



**Issue Date: 26 October 2016**

**BALCA Case No.: 2012-PER-02653**  
ETA Case No.: C-08105-42050

*In the Matter of:*

**LIFEHOUSE TOURING, INC.,**  
*Employer,*

*on behalf of*

**SODERBERG, BRYCE DANE,**  
*Alien.*

Certifying Officer: William Carlson, Ph.D.  
National Certifying Officer  
Atlanta National Processing Center

Appearance: Ralph Ehrenpreis, Esquire & Bernard J. Lurie, Esquire  
Ralph Ehrenpreis, PLC  
Los Angeles, California  
*For the Employer*

Before: Stephen R. Henley, Chief Administrative Law Judge; William T. Barto  
and Daniel F. Sutton,<sup>1</sup> Administrative Law Judges.

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

**PER CURIUM.** This matter which 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

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<sup>1</sup> Appointed under the U.S. Office of Personnel Management Senior Administrative Law Judge Program. *See* 5 C.F.R. § 930.209.

C.F.R. Part 656<sup>2</sup> is before the Board of Alien Labor Certification Appeals (“the Board”) on the Employer’s request for review pursuant to 20 C.F.R. § 656.26 of the administrative denial of its application for a Permanent Employment Certification. The Board’s consideration of the request for review is based on a review of the record upon which the denial of certification was made. 20 C.F.R. § 656.27(c). Upon review, we affirm the denial of labor certification.

## **BACKGROUND**

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) on May 16, 2008 sponsoring the Alien for permanent employment in the United States in Los Angeles, California. (AF 120-129).<sup>3</sup> The occupational title listed in Form 9089, Section F-3 was “Music Director and Composer,” Standard Occupational Classification Code 27-2041.00. (AF 121). On the Form 9089, the Employer indicated that the title of the job for which it is sponsoring the Alien is Associate Music Director, that there is no minimum educational level required for the job, and that there is a minimum requirement of 24 months’ work experience in the job or in an alternate occupation as a “Composer, Songwriter, Performing Artist or related field.” (AF 121-122). The Employer classified the job opportunity in the Form 9089 as a professional position, and it attested that it had conducted three additional required pre-application professional recruiting steps by listing the job opportunity on a job search website, advertising the job opportunity with a campus placement office, and advertising in a local or ethnic newspaper. (AF 123-124).

On August 18, 2008, the Certifying Officer (“CO”) for the Department of Labor’s Employment and Training Administration, Office of Foreign Labor Certification (“OFLC”), Atlanta National Processing Center (“ANPC”) notified the Employer that its requested labor certification could not be approved under § 212(a)(5)(A) of the INA, 8 U.S.C. § 1182(a)(5)(A). (AF 117-119). The reason given by the CO for denial of the labor certification was:

ETA Form 9089 indicates the alien is currently employed by the petitioning employer and only qualifies for the position identified in the application by virtue of the employer’s alternative requirements. Specifically, the application indicates in Section H.10-B that two years experience in alternate occupation of Composer, Songwriter, Performing Artist or related field is acceptable. However, the employer has not indicated on the application that applicants with any suitable combination of education, training, or experience are acceptable.

(AF 119). As authority for the denial, the CO cited 20 C.F.R. § 656.17(h)(4)(ii). (AF 119).

The Employer requested reconsideration of the denial on September 12, 2008 (AF 91-118). After the Employer’s attorney inquired into the status of the case, the ANPC Helpdesk asked the Employer on November 7, 2011, to resubmit its request for review accompanied by

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<sup>2</sup>“PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005. 69 Fed. Reg. 77326 (Dec. 27, 2004).

<sup>3</sup> Citations to the Appeal File are abbreviated as “AF” followed by the page number.

proof of delivery. (AF 74). The Employer responded by letter dated November 8, 2011. (AF 72-73).

On January 5, 2012, the CO issued an *audit notification* which requested the Employer to provide certain information including documentation of its compliance with the recruitment efforts required under the § 656.17 of PERM regulations. (AF 69-71). The Employer responded to the CO's audit notification on February 6, 2012. (AF 16-68).

After reviewing the information submitted in response to the audit notification, the CO advised the Employer by letter dated April 25, 2012, that the labor certification was denied for the following reason:

The employer failed to provide adequate documentation of the additional recruitment steps for professional occupations as requested in the Audit Notification letter. Specifically, the employer indicated in ETA Form 9089 Item I.d.20 that it used a campus placement office. The employer has provided pages from "Monster Trek;" [sic] however, the employer failed to provide a copy of the employer's notice of the job opportunity provided to an actual campus placement office.

(AF 14-15). As authority for denial, the CO cited 20 C.F.R. § 656.17(e)(1)(ii)(H) which, in pertinent part, states that "[t]he use of a campus placement office can be documented by providing a copy of the employer's notice of the job opportunity provided to the campus placement office." (AF 15).

The Employer timely filed a request for reconsideration by the CO or, alternatively, seeking review by the Board. (AF 3-13). In its request, the Employer argued that the CO erred in denying certification because it had submitted a copy of job opportunity notice that was distributed for posting at college placement offices by "MonsterTrak," a recognized company, specializing in college student placement. (AF 3-4). On reconsideration, the CO acknowledged that the Employer had previously submitted a copy of the job opportunity that was sent to "MonsterTrak." (AF 1). However, the CO stated that "[d]ated copies of the employer's notice are necessary to establish the timeliness of the advertisement, to verify the content of the advertisement adequately apprises U.S. workers of the job opportunity as presented by the employer on the ETA Form 9089, and to establish that the notice was provided to a campus placement office responsible for presenting employment opportunities to students and alumni." (AF 1). The CO further stated that "although the documentation submitted by the employer with its audit response proves it advertised the job opportunity on a website geared towards college students and alumni, no evidence was submitted that the website owner provided the advertisement to a campus placement office." (AF 1). The CO explained that the Employer's statement that MonsterTrak provides such a service "is not sufficient to prove conclusively that the advertisement placed by the employer on the website was provided to a campus placement office as required by Departmental regulations." (AF 1). Consequently, the CO concludes that "[s]ince the employer failed to provide adequate documentation of its campus placement advertisement with its audit response as requested in the audit notification letter, the Office of

Foreign Labor Certification Certifying Officer has determined this reason for denial is valid in accordance with the Department's regulations at 20 CFR § 656.17(e)(1)(ii)(H).” (AF 1).

The CO transmitted the case to the Board. In response to the Board’s notice of docketing, the Employer filed a statement confirming its intention to proceed with the appeal. Neither the Employer nor the CO filed appellate briefs.

## DISCUSSION

The Board’s review of the CO’s legal and factual determinations when denying an application for permanent alien labor certification is *de novo*, limited in scope by 20 C.F.R. § 656.27(c). *Albert Einstein Medical Center*, 2009-PER-00379 (Nov. 21, 2011) (*en banc*), slip op. at 32. Thus, the Board engages in *de novo* review of the record upon which the CO denied permanent alien labor certification, together with the request for review, and any statements of position or legal briefs. *Id.* at 25. The Board may not consider evidence first presented in an appellate brief. *Id.* at 7. The Board permits general legal argument in briefs, but will not consider wholly new arguments not made before the CO. *Id.* at 8. The Board will not decide an appeal on grounds for denial not raised while the case was before the CO. *Loews Anatole Hotel*, 1989-INA-00230 (Apr. 26, 1991) (*en banc*); *Mandy Donuts Corp.*, 2009-PER-00481 (Jan. 7, 2011).

The PERM regulations at 20 C.F.R. § 656.10(c) establish an attestation-based program designed to limit discourse between employers and COs; the program is “generally intended to streamline the application process and allow the CO to grant or deny [certification] **based solely on the application.**” *Michigan Technological University*, 2011-PER-00790, slip op. at 6 (May 21, 2012) (internal citations omitted) (emphasis added). Furthermore, “because PERM is an attestation based program, the PERM program can only function if the CO is able to rely on the information contained in an employer’s application.” *University of Nebraska-Lincoln*, 2012-PER-00408, slip op. at 4 (Jan. 14, 2015).

Among other attestations, an employer must attest that the job opportunity in the permanent labor application has been and is clearly open to any U.S. workers. 20 C.F.R. § 656.10(c)(8). Accordingly, the PERM regulations require an employer to conduct mandatory 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. When the position involved in the labor application as in the instant case is for a professional position, the employer must conduct at least three additional recruitment steps. 20 C.F.R. § 656.17(e)(1)(ii). One of the additional recruitment steps an employer can utilize to advertise a professional position is to advertise the job opportunity through on-campus recruiting. 20 C.F.R. § 656.17(e)(1)(ii)(D). This on-campus recruitment step “can be documented by providing copies of the notification issued or posted by the college’s or university’s placement office naming the employer and the date it conducted interviews for employment in the occupation.” *Id.*

One of the three additional professional recruiting steps utilized by the Employer in this case was on-campus recruiting. (AF 124). As documentation of this step, the Employer

submitted copies of its account activity from the MonsterTrak website showing that a Music Director job was advertised from February 11, 2008 to March 10, 2008. (AF 51-66). The documentation that the Employer submitted from MonsterTrak also shows that it purchased an “individual school” package for \$30.00. (AF 55). However, the Employer’s documentation does not show that MonsterTrak sent the job order to any schools, nor are there any copies of the notification issued or posted by the college’s or university’s placement office naming the employer and the date it conducted interviews for employment in the occupation.

The CO denied certification because “no evidence was submitted that the website owner [MonsterTrak] provided the advertisement to a campus placement office.” (AF 1). The Employer argues that the CO erred in denying certification because “the notice copy that was submitted [with the audit response] was a copy of the notice that was distributed by MonsterTrak to college placement offices throughout the United States.” (AF 4). The Employer notes that MonsterTrak “was recognized by the U.S. Department of Labor as a college placement recruitment resource during the time period prior to the submission of the labor certification application on May 16, 2008 . . . [and] that some consideration should have been given . . . to the fact that a period of approximately four (4) years had elapsed between the time that this application was originally submitted on May 16, 2008, and the date of the decision in this matter.” (AF 4). Thus, it appears to be the Employer’s position that the fact that MonsterTrak is a recognized college placement source is sufficient to establish that MonsterTrak forwarded the Music Director job order to college and university placement offices and that any doubts should be resolved in the Employer’s favor due to the delay in processing its application.

While the regulation at § 656.17(e)(1)(ii)(D) provides one method for documenting an employer’s on-campus recruitment, the employer can document its recruitment by other means if the alternative documentation is reasonably equivalent to the primary proof required by the regulation, and it adequately indicates the employer actually participated in on-campus recruitment. *See St. Landry Parish Sch. Bd.*, 2012-PER-01135 (Apr. 28, 2016) (finding that alternative documentation of an additional recruitment step must be reasonably equivalent to the primary proof specified in the regulation); *Micron Tech., Inc.*, 2011-PER-02193 (Jan. 30, 2014) (finding alternate means of documentation must indicate the recruitment method was used and the necessary information was provided to potential U.S. applicants). The facts established by the record in this case clearly demonstrate that the Employer did not provide the CO with a copy of the notification issued or posted by the college’s or university’s placement office naming the employer and the date it conducted interviews for employment in the occupation. 20 C.F.R. § 656.17(e)(1)(ii)(D). The Employer only submitted evidence that it posted the job opportunity on the MonsterTrak website and that it ordered a \$30.00 “individual school” package, but there is no evidence and only the Employer’s speculation that the job order was ever forwarded to any college or university placement office. A posting on MonsterTrak, and a receipt for \$30.00, which does not even document which school is included in this “individual package,” is not equivalent to a notification or posting by a college. Also, even if MonsterTrak was a DOL approved “college placement recruitment resource,” this does not change the fact that the documentation does not prove compliance with the regulations.<sup>4</sup> The regulations require some

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<sup>4</sup> The Employer also did not provide evidence that MonsterTRAK was recognized by the Department of Labor as a college placement recruitment resource for PERM applications. A search by BALCA did not reveal what guidance or source to which the Employer refers.

sort of documentation showing notice by the college naming the employer and the date it conducted interviews. The Employer provided none. Finally, the Employer's reliance on adjudication delays is unpersuasive and does not excuse its noncompliance with the PERM regulations. *See Aurionpro Solutions, Inc.*, 2010-PER-00539 (Aug. 9, 2010).

Therefore, we affirm the CO's denial of certification.

### **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.