



Issue Date: 28 October 2016

**BALCA Case No.:** 2012-PER-01834  
**ETA Case No.:** A-10239-16181

*In the Matter of:*

**BROADRIDGE FINANCIAL SOLUTIONS, INC.,**  
*Employer,*

*on behalf of*

**MEKA, RAVI CHANDRA KUMAR,**  
*Alien.*

**Certifying Officer:** Atlanta National Processing Center

**Appearance:** Steven L. Weinberg, Esquire  
Wildes & Weinberg, P.C.  
New York, New York  
*For the Employer*

**Before:** Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and  
Larry S. Merck, *Administrative Law Judges*

**DECISION AND ORDER**  
**AFFIRMING DENIAL 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.<sup>1</sup>

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<sup>1</sup> “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 “Sr. Programmer Analyst-HT.” (AF 105-117).<sup>2</sup> While the Employer attested on its Form 9089 that the position’s salary was \$105,873.00, the State Workforce Agency (“SWA”) job order posted in connection with the application stated a salary range of \$84,885.00 to \$100,000.00. (AF 83, 106). The Certifying Officer (“CO”) audited the application and subsequently denied certification pursuant to 20 C.F.R § 656.10, finding that the job opportunity was not clearly open to U.S. workers because the SWA job order contained terms and conditions less favorable than those offered to the Alien in violation of 20 C.F.R § 656.17(f)(7).<sup>3</sup> (AF 15).

The Employer submitted a request for reconsideration and explained that the SWA’s order form required the salary to be entered as a range. The Employer stated that “[w]hile it is conceivable that [we] could have listed a range such as \$105,873.00-\$105,873.00 ... [we] considered that confusing and redundant or worse.” (AF 7). Instead, the Employer clarified that it entered the prevailing wage, \$84,885.00, as the lower-bound of the wage range as part of a good faith recruitment effort. *Id.* The Employer further argued that the difference between the upper-bound of the SWA wage range, \$100,000.00, and the actual wage offered, \$105,873.00, was negligible and did not warrant denial of certification. *Id.*

The CO rejected the Employer’s arguments and affirmed the denial of certification pursuant to § 656.10 and § 656.17(f)(7). (AF 1).

The Employer filed a brief on appeal and advanced several new arguments in addition to reiterating the arguments it made on reconsideration. First, the Employer argued that stating a range of “\$105,873.00-\$105,873.00 ... [would be] artificial, confusing and unnatural to any serious recruiter and definitely not informative to any interested U.S. worker.” Employer’s Brief at 3. Second, the Employer argued the SWA job order was not an advertisement for the purposes of § 656.17(f)(7). *Id.* at 4. Third, the Employer argued the CO’s reasoning was arbitrary, capricious, and otherwise an abuse of discretion because it forced the Employer to use a state program that did not comply with the federal regulations. *Id.* at 6. Finally, the Employer argued the difference between the wage range included on the SWA job order and the wage listed on the Form 9089 was small enough that no U.S. workers would have been dissuaded from applying for the position. (AF 7). The CO did not file a brief.

## **DISCUSSION**

The regulation at 20 C.F.R § 656.10(c)(8) requires employers to attest that the “job opportunity has been and is clearly open to any U.S. worker.” The CO in this case argued that § 656.10(c)(8) requires SWA job orders to comply with § 656.17(f)(7), which mandates that advertisements must “[n]ot contain wages or terms and conditions of employment that are less

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

<sup>3</sup> The CO also denied certification on additional grounds. Only the SWA job order deficiency remains at issue on appeal.

favorable than those offered to the alien.” The Board has ruled, however, that § 656.17(f) applies only to advertisements placed in newspapers of general circulation or professional journals. *Symantec Corp.*, 2011-PER-1856 (July 30, 2014) (*en banc*). It therefore does not necessarily follow that § 656.10(c)(8) directly incorporates § 656.17(f).

Instead, the relevant inquiry under § 656.10(c)(8) is whether the Employer’s SWA job order so misinformed, or so failed to inform, potential applicants about the job opportunity that the recruitment did not support the Employer’s attestation that the job opportunity was clearly open to any U.S. worker. *SWDWII, LLC*, 2012-PER-887 (Jan. 29, 2016); *The China Press*, 2011-PER-2924 (Aug. 20, 2015) *vacated on other grounds* (Nov. 30, 2015). Panels have held that a discrepancy between the advertised wage and the offered wage undermines the § 656.10(c)(8) attestation. *See AMR Capital Trading Corp.*, 2012-PER-609 (Jan. 19, 2016) (finding that a \$22,000.00 wage discrepancy on the SWA job order does not support the employer’s attestation that the job was clearly open to U.S. workers); *The China Press, supra*.

In this case, the lower-bound of the SWA wage range was \$20,988.00 less than the offered wage, and the upper-bound was \$5,873.00 less than the offered wage. While the Employer argues these discrepancies are *de minimis*, we find that they materially misinform potential applicants about the job opportunity and undermine the Employer’s attestation that the job order was clearly open to U.S. workers.

The Employer also argues the SWA’s order form forced it to state the wage as a range and that a range of \$105,873.00-\$105,873.00 would confuse U.S. workers. This reasoning is unpersuasive. Deliberately under-reporting the salary, as the Employer concedes it did in this case, does far more to confuse U.S. workers than stating a range with identical values.

Accordingly, we find that the CO’s determination is supported by the regulations.

### **ORDER**

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer’s **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

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.