

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 30 July 2014

BALCA Case No.: 2011-PER-01856
ETA Case No.: A-08190-68256

In the Matter of:

SYMANTEC CORPORATION,
Employer,

on behalf of

NIKHILKUMAR S. SAKHALKAR,
Alien.

Certifying Office: Atlanta National Processing Center

Appearances: Clifford Chin, Esquire
Berry Appleman & Leiden LLP
San Francisco, California
For the Employer

Jonathan Waxman, Acting Associate Solicitor
Harry Sheinfeld, Counsel for Litigation
Matthew Bernt, Attorney
U.S. Department of Labor, Office of the Solicitor, Division of
Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: Stephen R. Henley, *Associate Chief Administrative Law Judge*; Alan L.
Bergstrom, Jonathan C. Calianos, Larry W. Price, Patrick Rosenow,
Administrative Law Judges

Opinion for the Board filed by HENLEY, *Associate Chief Administrative Law Judge*, with whom
CALIANOS, PRICE, AND ROSENOW, *Administrative Law Judges*, join:

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

This appeal arises under section 212(a)(5)(A) of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1182(a)(5)(A), and the “PERM” regulations promulgated thereunder at title 20, part 656 of the Code of Federal Regulations.¹ It presents the issue of whether a Certifying Officer may deny an *Application for Permanent Employment Certification* (ETA Form 9089) for a position involving a professional occupation if one of the “additional” recruitment steps does not comply with the advertising content requirements in 20 C.F.R. § 656.17(f)(6). For the reasons set forth below, we find that a Certifying Officer may not deny certification on this basis.

BACKGROUND

The INA regulates the admission of foreign nationals (i.e., aliens) into the United States. Section 212(a)(5)(A) prohibits the admission of aliens who seek to enter the United States for the purpose of performing skilled or unskilled labor unless “the Secretary of Labor has determined and certified . . . that there are not sufficient workers who are able, willing, qualified . . . and available at the time of application . . . and at the place where the alien is to perform such skilled or unskilled labor, and the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.” 8 U.S.C. § 1182(a)(5)(A). The Department of Labor (“Department”) has promulgated regulations setting forth the procedures whereby this certification—known as a “labor certification”—may be applied for and granted or denied. 20 C.F.R. § 656.1(b).

The instant case arises from an *Application for Permanent Employment Certification* (ETA Form 9089) that Symantec Corporation (“Symantec”) filed on behalf of Mr. Nikhilkumar S. Sakhalkar for the position of “Financial Programmer Analyst” under the basic labor certification process at 20 C.F.R. § 656.17. (AF 104-121).² Before an employer may file an application under this process, it must test the labor market to ensure that there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the position for which the employer seeks certification. If the application involves a professional occupation, as it does in the instant case, then the petitioning employer must conduct the “mandatory” recruitment steps required by § 656.17(e)(1)(i) and three of the ten “additional” recruitment steps enumerated in § 656.17(e)(1)(ii). The “mandatory” recruitment steps consist of (1) placing a job order with the state workforce agency in the area of intended employment, and (2) placing two print advertisements in the Sunday edition of the newspaper of general circulation in the area of intended employment (or, in lieu of placing one of the newspaper advertisements, placing an advertisement in the professional journal most likely to bring responses from able, willing,

¹ “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005. The regulations in effect prior to that date will be referred to as the “pre-PERM” regulations.

² Citations to the Appeal File forwarded by the Employment and Training Administration will be abbreviated “AF” followed by the page number.

qualified, and available U.S. workers). The “additional” recruitment steps are more flexible; employers may select any three of the ten alternatives listed in § 656.17(e)(1)(ii).

This appeal involves the advertisement that Symantec placed on a job search website pursuant to § 656.17(e)(1)(ii)(3). Symantec placed the advertisement at issue on jobvertise.com. (AF 63). The dated copies of this advertisement in Symantec’s audit response appear, in relevant part, as follows:

Current Openings at Symantec Corporation

Financial Programmer Analyst - (US-CA-Cupertino)

Minimum Education: Bachelors
Job Type: Full Time
Jobcode: FPAHQ1081
[Email this job to yourself or to a friend](#)

[Click Here to Apply Online](#)

May analyze engineering, business, and all other data processing problems for application to electronic data processing systems. May architect, design and develop company infrastructure, finance and business process applications. May evaluate and recommend new development tools, processes and environments. May support finance reporting development team. May analyze user requirements, procedures, and problems to automate or improve existing systems and review computer system capabilities, workflow, and scheduling limitations. May be required to be available to work on projects at various, unanticipated sites throughout the United States. May require BS/MS + 6 months - 5+ years experience. Submit resumes to GMRHADS@symantec.com Must reference job title and job ID# FPAHQ1081.

GMRHADS@symantec.com
Symantec Corporation
20330 Stevens Creek Blvd.
Cupertino, CA 94043
Phone: 408-725-2778

[Click Here to Apply Online](#)

Id. A Certifying Officer (“CO”) audited Symantec’s application and denied certification after determining that this advertisement did not comply with the advertising content requirements in § 656.17(f). (AF 23-24).³ The CO’s denial letter explained the basis for the denial as follows:

The additional professional recruitment step(s) contain job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089. Specifically, the recruitment conducted through the job search website other than the employer’s contains a travel requirement which is not stated on the ETA Form 9089.

AUTHORITY FOR DENIAL: Per 20 CFR 656.17(f)(6), advertisements must “not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089.”

(AF 21).

³ The CO cited two additional grounds for denial, both of which he later withdrew. (AF 1).

Symantec filed a timely request for reconsideration, arguing, *inter alia*, that the CO erred in denying certification because the content requirements in § 656.17(f) do not apply to the additional recruitment steps for professional occupations required by § 656.17(e)(1)(ii). (AF 11-12, n 1). Alternatively, Symantec argued that even if § 656.17(f)'s content requirements apply, the website advertisement at issue did not violate § 656.17(f)(6) because it advertised multiple positions, some of which require travel and some of which do not. According to Symantec, the phrase “[m]ay be required to be available at various, unanticipated worksites throughout the United States” did not create a mandatory requirement for all of the position openings announced in the advertisement. (AF 3-22). The CO disagreed, affirmed the denial, and forwarded the matter to BALCA for administrative review. (AF 1-2). In the transmittal letter, the CO noted that “interested individuals reviewing [Symantec’s] advertisement . . . could consider travel ‘may’ be required as a term and condition of employment for the position,” which according to the CO, “could have a chilling effect on applicants, artificially excluding potentially qualified U.S. workers who would otherwise pursue the position as listed on the ETA form 9089.

On appeal, a panel of three Administrative Law Judges found that the content requirements in § 656.17(f) do not apply to the additional recruitment steps required by § 656.17(e)(1)(ii) and reversed the denial. The CO petitioned for en banc review, arguing the panel’s holding conflicted with BALCA precedent and en banc review was therefore necessary to maintain uniformity of the Board’s decisions. We granted the CO’s petition, vacated the panel decision, ordered a rehearing en banc, and permitted the parties to file supplemental briefs.

DISCUSSION

As discussed above, employers seeking permanent labor certification under the basic process at § 656.17 must test the labor market before filing an application with the Department. If the application involves a professional occupation, then the petitioning employer must complete the “mandatory” recruitment steps required by § 656.17(e)(1)(i) and three of the “additional” recruitment steps listed in § 656.17(e)(1)(ii). Newspaper and professional journal advertisements placed to fulfill the mandatory recruitment steps must comply with the advertising content requirements in § 656.17(f). *See* 20 C.F.R. § 656.17(e)(1)(i)(B)(3) (stating that the advertisements placed in newspapers or professional journals “must satisfy the requirements of paragraph (f) of this section.”). The issue in the instant case is whether advertisements placed to fulfill the additional recruitment steps must also comply with these detailed content requirements. We conclude that they do not.

By its plain language, § 656.17(f) applies to “[a]dvertisements placed in newspapers of general circulation or in professional journals.” Specifically, § 656.17(f) provides:

Advertising requirements. Advertisements placed in newspapers of general circulation or in professional journals before filing the *Application for Permanent Employment Certification* must:

- (1) Name the employer;
- (2) Direct applicants to report or send resumes, as appropriate for the occupation, to the employer;

- (3) Provide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought;
- (4) Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity;
- (5) Not contain a wage rate lower than the prevailing wage rate;
- (6) Not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089; and
- (7) Not contain wages or terms and conditions of employment that are less favorable than those offered to the alien.

20 C.F.R. § 656.17(f). This regulation does not reference advertisements placed in other media. The neighboring provisions of the regulation confirm that the omission of these advertisements was intentional.

The regulations explicitly identify three situations in which an employer must comply with the advertising content requirements in § 656.17(f): first, when an employer places an advertisement in a newspaper of general circulation or a professional journal in fulfillment of the mandatory recruitment for applications involving professional occupations, 656.17(e)(1)(i)(B)(3); second, when an employer places an advertisement in a newspaper of general circulation in fulfillment of the mandatory recruitment for applications involving nonprofessional occupations, 20 C.F.R. § 656.17(e)(2)(ii)(D); and third, when an employer posts a Notice of Filing announcing its intent to file an *Application for Permanent Employment Certification* (ETA Form 9089) under the basic labor certification process at § 656.17, 20 C.F.R. § 656.10(d)(4). The first two situations involve the types of advertisements that are expressly identified in § 656.17(f), and all three situations explicitly cross-reference the advertising content requirements listed in § 656.17(f). No such cross-reference exists in the regulation requiring employers to conduct additional recruitment steps for applications involving professional occupations. 20 C.F.R. § 656.17(e)(1)(ii). The fact that the regulations specifically require some types of advertisements and postings to comply with the content requirements in § 656.17(f), but are silent on others, suggests that the Department did not intend to impose these content requirements on all types of advertisements. To read otherwise would render the explicit cross-references to § 656.17(f) superfluous.

The preamble to the PERM regulations confirms that the Department did not intend to impose specific content requirements on advertisements placed to fulfill the additional recruitment steps. Under the “pre-PERM” regulations, the standard labor market test consisted of: (1) filing an application with the state employment agency, which in turn would post a 30-day job order; (2) posting a Notice of Filing; and (3) placing a newspaper advertisement for three consecutive days including a Sunday or a one-time ad in a professional journal. 20 C.F.R. § 656.21(f) and (g) (2004). After the Department proposed amending this labor market test to require, *inter alia*, three additional alternative recruitment steps, it received a number of comments in opposition to the proposal. *See* Labor Certification for the Permanent Employment of Aliens in the United States; Final Rule, 69 Fed. Reg. 77326, 77345 (Dec. 27, 2004) (summarizing commenters’ concerns about requiring additional recruitment steps for professional positions). Most commenters were concerned that conducting the additional

recruitment steps would be costly and unduly burdensome. 69 Fed. Reg. at 77345. The Department responded to these concerns as follows:

We believe the additional recruitment steps represent real world alternatives. The overwhelming majority of employers seriously recruiting for U.S. workers would routinely use one or more of the listed additional recruitment steps. ***Additionally, it should be noted the alternative recruitment steps only require employers to advertise for the occupation involved in the application rather than [sic] for the job opportunity involved in the application as is required for the newspaper advertisement. Allowing employers to recruit for the occupation involved in the application should also work to minimize employer costs to conduct special recruitment efforts solely to satisfy the alternative recruitment steps.*** In sum, we do not believe the cost to employers of the additional recruitment steps will be significant.

Id. (emphasis added). As this response makes clear, the Department sought to alleviate the burden of requiring three additional recruitment steps by providing greater flexibility over the content and form of advertisements fulfilling this requirement.

Even though the Department intended to treat the additional recruitment steps differently than the mandatory advertisements in newspapers of general circulation or professional journals, the CO seeks to impose the same detailed content requirements on both types of advertisements. In defending such a requirement, the CO does not cite to the language or structure of the regulations. Rather, he contends that this requirement is consistent with BALCA precedent and necessary for the effective operation of the PERM program. But, as discussed below, these reasons do not justify the imposition of a requirement that is inconsistent with the unambiguous text of the regulations and contrary to the Department's intent at the time the regulations were promulgated.

The CO primarily relies on the BALCA panel decision in *Credit Suisse Securities (USA) LLC* (“*Credit Suisse*”), 2010-PER-103 (Oct. 19, 2010).⁴ In this case, a three-judge BALCA panel affirmed the denial of certification based on a CO's determination that one of the additional recruitment steps—specifically, the advertisement that the petitioning employer placed on its website pursuant to § 656.17(e)(1)(ii)(B)—did not provide a position description specific enough to apprise U.S. workers of the job opportunity for which certification was sought, as required by § 656.17(f)(3). The petitioning employer argued that the denial should be reversed because the PERM regulations only require that the additional recruitment steps advertise the occupation involved in the application, as opposed to the specific job opportunity and the other content required by § 656.17(f)(3). The panel acknowledged that “the content requirements in § 656.17(f) only explicitly apply to advertisements in journals and newspapers of general

⁴ The CO additionally relies on *East Tennessee State University*, 2010-PER-38 (Apr. 18, 2011) (en banc), where the Board concluded that an advertisement placed in fulfillment of an additional recruitment step must not include requirements not listed on the Form 9089. *Id.*, slip op. at 8, n.7. We do not find this conclusion to be binding upon us today, as the issue was not raised or briefed by the parties, or necessary to the resolution of the appeal, and the Board did not analyze the scope of § 656.17(f) in any depth.

circulation,” but found that these requirements also implicitly apply to all advertisements, including those placed in fulfillment of the additional recruitment steps. *Id.* at 7. This was so, according to the panel, because “the additional recruitment steps must be interpreted in light of the other PERM regulations and the policy considerations embedded in the permanent labor certification program.” Specifically, the *Credit Suisse* panel found:

The requirements that the position in the labor application must clearly be open to U.S. workers, that the employer must recruit U.S. workers in good faith, and that the CO must only certify the application if there are no available U.S. workers to perform the position implicitly require that all advertisements placed by an employer must have the purpose and effect of apprising U.S. workers of the job opportunity. In order for U.S. workers to know about the job opportunity, the advertisements placed to fulfill the additional recruitment steps must contain sufficient information about the position. We hold that all advertisements placed by employers in fulfillment of the additional recruitment steps must comply with the advertisement content requirements listed in § 656.17(f).

Id. at 8 (footnotes omitted). The panel decided there was little, if any, distinction between advertising for “the occupation involved in the application,” as is required by § 656.17(e)(1)(ii)(B), and “appris[ing] U.S. workers of the job opportunity for which certification is sought,” as is required by § 656.17(f)(3), because the difference in these terms did not “negate[] the employer’s duty to seriously recruit for the position in the labor application.” *Id.* at 8. According to the panel, advertisements placed in fulfillment of an additional recruitment step may not merely advertise for the occupation involved in the application, as the text of the regulations indicate, because “[t]he additional recruitment steps were not intended to be some sort of watered-down or cursory method of advertisement.”

We respectfully disagree with the conclusion of the panel in *Credit Suisse* that the content requirements in § 656.17(f) implicitly apply to the advertisements that employers place to fulfill the additional recruitment steps. Unambiguous regulations must be interpreted in a manner that is consistent with the common understanding of the terms used. The regulation that governs the additional recruitment step at issue here, § 656.17(e)(1)(ii)(C), only requires that a petitioning employer advertise *the occupation* involved in the application.⁵ The advertisement that Symantec placed on a job search website meets this minimum requirement. Symantec placed the advertisement on jobvertise.com under the general heading “Current Openings at Symantec Corporation.” (AF 63). The top of this advertisement indicates there are currently openings for a “Financial Programmer Analyst — (US-CA-Cupertino).” This is the same position title as the position for which Symantec seeks certification, and thus clearly fits within the larger classification of advertising for the occupation involved in the application. (AF 63).

⁵ Specifically, § 656.17(e)(1)(ii)(C) provides: “The use of a job search Web site other than the employer’s can be documented by providing dated copies of pages from one or more website(s) that advertise the occupation involved in the application.”

Neither the text of the regulations nor the regulatory history justifies the CO's requirement that a website advertisement match the particular job opportunity for which certification is sought. The language of § 656.17(f) limits the scope of the advertising content requirements to "[a]dvertisements placed in newspapers of general circulation or in professional journals." These content requirements additionally apply to certain Notices of Filing because they are specifically incorporated by another regulation, § 656.10(d)(4). Section 656.17(e)(1)(ii)(C), by contrast, only requires that a petitioning employer advertise *the occupation* involved in the application. As explained above, the labor market test required by the PERM regulations is the result of a lengthy notice and comment rulemaking process. When the Department drafted the regulation requiring three additional recruitment steps for professional occupations, it considered the additional costs that employers would incur in completing the additional recruitment steps and affirmatively sought to minimize these costs by permitting an employer to advertise for *the occupation* involved in the application, as opposed to the specific job opportunity for which certification is sought. 69 Fed. Reg. at 77345. If the CO does not believe that this approach adequately tests the labor market for able, willing, qualified, and available U.S. workers, then the recruitment regulations may be amended through a new notice and comment rulemaking process. See *SAP America*, 2010-PER-1250, slip op. at 9 (Apr. 18, 2013) (en banc) (rejecting attempt by the CO to go beyond the plain language of the regulation). However, neither BALCA nor the CO may disregard the plain text of the regulations for policy or other considerations. See, e.g., *Dearborn Public Schools*, 1991-INA-222, slip op. at 7 (Dec. 7, 1993) (en banc) (holding BALCA lacks the express authority to invalidate a regulation as written); *Seven Oaks Landscapes-Hardscapes, Inc.*, 2011-PER-2628, slip op. at 5 (July 26, 2013) (noting that "cannons of construction caution against implying provisions not included in the regulations").

We acknowledge the CO's concern that some employers may seek to deter qualified workers by including requirements or job duties in the additional recruitment steps that are more restrictive than the minimum requirements and job duties in the ETA Form 9089. But there is no indication that Symantec acted in bad faith when it posted the job search website advertisement at issue here. In its request for reconsideration, Symantec explained that the advertisement does not directly parallel the job duties and minimum requirements in the ETA Form 9089 because it advertised openings for multiple Financial Programmer Analyst positions with varying job requirements, as indicated by the word "may" at the beginning of each sentence. (AF 9-14). This type of broadly worded advertisement is permitted by § 656.17(e)(1)(ii)(C), which only requires that the advertisement "advertise the occupation involved in the application." § 656.17(e)(1)(ii)(C). The inclusion of a travel requirement, preceded by the word "may," does not lead us to conclude that Symantec's job search website advertisement did not advertise the occupation involved in the application, or that Symantec included the possibility of travel in this advertisement to dissuade qualified workers from applying for the job opportunity.

A CO may not deny an *Application for Permanent Employment Certification* (ETA Form 9089) based on a petitioning employer's failure to comply with an unwritten requirement that has no basis in the clear text of the regulations. This does not mean, however, that a CO must certify an application if he has reason to believe that an employer's recruitment efforts were not sufficient to make the certification required by § 212(a)(5)(A) of the INA. Rather, in such a situation, the CO may exercise his broad discretion to order supervised recruitment under 20

C.F.R. § 656.21. In the instant case, the CO chose not to exercise this discretion and, instead, denied Symantec's *Application for Permanent Employment Certification* (ETA Form 9089) on the ground that Symantec failed to meet a requirement that is not mandated by the regulations and for which Symantec had no prior notice.

As the only ground upon which the CO relied to deny certification is not supported by the regulations, we hereby REVERSE the Certifying Officer's denial and DIRECT the CO to grant certification.

A.L. Bergstrom, *Administrative Law Judge*, concurring.

I concur that the strict newspaper advertising requirements of 20 C.F.R. § 656.17(f) are not requirements to be met per se under non-newspaper advertising conducted as an additional recruitment step under 20 C.F.R. § 656.17(e)(1)(ii).

However, the application in this case might have been denied at the CO level because the Employer's stated alternative experience requirements listed in Item H-8 and H-14 of the PERM application may not have been substantially equivalent to the primary job requirements listed in Items H-4 and H-6, thus violating the provisions of 20 C.F.R. § 656.17(h)(4)(i). Since BALCA is limited to considering only those issues raised in the CO's denial determination of June 27, 2011 (original AF 1 of 121)⁶ and ETA has eliminated the regulatory ability of BALCA to remand a case to the CO,⁷ the questions that remain, and will not be answered, are (1) was the additional recruitment step in this case under 20 C.F.R. § 656.17(e)(1)(ii)(C) an adequate test of the labor market and (2) did the CO stop processing the application without evaluating the application on its merits upon erroneously finding that one of the three additional recruitment steps was not satisfied because it did not conform to unrelated advertising requirements.

Entered at the Direction of the Board:

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

⁶ See *Datagate, Inc.*, 1987-INA-582 (Feb. 17, 1989) (en banc); *International Student Exchange of Iowa, Inc.*, 1989-INA-261 (Apr. 21, 1992) (en banc); *Barbara Harris*, 1988-INA-392 (Apr. 5, 1989) (en banc); *Lowes Anatole Hotel*, 1989-INA-230 (Apr. 26, 1991) (en banc).

⁷ See 69 Fed. Reg. 77326, 77363 (Dec. 27, 2004); 20 C.F.R. §656.27(c).