



Issue Date: 28 October 2016

**BALCA Case No.:** 2016-PER-00064  
**ETA Case No.:** A-13353-26375

*In the Matter of:*

**KARMA HOSPITALITY, LLC,**  
*Employer,*

*on behalf of*

**VACHHRAJANI, RUCHIT KASHYAP,**  
*Alien.*

**Certifying Officer:** Atlanta National Processing Center  
National Certifying Officer

**Appearance:** Arturas Overas, Esquire  
Law Offices of Hyder & Overas  
Richmond, Virginia  
*For the Employer*

**Before:** Stephen R. Henley, *Chief Administrative Law Judge*; William T. Barto  
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>

**BACKGROUND**

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States in Dahlgren,

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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.

Virginia. The occupational title listed on the Form 9089, Section F.3, was “General and Operations Manager,” Standard Occupational Classification Code 11-1021.00. (AF 97-108).<sup>2</sup> The Employer attested on the Form 9089 that one of its additional recruitment steps was the use of a radio or television advertisement placed from December 7, 2013 to December 8, 2013. (AF 101).

On June 12, 2014, the Certifying Officer (“CO”) issued an audit notification to the Employer requesting, among other items, recruitment documentation as outlined in § 656.17(e). (AF 92-96). On July 9, 2014, the Employer submitted its audit response, including an invoice from “WFLS/WWUZ/WVBX/WNTX-AM” for the Employer’s purchase of twelve, one-minute spots to begin on December 7, 2013 and end on December 8, 2013. (AF 51). The content of the radio advertisement was not included. After reviewing the Employer’s audit response, the CO denied certification because the Employer failed to provide the text of its radio advertisement that was aired by the radio station, a violation of 20 C.F.R. § 656.17(e)(1)(ii)(J). (AF 13-16).

On June 25, 2015, the Employer submitted a request for reconsideration, arguing that the regulation at § 656.17(e)(1)(ii)(J) does not require that the text of the advertisement be provided, but does state that the radio advertisement “can be documented” in that way. (AF 9). The Employer contended that its invoice confirming its advertisement spots was sufficient. *Id.* The Employer also included a statement from its owner confirming that it communicated to the sales representative with the radio station that it wanted to run an advertisement for the position of general manager. (AF 11). Further, the Employer included a statement from the radio station indicating that the sales representative that ran the advertisement no longer worked for the station, and also, it purges its commercials and scripts after 90 days. (AF 12).

The CO reconsidered, but found that the ground for denial was valid because the Employer’s evidence of “a” commercial without the text was not sufficient for the CO to verify the Employer adequately tested the labor market. (AF 7-8). The CO also noted that, pursuant to 20 C.F.R. § 656.10(f), it was the Employer’s responsibility to maintain all of its supporting documentation for five years from the date of filing of the application. *Id.*

On October 13, 2015, the Employer requested an appeal before the Board of Alien Labor Certification Appeals (“BALCA”). (AF 3). The Employer filed a statement confirming its intention to proceed with the appeal as well as a letter with its statement of position. The Employer made similar arguments to those included in its request for reconsideration, but further argued that *A Cut Above Ceramic Tile*, 2010-PER-00224 (Mar. 8, 2014 (*en banc*)), was applicable for its reasoning that “evidence that is related to recruitment but that is not specified by the regulations... need not be maintained.” The CO did not file a statement of position or an appellate brief.

## **DISCUSSION**

When an employer files an application for permanent labor certification for a professional occupation under the basic process at § 656.17, an employer must conduct “mandatory steps,” including two print advertisements and a job order, as well as three of ten “additional recruitment

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

steps.” 20 C.F.R. § 656.17(e)(1). A radio advertisement is one type of an additional recruitment step an employer may utilize. 20 C.F.R. § 656.17(e)(1)(ii)(J). One way an employer can document this type of recruitment is “by providing a copy of the employer’s text of the employer’s advertisement along with a written confirmation from the radio...station stating when the advertisement was aired.” *Id.*

In this case, the Employer submitted an invoice with its audit response in which the radio station confirmed the air dates of radio advertisements, but it omitted the text of the advertisement. The Employer argues that the regulation at § 656.17(e)(1)(ii)(J) does not require it to submit the text of the radio advertisement because it states how an employer “can” document the recruitment step. In *St. Landry Parish School Bd.*, 2012-PER-01135 (Apr. 28, 2016), the panel determined that while the regulation “specifies an acceptable method for documenting [the additional recruitment step],” documentation of the advertisement is permissible through other means. *See also Chem. Abstracts Serv.*, 2011-PER-02787 (Aug. 17, 2015). The *St. Landry* panel found that alternative documentation “must...be reasonably equivalent to the primary form of proof specified in the regulation.”

The primary form of proof of a radio advertisement is two-fold, requiring both the text of the advertisement and a written confirmation from the advertiser. *See Mexi-Cali, Inc.*, 2010-PER-01038 (Feb. 4, 2011) (finding that an invoice and an email from the television station were insufficient because the employer did not include the text of the advertisement); *S. Overhead Doors & Fireplaces Inc.*, 2012-PER-00345 (Apr. 30, 2014) (finding that “an invoice from the radio station alone is insufficient...”).

Here, the Employer submitted written confirmation from the radio station of its advertisement air dates, but the failure to include the text of the advertisement was fatal to the application. The regulation’s example of “a copy of the...text” as adequate documentation of a radio advertisement demonstrates that the content of the advertisement is required in some format. *Kanematsu Textile USA, Inc.*, 2011-PER-02937 (Mar. 18, 2014) (“The content of the advertisement is essential for the CO to determine the job was open and available to U.S. workers and to show good faith recruiting...”); *GSS Infotech, Inc.*, 2012-PER-03715 (July 27, 2016). For example, an employer may choose to document the “text” by submitting an audio recording of the radio advertisement rather than a written text, but the content is necessary. *See Waldorf Sch. of Orange Cnty.*, 2012-PER-01140 (Nov. 6, 2015); *Nine Muses & Apollo, Inc.*, 2011-PER-00025 (Dec. 27, 2011).

The Employer’s documentation submitted on reconsideration does not cure the deficiency. The Employer submitted a statement from its owner and from the radio station, both asserting that the Employer’s advertisement for the position of general manager was aired.<sup>3</sup> However, the assertions of the Employer and the radio station are not reasonably equivalent to the content of the advertisement. The burden of proof was on the Employer to establish its eligibility for a permanent labor certification. *See* 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). Bare assertions describing the content of the radio advertisement without the text of the advertisement

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<sup>3</sup> The evidence submitted on reconsideration is admissible because when a CO acknowledges evidence and does not state whether it is barred by § 656.24(g), he has actually considered evidence, and it is part of the record on which the decision was made. *New York City Department of Education*, 2012-PER-02753 (June 19, 2015).

to support those assertions do not carry the Employer's burden in this case. *See generally N. Cnty. Cooling*, 2007-PER-00093 (June 4, 2008) (citing *Gencorp*, 1987-INA-00659 (Jan. 13, 1987) (*en banc*) for the proposition that a bare assertion without supporting evidence is insufficient to carry an employer's burden of proof).

The Employer argued on appeal that the Board's findings in *A Cut Above Ceramic Tile* is applicable to the facts of this case. That argument is misplaced. In *A Cut Above*, the Board considered *en banc* whether an employer was required to maintain and furnish evidence of a State Workforce Agency ("SWA") posting. The issue arose under 20 C.F.R. §§ 656.17(a)(3) and 656.10(f), which together require an employer to retain all supporting documentation for five years after the filing of an application and furnish it in the event of an audit. However, 20 C.F.R. § 656.17(e)(2)(i) provides that sufficient documentation for a SWA posting is "the start and end dates of the job order entered on the application." Furthermore, the preamble to the regulations notes that additional information over and above the dates on the application is not necessary. The Board held that proof of publication of a SWA job order is not "required supporting documentation." *A Cut Above*, at 12.

In this case, the Employer was required to retain documentation of its radio advertisement sufficient enough to meet the requirements of § 656.17(e)(1)(ii)(J). While the regulation is permissive and allows for reasonably equivalent alternatives, it still requires particularized information, unlike the regulation for the SWA job order documentation.

Because the regulations required the Employer to submit the text of the radio advertisement with its audit response as evidence of an additional recruitment step, and the Employer failed to do so, we affirm the CO's denial of labor certification.

## **ORDER**

**IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

For the panel:

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.