

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 October 2011

BALCA No.: 2011-PER-02599
ETA Case No.: A-08176-64095

In the Matter of:

HSB SOLOMON ASSOCIATES LLC,
Employer,

on behalf of

WILFRIDO JESUS JATEM,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Brian S. Weiss, Esquire
Garganigo, Goldsmith & Weiss
New York, New York
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: **Chapman, Colwell and Johnson**
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 governing permanent alien labor certification found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).

STATEMENT OF THE CASE

On June 25, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s application for Permanent Employment Certification for the position of “Latin American Refining Prospect Director.” (AF 169-185).¹ In its ETA Form 9089, the Employer stated that it conducted three additional recruitment steps to advertise this professional job opportunity, including listing the job opportunity with a private employment firm from May 14, 2008 to June 13, 2008. (AF 172).

On July 7, 2008, the CO audited the Employer’s application and directed the Employer to submit its recruitment documentation. (AF 164-167). The Employer submitted its audit response materials to the CO on August 7, 2008. (AF 31-163). As documentation of its use of a private employment firm, the Employer submitted a *Letter of Certification for Services Completed* for position number 117242, dated June 16, 2008, and signed by the Office Manager for Placement Services USA. (AF 152). The letter states that:

Placement Services USA is a full-service placement agency that assists Employers throughout the United States to find qualified professionals for their companies and organizations. We specialize in placing Professionals in Full Time Permanent positions with an employer in an expeditious and convenient manner.

Placement Services USA provides a full range of recruitment efforts in order to place the position of **Latin American Refining Prospect Director** with HSB Solomon Associates, LLC. The position is located in Dallas, Texas.

We diligently checked through our data base pool of existing applicants and posted the specific job position Online for any qualified applicants to review. The job placement search and posting were conducted between May 14th and June 13th, 2008.

¹ “AF” refers to the Appeal File.

Based on our efforts, we certify that we were unable to find applicants and received zero (0) resumes that met the minimum qualifications set forth by this employer in education and/or experience for this position of **Latin American Refining Prospect Director**. The requirements are a Master's Degree in Business Administration or Chemical Engineering and ten (10) years of experience in the job offered or in a managerial/executive position in the petroleum/refining industry.

Id. The Employer also submitted a copy of the advertisement that Placement USA posted online for job number 117242. (AF 153). The advertisement includes an extensive job description, the education and experience requirements, and the location of the job opportunity.

Id. The advertisement does not include the Employer's name. *Id.*

On July 10, 2010, the CO found that the recruitment conducted through Placement Services USA, Inc. did not identify the name of the Employer, and therefore found that the Employer failed to provide adequate documentation of its recruitment through a private employment firm.² (AF 29-30). In its denial, the CO stated:

Inclusion of the company name allows potential applicants to identify the employer and determine whether they'll apply for the advertised position. In addition, potentially qualified applicants may be unwilling to respond to blind advertisements, as they cannot be certain who will receive their response. Finally, requiring the company's name allows DOL to match the advertisements to the sponsored job opportunity.

(AF 30). The CO cited 20 C.F.R. § 656.10(c), which requires the employer to attest that the job opportunity has been and is clearly open to U.S. workers, and 20 C.F.R. § 656.17(f)(1), which requires that advertisements name the employer, as the regulatory bases for denial. *Id.*

The Employer requested reconsideration on July 16, 2010. (AF 3-27). The Employer explained that the general business purpose of a private employment firm is to handle all recruitment on behalf of an employer, and therefore it is the firms' common practice to omit the name of the employer in the advertisements that they place. (AF 7-8). The Employer submitted a letter from Michael Garmisa, President and Founder of SearchOne, LLC, a private recruitment firm, to support this contention. (AF 21). Mr. Garmisa stated that "[w]hen our firm conducts recruitment on behalf of our clients, we do not initially reveal the name of the client with prospective candidates. An employer's name, or their contact information, is not initially provided to prospective candidates. I can safely say that this is an industry standard." *Id.* The

² The CO denied the Employer's application on one additional ground, which is not at issue on appeal. (AF 1).

Employer argued that the job opportunity was clearly open to U.S. workers. The Employer also noted that it was recently contacted by a representative from the Department of Labor regarding another case that was denied for the same reason and was informed that the CO would certify the application based on the recruitment provided. (AF 9).

On August 18, 2010, the CO again denied the Employer's application. (AF 1-2). The CO found that the requirement that an employer's name be included in the advertisement is necessary to ensure the results of an employer's test of the labor market are legitimate. (AF 1). The CO cited the preamble to the Final Rule published in the Federal Register implementing the PERM regulations, which provides that "advertisements naming the employer are more likely to represent bona fide openings or vacancies." 69 Fed. Reg. 77326, 77248 (Dec. 27, 2004). The CO found that because the possibility exists that potentially qualified U.S. workers will not respond to advertisements that do not name the employer, the results of any such recruitment are deficient and cannot be used by the employer to demonstrate the lack of willing, able, qualified and available U.S. workers. (AF 1).

The CO forwarded the matter to BALCA, and the Board issued a Notice of Docketing on September 28, 2011.³ The Employer filed its appellate brief on October 5, 2011, arguing that 20 C.F.R. § 656.17(e)(1)(ii)(F) is not specific in the type of evidence required to fulfill the recruitment step, and therefore grants employers the latitude to follow the standard practice of private employment firms and not include the name of the employer in an advertisement. The Employer also argued that one major purpose of using a private employment firm is so that the employer does not have to handle the recruitment, and that if an employer's name is listed in the advertisement placed by a private employment firm, an applicant may be tempted to bypass the employment firm and contact the employer, thereby defeating the purpose of using the employment firm. Additionally, the Employer argues that BALCA's decision in *Credit Suisse Securities*, 2010-PER-103 (Oct. 19, 2010), did not address whether an advertisement placed by a private employment firm must comply with the content requirements at Section 656.17(f).

³ Prior to the issuance of the Notice of Docketing, the Employer filed a motion to expedite pursuant to 29 C.F.R. § 18.42. The Employer included an affidavit from the foreign worker attesting that his son will turn 21 years old on November 5, 2011, at which time he will lose eligibility for derivative permanent resident status. The Employer also included a certified copy of the foreign worker's son's birth certification and a notarized English translation. In light of the exigent circumstances presented, the Board granted the Employer's motion to expedite on September 28, 2011.

The CO filed a Statement of Position on October 24, 2011, arguing that denial of certification was proper under the Board's decision in *Credit Suisse Securities*. The CO argues that while the panel in *Credit Suisse Securities* limited its holding to the additional recruitment steps that require placement of an advertisement, *Credit Suisse Securities* should be extended to cover any advertisement placed by private employment firms in fulfillment of the additional recruitment steps. The CO argues that without the inclusion of all of the content requirements in Section 656.17(f), including an employer's name, the greatest number of able, willing, qualified, and available U.S. workers will not be apprised of the job opportunity. Accordingly, the CO argues that because the Employer's name was not included in the advertisement placed by the private employment firm, the CO's ability to verify that there were no U.S. workers available for the position was impaired.

DISCUSSION

The PERM regulations provide that an employer seeking to hire a foreign worker for a professional position must conduct three additional recruitment steps to advertise the occupation. 20 C.F.R. § 656.17(e)(1)(ii). One of the three additional recruitment steps is to use the services of a private employment firm or placement agency. Twenty C.F.R. § 656.17(e)(1)(ii)(F) provides:

The use of private employment firms or placement agencies can be documented by providing documentation sufficient to demonstrate that recruitment has been conducted by a private firm for the occupation for which certification is sought. For example, documentation might consist of copies of contracts between the employer and the private employment firm and copies of advertisements placed by the private employment firm for the occupation involved in the application.

BALCA has noted that this regulation “offers a flexible standard” and that “producing a copy of an advertisement placed by the private employment firm is not a mandatory requirement.” *Yosef, Inc.*, 2009-PER-296, slip op. at 4 (Feb. 3, 2010).

In *Yosef, Inc.*, a BALCA panel determined that the employer failed to adequately document its recruitment with a private employment firm because the employer could only produce an unsigned, undated, and unaddressed letter requesting recruitment for 30 days to a private employment firm, but could not produce any kind of agreement between the employer

and the private firm. *Id.* The panel found that there was no evidence that the letter led to the firm conducting any recruitment on behalf of the employer.

The facts in the case at bench are significantly different. Here, the Employer provided a copy of a *Letter of Certification for Services Completed* from Placement Services USA, Inc., and the dates of recruitment in this letter match the dates provided on the ETA Form 9089. The letter shows that the employment firm recruited for the position of Latin American Refining Prospect Director in Dallas, Texas, and the education and experience requirements also match the dates provided on the ETA Form 9089. Accordingly, based solely on the information in the *Letter of Certification* from Placement Services USA, Inc., it is readily apparent that recruitment was conducted by a private firm for the occupation for which certification is sought.

Therefore, we must determine whether the fact that the Employer also submitted a copy of the advertisement placed by Placement Services USA, Inc., and that this advertisement does not include the Employer's name, is fatal to the Employer's application. In deciding this issue, we will consider the purpose of the additional recruitment steps and whether this job opportunity was clearly open to U.S. workers.

The regulations themselves contain little guidance regarding what information must be included in an advertisement placed to fulfill an additional recruitment step. In rulemaking, the Employment and Training Administration ("ETA") explained that the additional recruitment steps were intended to replicate "real world alternatives" that the majority of employers seriously recruiting U.S. workers would routinely use. Final Rule, *Labor Certification Process for the Permanent Employment of Aliens in the United States* ["PERM"], 69 Fed. Reg. 77326, 77345 (Dec. 27, 2004). In *Credit Suisse Securities*, 2010-PER-103, slip op. at 8 (Oct. 19, 2010), a BALCA panel explained that while the advertisement content requirements in Section 656.17(f) only explicitly apply to advertisements placed in newspapers of general circulation or in professional journals, an employer's duty to recruit U.S. workers in good faith and hold the job opportunity clearly open to U.S. workers requires that all advertisements placed by an employer must have the purpose and effect of apprising U.S. workers of the job opportunity. Accordingly, the Board found that all advertisements placed by employers in fulfillment of the additional recruitment steps must comply with the advertisement content requirements listed in Section 656.17(f). *Id.* In *Credit Suisse Securities*, the employer's website advertisement consisted of a generalized list of several broad areas of employment, and did not contain any information about

the position offered or the skills or qualifications required. The panel found that the position was not clearly open to U.S. workers, and affirmed the CO's denial pursuant to Section 656.10(c)(8). *Id.* at 9.

However, the panel in *Credit Suisse Securities* specifically refrained from making any determination about the applicability of Section 656.17(f) to additional recruitment steps that do not require placement of an advertisement, *e.g.*, job fairs, on-campus recruiting, private employment firms, and campus placement office. *Id.* at 8, n.7. The Employer argues, and we agree, that the nature of these methods of recruitment do not readily lend themselves to the specific requirements in Section 656.17(f). Therefore, the issue before us is what content must be included in an advertisement placed by a private employment firm.

We return to the decision in *Credit Suisse Securities* and the purpose of the additional recruitment steps. We agree with the panel that where a recruitment step requires the placement of an advertisement, *i.e.* in a newspaper, journal, or on a website, consistent with the Employer's duty to advertise in good faith and hold the job clearly open to U.S. workers, the content must comply with Section 656.17(f). However, when an advertisement is placed by a private employment firm, the advertisement will be assessed based on whether it contains enough information to adequately apprise U.S. workers about the job opportunity. If the advertisement contains incorrect or misleading information, *e.g.*, the wrong wage, duties, or job description, the position advertised is not clearly open to U.S. workers.⁴ Where there is no incorrect information, but the advertisement does not contain the content required by Section 656.17(f), it is necessary to engage in a more fact-specific inquiry of the advertisement to determine whether the omission contravenes the employer's duty to recruit in good faith or whether it prevents the job opportunity from being clearly open to U.S. workers. Limited to the precise facts of this case, we find that the fact that the Employer's name was not included in the advertisement placed by the private employment firm is not fatal to the Employer's application.⁵

⁴ For example, although an employer need not submit an advertisement to document recruitment through its employee referral program, a job opportunity is not clearly open to U.S. workers if the employer does use an advertisement and the advertisement contains a wage less than the prevailing wage determination or the wage offered to the foreign worker. *See Boston Technology Corp.*, 2010-PER-973, slip op. at 3 (Jan. 24, 2011).

⁵ We decline to speculate about whether a failure to include any of the other content required by Section 656.17(f) would have rendered the job not clearly open to U.S. workers.

Our finding is predicated on several facts. First, the placement agency's posting contains a lengthy description of the job opportunity, provides the job title, the location of the job, and the education and experience requirements of the job. Secondly, although the Employer's name is omitted from the posting, the job number is included. (AF 153). The job number in the posting corresponds to the job number in the *Letter of Certification* from Placement Services USA, and permits the CO to match the employer's advertisement to the sponsored job opportunity. (AF 152). Additionally, the Employer has provided unrebutted evidence that blind advertisements are the usual method by which a private employment firm advertises a job. (AF 21). In rulemaking, ETA explained that the additional recruitment steps were intended to replicate employer's normal recruitment methods. 69 Fed. Reg. at 77345. There is nothing in the regulations or in rulemaking to indicate that an employer using a private employment firm to recruit U.S. workers cannot recruit in the normal method, *i.e.* by placing blind advertisements.⁶ Indeed, we agree with the Employer that a major purpose of using a private employment firm is so that the employer does not have to handle the recruitment. As such, we find that there is a reasonable and legitimate reason why a private employment firm would not include an employer's name. Finally, as noted earlier, the Employer did not even need to include the actual Placement Services USA posting, as the *Letter of Certification* clearly complied with the regulatory requirement that the employer be able to demonstrate that recruitment was conducted by a private firm for the occupation for which certification is sought.

Based on the foregoing, we find that the Employer provided adequate documentation that recruitment was conducted by a private firm for the occupation for which certification is sought and that the position advertised by the private firm was clearly open to U.S. workers. Accordingly, we reverse the CO's denial of certification and remand the matter for the CO to grant certification.

⁶ While the language in the preamble notes that some applicants may be unwilling to apply for a job opportunity when the advertisement does not include the employer's name, ETA's comments were directed at newspaper advertisements, and therefore, we find these comments to be inapplicable to the situation at bench, where an employer need not place an advertisement in order to comply with the additional recruitment step. *See generally*, 69 Fed. Reg. at 77348.

ORDER

Based on the foregoing, **IT IS ORDERED** that the CO's determination is **REVERSED** and labor certification is hereby **GRANTED**.

For the panel:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: In light of the Board's expedited review in this matter, this Decision and Order will become the final decision of the Secretary unless a party petitions for review by the full Board **by Tuesday, November 1, 2011 at 4:30 p.m. EST**. 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.