the CO denied labor certification because the Employer's

[5] We acknowledge that in a footnote in *A Cut Above Ceramic Tile* the Board indicated that if an employer chooses to submit documentation of its job order, such documentation must comply with 20 C.F.R. § 656.17(f). *Id.* at 12 n.5. However, the Board did not analyze the issue in any depth and the conclusory statement found in the footnote is non-binding dicta.

[6] We further find that applying the plain language of the regulations does not produce an absurd result--there are rational explanations why the ETA chose to treat job orders differently from other forms of recruitment. For example, as pointed out by the Employer in this matter, the SWA's job order form consisted of drop-down selections, limiting an employer's ability to control the content of the job order. (AF 3). Because job orders are under the control of the various states, the job order and its content is not entirely within an employer's control. Such a limitation on an employer's ability to dictate the content of job orders would be a legitimate and rational reason for the ETA to distinguish job orders from other recruitment steps. We also note that the ETA distinguished job orders from other recruitment steps in other ways. For instance, although all other forms of advertisements are required to be documented by providing copies of such advertisements to the CO, copies of job orders are not required--merely stating the start and end dates of the job order on the ETA Form 9089 is sufficient to document this step. *Compare* 20 C.F.R. § 656.17(e)(1)(i)(A), *with* 20 C.F.R. § 656.17(e)(1)(i)(B)(4), (ii)(A)-(J).

job order did not meet the content requirements found in Section 656.17(f), we must reverse the CO's denial.[7]

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **REVERSED** and the CO is directed to **GRANT** certification.

For the Board:

Digitally signed by TIMOTHY MCGRATH
DN: CN=TIMOTHY MCGRATH, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, MA

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

[7] We acknowledge that this decision is contrary to several other panel decisions applying Section 656.17(f) to job orders. *See e.g.*, *East Tennessee State University*, 2010-PER-00038, PDF at 8 n.7 (Apr. 18, 2011) (*citing Jesus Covenant Church*, 2008-PER-00200 (Sept. 14, 2009)) (noting the attestation requirement that a job be clearly open to U.S. workers requires an employer to comply with the advertising content requirements); *see also Acrison, Inc.*, 2009-PER-00399, PDF at 5-6 (Oct. 27, 2010); *Xceed Technologies*, 2010-PER-00080 (July 27, 2010); *N.A.F.A. Consultants and Employment Agency, Corp.*, 2010-PER-00690 (Aug. 19, 2010). We reviewed those decisions and do not find the reasoning set forth in the respective discussions to be persuasive. As there has been no en banc decision on this issue, we are not bound by those decisions, and respectfully disagree with their holdings. Although this Panel has previously affirmed denials based on the content of job orders violating the requirements of Section 656.17(f), in those past cases we stated in a footnote that it was not necessary to consider in depth the issue of whether the requirements of Section 656.17(f) apply to job orders; the employer failed to raise the issue, thereby effectively waiving any objection to the regulation's application. *See, e.g.*, KPMG, LLP, 2011-PER-02673/02695, PDF at 3 n.2 (Jan. 23, 2013); *Systems Management Services*, 2011-PER-00862, PDF at 3, n.2 (June 7, 2012).

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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.