



Issue Date: 09 June 2016

BALCA No.: 2012-PER-03118
ETA No.: A-11266-07734

In the Matter of:

SOFTPATH SYSTEM, LLC,
Employer,

on behalf of

GAJAWADA, ROHITH,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Layli Eskandari Deal, Esquire
Levine & Eskandari LLC
Marietta, Georgia
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Morris D. Davis and
Larry S. Merck, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

PER CURIAM. This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the “PERM” labor certification regulations at 20 C.F.R. Part 656.¹

¹ “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

BACKGROUND

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States for the position of “Senior OBIEE/Data Warehouse Engineer.” (AF 68-79).² The Employer attested on the Form 9089 that the position’s wage was \$78,000.00. (AF 69). In connection with its application, the Employer advertised the position through a private employment firm. (AF 45). The advertisement stated a wage of \$80,000.00. *Id.*

The Certifying Officer (“CO”) audited the application and subsequently denied certification on two grounds, only one of which remains at issue on appeal. (AF 11). Specifically, the CO denied certification pursuant to 20 C.F.R. § 656.17(f)(3), finding that the private employment firm advertisement did not sufficiently apprise U.S. applicants of the job opportunity because it listed a higher wage than the one listed on the Form 9089. (AF 11). The Employer filed a request for reconsideration and explained that the higher wage on the advertisement was the result of an error made by the private employment firm. (AF 5). The Employer argued that this error was harmless because a higher wage “should have yielded more [U.S.] applicants.” *Id.* The CO rejected the Employer’s arguments on reconsideration and affirmed the denial of certification pursuant to § 656.17(f)(3). (AF 1).

On appeal, the Employer filed a brief that relied in part on the panel decision *HBS Solomon*, 2011-PER-02599 (Oct. 25, 2011) to argue that “advertisements placed by a private employment firm do[] not have to comply with the requirements of 20 C.F.R. § 656.17(f).” Employers Brief at 3. The CO did not file a brief on appeal.

DISCUSSION

The only issue on appeal is whether the Employer’s private employment firm advertisement complied with the regulation at § 656.17(f)(3). As the Board articulated in *Symantec Corp.*, 2011-PER-01856 (July 30, 2014) (*en banc*), a CO may not deny an application based on a petitioning employer’s failure to comply with an unwritten requirement that has no basis in the clear text of the regulations. The Board further held that § 656.17(f), by its plain language, applies only to “[a]dvertisements placed in newspapers of general circulation or in professional journals.” *Symantec Corp.*; *see also Fidelus Technologies*, 2011-PER-01635 (June 11, 2015); *Special Lotus Inc.*, 2011-PER-02312 (Jan. 13, 2015); *Cape Advisors, Inc.*, 2011-PER-02882 (Dec. 11, 2014). Accordingly, § 656.17(f) does not govern the content of private employment firm advertisements. We therefore find that the CO’s denial is not supported by the regulations.

² Citations to the Appeal File are abbreviated as “AF” followed by the page number.

ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2).

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.