U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 11 February 2014

BALCA Case No.: 2011-PER-01856
ETA Case No.: A-08190-68256

In the Matter of:

SYMANTEC CORPORATION,
Employer,

on behalf of

NIKHILKUMAR S. SAKHALKAR,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Clifford Chin, Esq.
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San Francisco, CA
For the Employer

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Vincent Costantino, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

JONATHAN C. CALIANOS
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 November 6, 2008, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Financial Programmer Analyst." (AF 1, 105).[1] On July 31, 2009, the CO sent the Employer an Audit Notification requesting that the Employer provide documentation in accordance with 20 C.F.R. § 656.20, and on August 21, 2009, the Employer responded to the Audit. (AF 25-103). On December 8, 2010, the CO denied the application because the Employer's advertisement placed on a job search website contained a travel requirement not included in the ETA Form 9089, in violation of 20 C.F.R. § 656.17(f)(6).[2] (AF 23-24).

On January 7, 2011, the Employer filed a request for reconsideration. (AF 3-22). Employer asserted that the requirements of section 656.17(f), relied on by the CO for his denial of certification, are expressly limited to advertisements placed in newspapers and professional journals, and do not apply to additional recruitment steps found in section 656.17(e)(1)(ii). (AF 11-12 n.1). Employer argued that the limited scope of section 656.17(f) is evidenced by the fact that a separate provision in the regulations was necessary to extend the requirements of section 656.17(f) to notices of filing, and no additional regulatory language exists applying the requirements of section 656.17(f) to the additional recruitment steps. The Employer also cited to the Preamble to the regulations, which states that additional recruitment steps need only advertise the occupation involved in the application, and not the specific job opportunity.

Alternatively, the Employer maintained that even if section 656.17(f) applies to advertisements placed on a job search website, it did not violate section 656.17(f)(6) because the job opportunity in this matter does not require travel. (AF 8). The Employer argued that the website advertisement was for multiple positions, as allowed by the Department of Labor, and the phrase "[m]ay be required to be available at various, unanticipated sites throughout the United States" did not create a mandatory requirement for all of the multiple open positions

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

[2] The CO additionally denied the application because the Notice of Filing contained a wage that was lower than the wage offered in the ETA Form 9089 and contained a travel requirement not listed in the ETA Form 9089. On reconsideration, the CO accepted the Employer's arguments regarding the Notice of Filing and the only remaining denial reason is that the website advertisement contained a travel requirement not listed in the ETA Form 9089.

listed on the advertisement. (AF 3-22). The Employer reasoned that the use of the term "may" indicates that travel "might or might not be part of the job" and since the advertisement covered multiple positions, if some of the positions "may" involve travel, then it follows that some of the positions "may not" involve travel. (AF 8).

On June 27, 2011, the CO denied reconsideration and forwarded the case to BALCA for administrative review. (AF 1-2). In the transmittal letter, the CO stated that applicants could consider the phrase travel "may be required" to be a term and condition of employment and as a result, it could have a chilling effect on applicants, "artificially excluding potentially qualified U.S. workers who would otherwise pursue the position." (AF 1).

On October 20, 2011, BALCA issued a Notice of Docketing. On November 3, 2011, the Employer submitted a Statement of Intent to Proceed, and on December 2, 2011, the Employer filed an appellate brief ("Er. Br."), reiterating its arguments made on reconsideration. On December 16, 2011, the CO filed a Statement of Position, and argued: "For a U.S. worker who simply is not willing to travel as part of the job, the express possibility that travel may be required can be as much of a deterrent as the requirement for travel."

On April 12, 2013, in response to this Panel's Order Requiring Certification on Mootness, the Employer certified that the job identified on the PERM application is still open and available on the same terms set forth in the application and the alien identified in the PERM application remains ready, willing, and able to fill the position should the decision below be overturned.

DISCUSSION

An employer filing an application for permanent labor certification is required to conduct certain recruitment steps prior to filing its application. For applications involving a professional occupation, in addition to placing a job order and advertising in a newspaper or professional journal, an employer must conduct three additional recruitment steps pursuant to 20 C.F.R. § 656.17(e)(1)(ii). An employer can utilize a job search website other than its own to satisfy one of the additional recruitment steps, and the advertisement may be documented by dated copies of pages from the website. 20 C.F.R. § 656.17(e)(1)(ii)(C).

The regulations do not address what content must be included in advertisements placed as additional recruitment steps. However, 20 C.F.R. § 656.17(f) lists content requirements for "advertisements placed in newspapers of general circulation or in professional journals."

Pursuant to this regulatory 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 advertisement placed on a job search website contained a travel requirement which was not listed in its ETA Form 9089 in violation of section 656.17(f)(6), and this is the sole reason for denial on appeal. Before determining whether Employer's website advertisement violated section 656.17(f)(6), we must first address Employer's contention that the advertising content requirements of section 656.17(f) do not apply to the additional recruitment steps found in section 656.17(e)(1)(ii). (AF 11-12 n.1; Er. Br. 9-10 n.1).

Section 656.17(f), "Advertising Requirements," applies only to "advertisements placed in *newspapers of general circulation or in professional journals*." 20 C.F.R. § 656.17(f) (emphasis added). Advertisements placed to satisfy the additional recruitment steps, including advertisements placed on a job search website, do not fall within these two enumerated categories of advertisements.

Looking at the overall structure of the regulations, there are instances where the Employment and Training Administration ("ETA") added provisions to explicitly apply the requirements of section 656.17(f) to recruitment that otherwise would not fall within the parameters of section 656.17(f). For example, in 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). Although notices of filing are not "newspaper" or "professional journal" advertisements, the ETA expressly stated section 656.17(f) applies to notices of filing. Section 656.10(d)(4) was necessary to extend the requirements of section 656.17(f) to notices of filing, because without this language, the notice of filing would not come within the purview of section 656.17(f). Unlike notices of filing, there is no separate provision extending the section 656.17(f) content requirements to additional recruitment steps in section 656.17(e)(1)(ii).

We recently issued a decision addressing a similar issue of whether the requirements of section 656.17(f) apply to job orders. *Chabad Lubavitch Center*, 2011-PER-02614 (July 29, 2013). In that decision, we observed that section 656.17(f) only applies to advertisements placed in newspapers and professional journals and that nothing in the section pertaining to job orders

explicitly incorporated the requirements of section 656.17(f). *Chabad*, 2011-PER-02614 at 4. Looking at the regulatory construction in its entirety, we found that the ETA added language applying the content requirements of section 656.17(f) in other regulatory sections, including section 656.10(d)(4), applying the content requirements to notice of filings, and sections 656.17(e)(2)(ii)(D) and 656.17(e)(1)(i)(B)(3), applying the content requirements to newspaper advertisements placed as part of the mandatory recruitment steps for professional and nonprofessional occupations. *Id.* at 4-5. We concluded because the ETA chose to expressly incorporate the advertising requirements of section 656.17(f) in these three separate regulatory provisions, and not in the provision addressing job orders, the omission with regard to job orders was intentional,[3] and based on the plain and unambiguous language of the regulations, we held that section 656.17(f) does not apply job orders. *Chabad*, 2011-PER-02614 at 5-7.

The same regulatory construction analysis in *Chabad* applies in the instant case. The ETA added provisions specifically applying the section 656.17(f) requirements to notices of filing and newspapers placed as mandatory recruitment, but omitted similar language in the regulation addressing additional recruitment steps. If the ETA intended that the additional recruitment steps meet the requirements of section 656.17(f), it could have easily included express language applying section 656.17(f), as it did in the other regulatory sections. Instead, section 656.17(e)(1)(ii) is silent as to the content of advertisements placed as additional recruitment steps.

In addition to the plain language of the statute, the Preamble to the Final Rules implementing the PERM regulations provides further insight into the ETA's intent. The ETA stated in the Preamble: "The list of alternatives [for additional recruitment steps] was based on what our program experience has shown are real-world methods normally used by businesses to recruit workers." ETA Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77345 (Dec. 27, 2004).

[3] *See Russello v. United States*, 464 U.S. 16, 23 (1983) (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").

Of particular relevance, the ETA stated:

> [I]t should be noted the *alternative recruitment steps only require employers to advertise for the occupation involved in the application rather [than] for the job opportunity involved in the application as is required for the newspaper advertisement.*[4] Allowing employers to recruit for the occupation involved in the application should also work to minimize employer costs to conduct special recruitment efforts solely to satisfy the alternative recruitment steps. In sum, we do not believe the cost to employers of the additional recruitment steps will be significant.

Id. at 77345, 77374 (emphasis added).

This passage of the Preamble makes a distinction between the requirements for newspaper advertisements and other forms of advertisements relied on as additional recruitment steps, and supports a finding that the ETA did not intend on imposing the stringent content requirements for newspapers on the additional forms of advertisements. Furthermore, the section of the Preamble which addresses the content requirements of section 656.17(f) only references "print advertisements" and "Sunday advertising" in newspapers, consistent with the regulatory language applying section 656.17(f) only to newspapers of general circulation and professional journals. *See* ETA Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77345-49 (Dec. 27, 2004). The Preamble provides a rational explanation for why the ETA would not apply the content requirements of section 656.17(f) to additional recruitment steps: it wanted to minimize the costs associated with these additional recruitment steps by not requiring the recruitment to be tailored specifically to the job opportunity listed on the ETA Form 9089.

[4] Consistent with the Preamble, 20 C.F.R. § 656.17(e)(1)(ii) repeatedly and consistently refers to the "*occupation* involved in the application" rather than the specific job opportunity identified in the application.

We acknowledge the decision *Matter of Credit Suisse Securities (USA) LLC*, 2010-PER-103 (Oct. 19, 2010), which found that the content requirements of section 656.17(f) apply to additional recruitment steps. It is not an *en banc* decision,[5] but is frequently cited and relied upon in other cases. The panel in *Credit Suisse* considered the regulatory provisions as a whole as well as the purpose of the regulations, and found that the requirements that the position be clearly open to U.S. workers, the employer recruit U.S. workers in good faith, and the CO certify the application only if there are no available U.S. workers to perform the position, implicitly require that all advertisements contain sufficient information to apprise U.S. workers of the job opportunity. *Credit Suisse*, 2010-PER-103 at 8. Accordingly, the Panel held "that all advertisements placed by employers in fulfillment of the additional recruitment steps must comply with the advertisement content requirements listed in § 656.17(f)." *Id.*

While we recognize from a policy standpoint that applying the content requirements to additional recruitment steps would further ensure that the job opportunity is open and available to U.S. workers, we do not have the authority to read into the regulations an additional requirement not stated therein. Only the ETA has the power to amend the regulations to ensure a result that more effectively aligns with the purpose of the regulations, and if the ETA did in fact intend section 656.17(f) to apply to additional recruitment steps, it can amend the regulations to expressly state so.

Based on the plain language of the regulations, combined with the regulatory history, we hold that the advertising content requirements of section 656.17(f) do not apply to the additional requirement steps found in section 656.17(e)(1)(ii). Accordingly, the CO's denial of certification because the Employer's website advertisement violated 20 C.F.R. § 656.17(f)(6) is hereby reversed.

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[5] There is one *en banc* decision that applied the requirements of section 656.17(f) to additional recruitment steps – *East Tennessee State University*, 2010-PER-00038 (Apr. 18, 2011) (en banc). In *East Tennessee*, BALCA summarily stated "although the regulations are silent as to the applicability of section 656.17(f) to the content of the additional recruitment steps for professional occupations, we agree with the holding of the panel in *Jesus Covenant Church*, 2008-PER-200 (Sept. 14, 2009) that such recruitment must not include requirements not listed on the Form 9089." *East Tennessee*, 2008-PER-00200 at 8 & n.7. Although *East Tennessee* was decided *en banc*, we do not find the Board's finding that section 656.17(f) applies to additional recruitment steps to be binding upon us, as BALCA did not analyze the issue in any depth, and the employer does not appear to have presented any arguments on the issue on reconsideration or appeal.

ORDER

It is **ORDERED** that the denial of labor certification in this matter is hereby **REVERSED** and we direct the Certifying Officer to **GRANT** labor certification in this case.

For the Panel:

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

JONATHAN C. CALIANOS
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
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.