

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 31 December 2014

BALCA Case No.: 2011-PER-02104
ETA Case No.: A-08297-98741

In the Matter of:

NEEDHAM-BETZ THOROUGHBREDS, INC.,
Employer,

on behalf of

ROBERT BARRY TILLYER,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: John T. Combs, Esq.
Ogletree Deakins
Denver, CO
For the Employer

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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
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.”). For the reasons set forth below, we affirm the denial of the Employer’s Application for Permanent Employment Certification.

BACKGROUND

On November 19, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Farm Manager.” (AF 58, 65).¹ On November 25, 2009, the CO sent the Employer an Audit Notification requesting the Employer provide certain information in accordance with 20 C.F.R. § 656.20. (AF 53-56). On December 23, 2009, the Employer responded to the Audit. (AF 13-52). In response to the CO’s audit request, the Employer explained the foreign worker lives at the Employer’s address because the Employer offers employees an option to live rent-free, on-site at the job location which is a horse farm, and the foreign worker took advantage of the option. (AF 14-15).

On December 16, 2010, the CO denied the application because the Employer’s Notice of Filing (“NOF”), Job Order, mandatory newspaper advertisements, and additional recruitment steps did not indicate the option for potential applicants to live in or on the employer’s establishment and therefore offered terms and conditions of employment that were less favorable than those offered to the alien in violation of 20 C.F.R. § 656.17(f)(7). (AF 10-12).

On January 14, 2011, the Employer filed a request for reconsideration. (AF 3-9). The Employer argued it is not required to enumerate every job duty, job requirement and condition of employment in its advertisements, citing to the Department of Labor’s Frequently Asked Questions. (AF 4). The Employer argued that silence on a particular aspect of a job does not violate section 656.17(f)(7) and there is no affirmative duty to advertise all aspects of a position. (AF 4-5).

On July 18, 2011, the CO denied reconsideration and forwarded the case to BALCA for administrative review, and on November 4, 2011, BALCA issued a Notice of Docketing. (AF 1-2). On November 18, 2011, the Employer submitted a Statement of Intent to Proceed.

The CO filed a Statement of Position on December 21, 2011. The CO relied on *Blue Ridge Erectors, Inc.*, 2010-PER-00997 (July 28, 2011), which found that the option to live on the Employer’s premise is a term and condition of employment that creates a more favorable job opportunity for which the labor market was not tested. CO Br. 1. The CO found the “convenience and cost-savings associated with employer-provided housing could induce a U.S. worker to apply for a position that he might not otherwise seek,” and since the Employer did not advertise the optional housing benefits, it did not conduct an appropriate test of the U.S. labor market. *Id.* The CO distinguished the contrary case of *Emma Willard School*, 2010-PER-01101 (Sept. 28, 2011), arguing in that case, the employer demonstrated that a “significant majority” of its boarding school teachers, including its U.S. workers, lived in employer-provided housing, whereas in the instant matter, the Employer failed to establish that housing would be equally available to U.S. applicants. *Id.* at 2. The CO further argued the *Emma Willard* panel limited its holding to the “precise circumstances” at issue and stated “[t]his decision should not be

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

construed as support for an employer never having to offer or disclose a housing benefit to U.S. workers.” *Id.*

On January 5, 2012, the Employer responded to the CO’s Position Statement. The Employer distinguished *Blue Ridge* because that panel upheld the denial of certification under 20 C.F.R. § 656.1(a)(1), which the Employer argues does not create an adjudicatory standard the Employer must comply with, but simply outlines the purpose and scope of the PERM process. Er. Br. 1. The Employer argued it met all applicable requirements in its recruiting, and that a CO is not required to speculate whether recruitment efforts beyond those required by 20 C.F.R. Part 656 might possibly have induced other U.S. workers to apply for the position. Er. Br. 2. The Employer presented a slippery slope argument that under the CO’s reasoning, the Employer’s application could potentially be denied for not including every benefit of employment, no matter how trivial. *Id.* The Employer reiterated that there is no regulatory requirement that an employer has an affirmative duty to advertise all beneficial aspects of a position. *Id.* at 2-3.

On December 23, 2013, in response to this Panel’s Order Requiring Certification on Mootness, the Employer certified the job identified on the PERM application is still open and available and the alien identified in the PERM application remains ready, willing, and able to fill the position.

DISCUSSION

An employer must conduct certain recruitment steps and make a good faith effort to recruit U.S. workers prior to filing an application for permanent alien labor certification. 20 C.F.R. § 656.17(f)(7); ETA Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326 (Dec. 27, 2004). Mandatory newspaper advertisements and Notices of Filing placed as part of the recruitment process must meet certain content requirements as outlined in 20 C.F.R. §§ 656.17(f) & 656.10(d)(4). In pertinent part, the advertisements must “[n]ot contain wages or terms and conditions of employment that are less favorable than those offered to the alien.” 20 C.F.R. § 656.17(f)(7).²

The Employer’s newspaper advertisements and Notice of Filing placed as part of the recruitment process did not mention an option to live on the Employer’s premises, rent-free. (*See* AF 39-51). The CO, in denying certification, found that the failure to offer potential U.S. applicants the option to live on-site resulted in a violation of section 656.17(f)(7) as the advertisements and Notice of Filing contained terms and conditions of employment less favorable than those offered to the foreign worker. (AF 11-12).

On appeal, the Employer relies on *Emma Willard School*, 2010-PER-01101 (Sept. 28, 2011), which held that the employer’s failure to indicate the availability of employer-subsidized housing in its advertisements did not violate section 656.17(f)(7). In reaching its holding, the *Emma Willard* panel found that there “is no obligation for an employer to list every term or

² We note that pursuant to *Symantec Corp.*, 2011-PER-01856 (July 30, 2014) (en banc) and *Chabad Lubavitch Center*, 2011-PER-02614 (July 29, 2013), only mandatory newspaper advertisements and Notices of Filing must meet the requirements of section 656.17(f). Accordingly the CO’s denial for the failure to include the option to live on the employer’s premise in its job order and additional recruitment steps under section 656.17(f)(7) cannot be upheld.

condition of employment and listing none does not create an automatic assumption that none exist.” *Id.* at 4. We do not find *Emma Willard* to be controlling here—it was not a binding en banc decision and that panel noted the “decision should not be construed as support for an employer never having to offer or disclose a housing benefit to the U.S. workers.” 2010-PER-01101 at 5.

We find two other BALCA decisions to be more persuasive and they reach an opposite holding than *Emma Willard*. *Blue Ridge Erectors, Inc.*, 2010-PER-00997 (July 28, 2011) and *Phillip Dutton Eventing, LLC*, 2012-PER-00497 (Nov. 24, 2014). *Phillip Dutton* is the most recent decision addressing the inclusion of an option to live onsite in an employer’s advertisements. Both *Phillip Dutton* and *Blue Ridge* upheld the CO’s denials of certification under section 656.17(f)(7), reasoning: “The option to live on Employer’s premises at no additional cost is a term and condition of employment that creates a more favorable job opportunity for which the labor market was not tested by the Employer’s recruitment effort” and “U.S. workers who might have responded to an ad if on-premises housing was an option were not given the opportunity to do so.” *Phillip Dutton*, 2012-PER-00497 at 4; *see also Blue Ridge*, 2010-PER-00997 at 3.

In *Phillip Dutton*, the panel distinguished on-site housing at no additional cost with wages, which are not required to be included in advertisements. 2012-PER-00497 at 4. The panel stated: “unlike on-site housing at no additional cost, wages are a legal requirement of work in this country. No-cost, on-site housing is not. Unlike wages, no reasonable potential applicant would have assumed that no-cost, on-site housing was a benefit associated with this job opportunity.” *Id.* Both *Blue Ridge* and *Phillip Dutton* concluded the Employers failed to establish there were insufficient able, willing, and qualified U.S. workers available as required by 20 C.F.R. § 656.1(a)(1).³ *Phillip Dutton*, 2012-PER-00497 at 5; *Blue Ridge*, 2010-PER-00997 at 3.

The Employer argues section 656.17(f)(7) only regulates what is contained in the advertisements and does not address silence about certain aspects of the job opportunity. We find this regulatory interpretation to be too narrow, and inconsistent with the purpose of the PERM program. The purpose of the PERM regulations is to ensure there are insufficient U.S. workers who are able, willing, qualified, and available for a job opportunity prior to the Department of Labor granting labor certification to a foreign worker. 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. §§ 656.1(a) & 656.24(b)(2). Relying on Employer’s interpretation of section 656.17(f)(7), material benefits offered as part of a position which would lead to more U.S. applicants applying for the position, would not be required to be placed in an advertisement, no matter the significance of the benefits offered to the alien.

We find a more consistent interpretation of section 656.17(f), along with the purpose of PERM, is to view the terms and conditions of employment in an employer’s advertisement as a whole and compare those terms and conditions with those offered to the alien to determine

³ Section 656.1(a)(1) states that the Secretary of Labor must certify that “[t]here are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work.”

whether they are less favorable than those offered the alien. In this case, we find that by not including the benefit of free housing in its advertisements and Notice of Filing, the Employer offered terms and conditions of employment less favorable than those offered to the alien, in violation of section 656.17(f)(7).

While we acknowledge the Employer's point that the Employment and Training Administration's Frequently Asked Questions ("FAQs") indicate that not every duty, requirement and condition of employment needs to be included in advertisements,⁴ the benefits of free housing is not a standard benefit attached to a job opportunity. Free housing for an employee is a huge income enhancement that is not readily assumed to be part of an employment opportunity, unlike the other more typical benefits such as health insurance or vacation days. Therefore, advertising a position that includes the economic benefit of free housing may well have a substantial influence on potential U.S. applicants deciding whether to apply for the position. Accordingly, although not all benefits of employment need to be included in an advertisement, we find that a free housing benefit is of such paramount economic importance, it must be included in an advertisement, and a failure to do so results in the advertisement containing terms and conditions of employment that are less favorable than those offered to the alien.

Based on the foregoing, we affirm the CO's denial of certification because the Employer's newspaper advertisements and Notice of Filing contain terms and conditions of employment less favorable than those offered to the alien, in violation of 20 C.F.R. § 656.17(f).

ORDER

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

For the Panel:

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, MA

⁴See OFLC Frequently Asked Questions and Answers, <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#adcont1> (last visited December 17, 2014).

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
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.