



Issue Date: 04 January 2012

BALCA Case No.: 2011-PER-00035
ETA Case No.: A-08043-23503

In the Matter of:

DISCOVERY NETWORKS LATIN AMERICA-IBERIA,
Employer

on behalf of

VACCARO, MAXIMILIANO,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Ana Gonzalez, Esq.
Fragomen, Del Rey, Bernsen & Loewy, LLP
Coral Gables, Florida
For the Employer

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

Before: Bergstrom, Malamphy, and Sarno
Administrative Law Judges

DECISION AND ORDER
AFFIRMING 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.”).

BACKGROUND

On May 12, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Producer” (AF 222).¹ On May 30, 2008 the CO issued an Audit Notification requiring, among other documentation, proof of the job order placed with the State Workforce Agency (SWA) and all resumes received in connection with this application. (AF 222-226) The Employer responded on June 25, 2008 (AF 211-221).

The CO issued an additional Audit Notification on December 9, 2008 requesting, among other documentation, proof of the job order placed with the SWA (AF 208-210). Employer responded again on December 18, 2008 noting they included copies of their original audit response submission on June 25, 2008 (AF 52-207).

On May 17, 2010 the Employer’s application was denied based on two grounds (AF 49-51). First, the Wall Street Journal does not qualify as a “professional journal,” and, as the ad was not run on a Sunday, it cannot be used in lieu of the mandatory Sunday advertisements required by 20 C.F.R. § 656.17(e)(1)(i). Second, the Alien did not meet the minimum requirements listed on section H prior to employment with the Employer citing 20 C.F.R. § 656.17(i)(1) for denial authority. (AF 50)

The Employer requested review on June 16, 2010 (AF 1-48). The Employer first argued that the U.S. Department of Labor (DOL) has “arbitrarily determined that the “Wall Street Journal” does not qualify as a “Professional Journal,” including an ‘expert opinion’ of Professor Sapp stating the Wall Street Journal (WSJ) qualifies as a professional journal (AF 4-6). Second, the Employer asserted that Section J and K of

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

ETA Form 9089 establish the Alien “more than exceeds the minimum requirements of the position as set forth in Section H” (AF 4).

The CO forwarded the case to BALCA on October 6, 2010, and BALCA issued a Notice of Docketing on December 1, 2010. The Employer filed a Statement of Intent to Proceed on December 9, 2010. On January 10, 2011 the Employer filed an Appeal Brief which only addressed the first reason for denial. On January 19, 2011 the CO filed a Statement of Position arguing the WSJ is a newspaper of general circulation.

DISCUSSION

The regulations at 20 C.F.R. § 656.17(e)(1)(i) requires that two print advertisements are “mandatory for all applications involving professional occupations.”

The regulations continue

(B) *Advertisements in newspaper or professional journals*

(1) 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 and most likely to bring responses from able, willing, qualified and available U.S. workers.

...

(4) If the job involved in the application requires experience and an advanced degree, and a professional journal normally would be used to advertise the job opportunity, the employer may, in lieu of one of the Sunday advertisements, place an advertisement in the professional journal most likely to bring responses from able, willing, qualified, and available U.S. workers. *Id.*

Neither ‘professional journal’ nor ‘newspaper of general circulation’ are defined in § 656.3 of the regulations. Additionally, the issue of whether the *Wall Street Journal* constitutes a professional journal has apparently not yet been addressed under the PERM regulations. However, in pre-PERM decisions BALCA has found the WSJ constitutes a newspaper of general circulation (*See*

Electro-Star, 92-INA-402, at 3 (Sept. 30, 1993). This finding is supported by the Employer's own argument who, in their brief, asserted that the WSJ has a circulation of over 2 million readers, demonstrating a widespread appeal beyond just the business professional market. Finally, the WSJ carries a section on national and international news, including political and opinion pages, like all major newspapers of general circulation. Based on the foregoing the Board finds that the Wall Street Journal constitutes a newspaper of general circulation and not a professional journal.

The Employer's ad in the WSJ, a newspaper of general circulation, ran on a Wednesday, not a Sunday as required by 20 C.F.R. § 656.17(e)(1)(i)(B)(I). Based on the foregoing the CO's denial was appropriate.²

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/AMJ/jcb
Newport News, Virginia

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

² The application was initially denied for two reasons, however the second denial reason was not briefed by either party. Furthermore because we affirm denial on this ground, we do not address the other reasons for denial given by the CO.

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.