

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 December 2013

BALCA Case No.: 2011-PER-02302
ETA Case No.: A-08185-67155

In the Matter of:

THE DALLAS MORNING NEWS, L.P.,
Employer,

on behalf of

NAVA, CARLOS,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Rebecca R. Massiatte, Esq.
Jackson Lewis LLP
Dallas, TX
For the Employer

Before: **Bergstrom, Johnson, and Krantz**
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.

BACKGROUND

On July 11, 2008, the Certifying Officer ("CO") accepted for processing the Employer's Application for Permanent Employment Certification for the position of "Assistant Sports Editor, Al Dia." (AF 694-705).¹ Employer's company is a newspaper publisher, and "Al Dia" is its

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

Spanish-language newspaper. (AF 696). Because the Assistant Sports Editor job opportunity was characterized as a professional position, the Employer attested that it had conducted three additional professional recruitment steps in accordance with 20 C.F.R. § 656.17(e)(1)(ii)(B), including placing a print advertisement for the job opportunity in a local or ethnic newspaper on May 14, 2008 and placing advertisements on its own website and on a job search website from May 1, 2008 to June 11, 2008. (AF 698).

On July 21, 2008, the CO issued an Audit Notification requesting documentation of the recruitment process. (AF 690-693). The Employer responded on August 14, 2008. (AF 434-689). The documentation submitted with the audit response included copies of print and online job advertisements the Employer had placed during recruitment. (AF 478-485). The documentation did not include any printouts of pages from the Employer's own website, but it did include printouts of a job advertisement posted at the URL <http://hotjobs.yahoo.com>. (AF 481-482).

On July 16, 2010, the CO denied the application for three reasons. First, the CO asserted the Employer had failed to adequately document that it had used its own website to advertise the job opportunity. Specifically, the CO noted that the Employer did not submit dated copies of the pages from its website that advertised the job opportunity. The other reasons the CO denied the application pertained to unlawful rejection of U.S. job applicants. (AF 430-433).

On August 12, 2010, the Employer submitted a request for reconsideration stating its rejection of U.S. job applicants was lawful, and arguing that at any rate it could not meaningfully respond to the CO's allegations to the contrary because the CO had not provided enough detail to clarify the specific basis of his allegations. (AF 57-429). Addressing the CO's assertion that the Employer had not adequately documented its placement of a job advertisement on the company website, the Employer contended that the printouts from <http://hotjobs.yahoo.com> showed that the Employer had used both its own website and the HotJobs website to advertise the job opportunity. (AF 60-61). The Employer attached an affidavit from Amber Thigpen, the employee who had posted its online job advertisements, attesting that the Employer was party to a contract with HotJobs.com Ltd. whereby the career sections of the Employer's website were linked to a co-branded HotJobs website, which explained why the HotJobs URL appeared at the bottom of the Employer's webpage printouts. (AF 85-86). The Employer submitted multiple documents in support of Ms. Thigpen's affidavit, including verification that Ms. Thigpen was the person who posted the online advertisements (AF 88); a copy of the contract with HotJobs (AF 90-204); and online printouts purporting to show that the Employer's website would direct potential job applicants to the HotJobs website (AF 206-224, 230-233).

After receiving the Employer's request for reconsideration, the CO requested additional information regarding some of the U.S. workers the Employer had rejected, and the Employer duly provided the requested information. (AF 3-56). On August 3, 2011, the CO accepted the Employer's argument that it had not unlawfully rejected U.S. workers but determined denial of the application was still valid because the Employer had not adequately documented placement of the job advertisement on its company website. (AF 1-2). Specifically, the CO stated:

[D]espite the employer's thorough explanation of its common practice to post employment advertisements on its company web site with a hyper link to

www.hotjobs.com, the employer did not provide sufficient proof to demonstrate the actual posting to its company web site ... The employer's copy of the advertisement listing www.hotjobs.com in the footer does not show a logical nexus to the actual advertisement posted on the employer's web site, www.dallasnews.com, despite the employer's regular business practice to hyper link advertisement from its web site to another web site.

(AF 1). The CO forwarded the case to the Board of Alien Labor Certification Appeals ("the Board"), where it was docketed on November 15, 2011. The CO has not further participated in this matter.

The Employer filed a Statement of Intent to Proceed on November 22, 2011 and a Statement of Position on December 29, 2011. In its position statement, the Employer contended that a complete review of all the evidence submitted with its request for reconsideration would provide the "logical nexus" the CO was seeking. The Employer acknowledged that a jobseeker could pull up the exact same advertisement either through the company website or through a direct search of HotJobs, but argued the fact that the advertisement would be identical whether accessed from the Employer's website or directly from the HotJobs website did not mean that the PERM regulations were not satisfied. The Employer further argued that documentation of online advertising may be adequate even if dated copies of the actual advertisement are unavailable, citing the PERM program's Frequently Asked Questions.

DISCUSSION

The PERM program features exacting regulations designed to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *HealthAmerica*, 2006-PER-00001, slip op. at 16 (Jul. 19, 2006) (*en banc*). The program was purposefully designed to sacrifice in-depth individual adjudication of applications for a theoretically faster and more efficient attestation process that demands strict adherence to the PERM regulations. *Spotsylvania County Schools*, 2011-PER-00562, slip op. at 4 (Dec. 14, 2011). The employer bears the burden of proving that all the regulatory requirements have been satisfied before labor certification can be granted. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b).

The regulatory requirements an employer must satisfy include conducting mandatory recruitment steps in a good faith effort to test the U.S. labor market before hiring a foreign worker. When an employer seeks to fill a professional position, as is the case here, the employer must select three additional professional recruitment steps from the ten choices listed in 20 C.F.R. § 656.17(e)(1)(ii)(A)-(J). One of these choices is to advertise the job opportunity through a job search web site other than the employer's. 20 C.F.R. § 656.17(e)(1)(ii)(C). Another is to advertise the job opportunity on the employer's website, which "can be documented by providing dated copies of pages from the site that advertise the occupation involved in the application," although other means of documentation (such as an affidavit of posting) may be acceptable under some circumstances. *Id.* § 656.17(e)(1)(ii)(B); U.S. Dep't of Labor, Employment & Training Administration, Office of Foreign Labor Certification, "Permanent Labor Certification – Frequently Asked Questions," Audit FAQ #4, available at http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_5-9-07.pdf.

In this case, the Employer has adequately documented that it placed a job advertisement on HotJobs, a job search website. (AF 481-482). This satisfied the additional professional recruitment step at 20 C.F.R. § 656.17(e)(1)(ii)(C). Also, adequate documentation has been submitted to conclude that at the time the Employer conducted recruitment, its company website, www.dallasnews.com, contained a “Careers” link at the bottom of the homepage (AF 220) that redirected users to the Employer’s profile on HotJobs at <http://hotjobs.yahoo.com>. (AF 223-224). However, this is not sufficient to satisfy the additional professional recruitment step at 20 C.F.R. § 656.17(e)(1)(ii)(B). This section contemplates that the Employer’s website will include actual “pages ... that advertise the occupation,” not just a link to a page that is located on a separate job search website. 20 C.F.R. § 656.17(e)(1)(ii)(B). The HotJobs website and the Employer’s company website do not share a domain name or URL, so posting a link to a HotJobs page was not tantamount to posting advertising information on the Employer’s website.

Moreover, in this case, posting a link to HotJobs was redundant of the additional professional recruitment step the Employer undertook pursuant to § 656.17(e)(1)(ii)(C), namely, advertising the job opportunity on HotJobs. The PERM regulations directed the Employer to choose three steps from among the ten additional professional recruitment steps listed at § 656.17(e)(1)(ii)(A)-(J). The Employer would be circumventing this regulatory directive if it were permitted to use one job posting to satisfy two of the requisite three steps.

The Employer has suggested it was contractually obligated to use HotJobs to advertise its job openings, stating that the “Careers” link on its homepage directed users “to a co-branded website for [Employer] on YahooHotjobs, in accordance with [Employer’s] Consortium Agreement with Yahoo.” (AF 61, 86). However, the Consortium Agreement, which was submitted by the Employer on reconsideration (AF 90-204), does not support the Employer’s position. The Employer is a newspaper publisher. The Consortium Agreement arranges for the Employer to place a HotJobs search console on its website for its readership and advertisers to use in place of a web-based Classifieds jobs section. (AF 90-204). Thus, the Agreement appears not to prohibit the Employer from posting information about its own job openings on its website – rather, it regulates online publication of some of the Employer’s Classifieds material.

Furthermore, even if the Employer were contractually obligated to use a link to HotJobs instead of posting job information on its own website, this would not excuse the Employer from compliance with § 656.17(e)(1)(ii). The regulations certainly do not prohibit an employer from using a link to an outside job search website, but an employer who does not actually advertise on its own website may not select § 656.17(e)(1)(ii)(B) as one of its three additional professional recruitment steps. Instead, the employer should choose from among the other nine options listed in § 656.17(e)(1)(ii).

Based on all the foregoing, we affirm the CO’s denial of certification because the Employer has failed to satisfy the regulatory requirements at 20 C.F.R. § 656.17(e)(1)(ii).

ORDER

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

For the panel:

ALAN L. BERGSTROM
Administrative Law Judge

ALB/ENK/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 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.