

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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BALCA Case No.: 2013-PER-00052

ETA Case No.: A-11308-16309

In the Matter of:

ARBIN CORPORATION,
Employer,

on behalf of

CHENG, ZHOUCHEG,
Alien.

Certifying Officer: William Carlson, Ph.D.¹
National Certifying Officer

Appearances: Baolin Chen, Esq.
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For the Employer

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For the Certifying Officer

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For the Amicus Curiae

Before: Stephen R. Henley, *Chief Administrative Law Judge*, Carrie Bland, *Acting Associate Chief Administrative Law Judge*, Francine L. Applewhite and Theodore W. Annos, *Administrative Law Judges*²

¹ Dr. Carlson was the National Certifying Officer at the relevant time.

² Although Associate Chief Administrative Law Judge Paul R. Almanza is a member of the Board, *see In re: Designation of United States Department of Labor Administrative Law Judges to the Board of Alien Labor Certification Appeals*, 2020-MIS-00003 (Jan. 24, 2020), he recused himself from the en banc consideration of this matter.

Opinion for the Board filed by HENLEY, Chief Administrative Law Judge, with whom BLAND, Acting Associate Chief Administrative Law Judge, APPLEWHITE, and ANNOS, Administrative Law Judges, join:

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

EN BANC. This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1182(a)(5)(A), and the “PERM”³ regulations promulgated at title 20, Part 656 of the Code of Federal Regulations.

On June 29, 2017, a three-judge panel of the Board of Alien Labor Certification Appeals (“BALCA” or “Board”) affirmed the Certifying Officer’s (“CO”) denial of an *Application for Permanent Employment Certification* (“Form 9089”) pursuant to 20 C.F.R. § 656.17(f)(4) for failure of the sponsoring employer to state a travel requirement in its newspaper advertisement, even though the CO cited 20 C.F.R. § 656.17(f)(3) as the regulatory basis for the denial. On March 23, 2018, the Board granted the Employer’s petition for en banc review to determine “whether 20 C.F.R. § 656.17(f)(4) require[s] disclosure of any job duties which entail travel in the mandatory newspaper advertisements.” The Board also requested briefing on additional “potential issues which had been raised in Employer’s filings.” The Employer, the CO, and the American Immigration Lawyers Association (“AILA”) appearing as amicus curiae, filed en banc briefs. For the following reasons, the CO’s denial of labor certification is affirmed.

BACKGROUND

The three-judge panel decision recites the case history in more detail.⁴ To summarize, the Employer, Arbin Corporation, is a designer and manufacturer of electrochemical testing instruments. Its products include advanced technological battery testing systems. (AF 13-42; 65). The Employer filed a PERM application sponsoring the Alien for the position of “Customer Support Engineer.” (AF 150). On the Form 9089, the Employer described the job as:

- (1) Maintain and repair Arbin battery testing systems;
- (2) install and set up the hardware and software for the Arbin battery testing systems;
- (3) on-site training for customers;
- (4) consulting and marketing;
- (5) provide other services such as warranty repair, replacements, testing and delivery of products.

(AF 151). The CO notified the Employer that he was auditing the application, and directed submission of the documentation outlined in 20 C.F.R. § 656.17(e). The newspaper

³ “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

⁴ See *Arbin Corp.*, 2013-PER-00052, slip op. at 1-3 (June 29, 2017).

advertisement required by 20 C.F.R. § 656.17(e)(1)(i)(B) is the focus of this appeal. It was concise:

CUSTOMER SUPPORT ENGINEER: Arbin Corporation seeks a Customer Support Engineer in College Station, TX. Maintain and repair Arbin battery testing systems; etc. BS in Physics, EE, CS or related degree or foreign equivalent, plus 5 yr exp. Send your resume to: HR at 762 Peach Creek Cut Off Road, College Station, TX 77845.

(AF 88-89).

After reviewing the Employer's documentation, the CO, citing 20 C.F.R. § 656.17(f)(3), denied certification on the ground that the newspaper advertisements did not provide a description of the job vacancy specific enough to apprise U.S. workers of the job opportunity. (AF 47).⁵ Specifically, the CO noted that the advertisement did not mention "delivery of products," even though this duty was listed on the Form 9089. The CO stated that "delivery of products" was a travel requirement, and explained that "potential U.S. applicants may have been interested in a company which would afford them the opportunity to travel." (AF 47).

The Employer filed a request for reconsideration, arguing that the CO improperly assumed that the phrase "delivery of products" reflected a travel requirement. (AF 4). The Employer submitted an explanatory letter from its Vice President, stating that its battery testing systems are "heavy equipment," which are shipped by the Employer's "shipping department . . . via FedEx to [its] customers" rather than hand-delivered by the Customer Support Engineer. (AF 4, 13-14). The Employer further stated that it did in fact disclose a travel requirement in its advertisements, which stated that the job opportunity required "the applicant to 'maintain and repair Arbin battery testing systems.' Together with the title 'Customer Support Engineer,' this job duty disclosure fully advised potential job applicants that this position requires a certain level of travel" because its battery testing systems are "big" and "can only be maintained and repaired at . . . customers' site[s] by" the Customer Support Engineer. (AF 4-5). Employer also stated that the CO mistakenly characterized travel as a benefit. (AF 8-9). It further argued that the condensed statement of the job duties listed in the advertisements was in compliance with the regulations, which do not require disclosure of every duty. (AF 7-8).

On reconsideration, the CO affirmed the denial of certification. The CO noted that in its request for reconsideration, the Employer "clearly states the job opportunity does require travel to deliver its services; testing and maintenance and sometime replacement of the battery systems at the customer's site." The CO found on that basis that the advertisements did "not provide a description of the job vacancy specific enough to apprise U.S. workers of the job opportunity." (AF 1).

⁵ The CO also based the denial on the failure of the job search website to state a travel requirement. The three-judge panel in this matter correctly cited *Symantec Corp.*, 2011-PER-01856, slip op. at 4 (June 30, 2014) (en banc), for the proposition that the advertising content requirements set forth in § 656.17(f) do not apply to additional recruitment steps, such as posting a job opportunity on an job search website, described in § 656.17(e)(1). This determination was not challenged by any party. Accordingly, for purposes of en banc review, we focus only on the newspaper advertisements.

The denial was then reviewed by a three-judge panel of the Board, which affirmed the denial. *Arbin Corp.*, 2013-PER-00052 (June 29, 2017). The panel, however, relied on 20 C.F.R. § 656.17(f)(4), finding that it was the appropriate regulation to apply. *Id.*, slip op. at 5. We subsequently agreed to review the case en banc.

DISCUSSION

Regulatory Framework

An employer filing an application for permanent alien labor certification is required to conduct certain recruitment steps and make a good-faith effort to recruit U.S. workers prior to filing its application. Mandatory print advertisements placed as part of the recruitment process at 20 C.F.R. §§ 656.17(e)(1)(i) (professional occupations) or 656.17(e)(2) (nonprofessional occupations) must comply with content requirements and proscriptions as outlined in 20 C.F.R. § 656.17(f):

(f) 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.

The provisions relevant to the instant appeal are §§ 656.17(f)(3) and (f)(4).

The Decision to Analyze the Case Under 20 C.F.R. § 656.17(f)(4)

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 Med. Ctr.*, 2009-PER-00379, slip op. at 32 (Nov. 21, 2011) (en banc). The limitations imposed by § 656.27(c) constrain the Board to a 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 may not consider wholly new

arguments not made before the CO. *Id.* at 8. The Board may 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) (pre-PERM); *Mandy Donuts Corp.*, 2009-PER-00481 (Jan. 7, 2011).

Provided that an employer is not denied a full and fair opportunity to present its case, however, it is within BALCA's de novo review authority to base our decision on a regulation not cited by the CO. As the Department's Administrative Review Board noted in *Heckman v. M3 Transp., LLC*, ARB No. 2018-0019, 2012-STA-00059 (ARB May 5, 2020):

Appellate courts routinely affirm on any ground supported by the record, even if it differs from the district court's rationale. *Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884 (9th Cir. 2019) (affirming district court's dismissal on alternate grounds despite district court's error dismissing as a sanction). "[I]n reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason." *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011), quoting *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

Id. slip op. at 4 n.5.

In the instant case, the CO cited § 656.17(f)(3) as the regulatory basis for his decision. The three judge panel found that § 656.17(f)(4) rather than § 656.17(f)(3) is the regulation that imposes a requirement that travel be disclosed in an employer's advertisements, and that citation to other sections of the regulations is "inappropriate." While we do not find that CO's are required to only analyze issues under a single regulation, the CO's citation to § 656.17(f)(3) took both the CO and the Employer on an analytical tangent. Section 656.17(f)(4) is the apposite regulation.⁶

⁶ The Board asked for briefing en banc on "[w]hether the CO may cite to any provision in 20 C.F.R. § 656.17(f) to deny an application on the basis of a lack of stated travel requirement, or whether they should be required to cite to the specific regulation at 20 C.F.R. § 656.17(f)(4). More specifically, whether §§ 656.17(f)(3), (7) are appropriate denial grounds when travel is required." This question is related to the three-judge panel's statement that "[w]hen the CO denies certification based on an employer's failure to disclose travel requirements in an advertisement, § 656.17(4) is the applicable provision, and citation of other sections is inappropriate." Slip op. at 4 (citations omitted). As the CO noted in its en banc brief, all of the caselaw cited by the panel in this respect related to § 656.17(f)(7). The CO also noted in its en banc brief that "[w]hile it is correct that § 656.17(f)(4) is applicable in this case, that does not render citation to (f)(3), which is broader than (f)(4), any less applicable." We agree with the CO that there is no principle or legal requirement that confines a CO to consider travel requirements only under 20 C.F.R. § 656.17(f)(4). In the instant case, however, it appears that § 656.17(f)(3), by its own terms, does not support a denial of certification under the facts. Section 656.17(f)(3) addresses the level of specificity that must be found in the advertisements. This provision, however, is not particularly demanding. It requires that "[a]dvertisements placed in newspapers of general circulation must . . . [p]rovide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought." *Id.* § 656.17(f)(3); see also *Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States*, 69 Fed. Reg. 77326, 77347 (Dec. 27, 2004) (noting in the preamble that this "regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment; rather, employers need only apprise applicants of the job opportunity. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity."); www.foreignlaborcert.doleta.gov/faqsanswers.cfm#adcont1 (FAQ answer stating the same).

Here, in reviewing the case under § 656.17(f)(4), we are not considering new evidence, and we are not considering matters outside the record, the request for review, and briefing. Moreover, we are not basing our decision on a wholly new ground—the question of whether the Employer’s newspaper advertisement adequately informed job seekers of a travel requirement was unquestionably raised by the CO. Rather, we are simply analyzing the evidentiary record based on the most apposite regulatory provision governing the issue presented.

We also find that, under the circumstances presented, basing the decision on § 656.17(f)(4) would not prejudice the Employer such that its procedural due process rights were violated. Due process is served under the PERM regulations if an employer is on notice of the applicability of regulatory provisions other than those cited by the CO and was afforded the opportunity to address those provisions. *See Riverwalk Educ. Found., Inc.*, 2012-PER-01281, slip op. at 4-5 (July 22, 2013); *Keihen Fuel Sys.*, 2011-PER-02974, slip op. at 4-5 (July 22, 2013); *Cosmos Found., Inc.*, 2012-PER-01209, slip op. at 4-5 (July 3, 2013); *Oracle Am., Inc.*, 2011-PER-00963, slip op. at 4 (Nov. 30, 2015).⁷ In the instant case, the Employer’s motion for reconsideration made arguments relevant to consideration of whether its advertisements met the specificity requirements of the regulations, and specifically quoted from § 656.17(f)(4). The Employer recognized in its appellate brief that § 656.17(f)(4) was applicable, stating that “[w]hile the CO did not cite 20 C.F.R. § 656.17(f)(4) in his denial [on reconsideration], denying Arbin’s application for failure to list the travel requirement in the advertisement suggests that the CO considered 20 C.F.R. § 656.17(f)(4).” Employer’s Brief at 12 n.4; *see also* AF 46-47. Employer’s appellate brief went on to extensively argue compliance with 20 C.F.R. § 656.17(f)(4). Employer’s Brief at 5-9, 12-14.

When the Employer petitioned for en banc review of the panel’s decision, it mentioned inconsistency in how BALCA panels have approached travel requirements, but it did not challenge the panel’s decision to analyze the case under § 656.17(f)(4) rather than § 656.17(f)(3). In its en banc brief, the Employer’s sole reference to the panel’s application of § 656.17(f)(4) to the facts of the case was the statement that “Arbin was deprived of this opportunity to address the issue in its Request for Reconsideration, as it was not aware that the panel would rely on 20 C.F.R. § 656.17(f)(4).” However, the Employer fully briefed the applicability of § 656.17(f)(4) in its initial briefing before BALCA. The Employer has not explained how the fact that the Board rather than the CO considered the application of § 656.17(f)(4) to the evidentiary record prevented it from a fair decision under the facts of the case. In short, the Board has de novo review authority, and under the circumstances presented, its affirmance of the

⁷ To the extent that the panel in *Preferred Equine Mktg.*, 2012-PER-03531, slip op. at 4 (July 11, 2019), indicated that it was beyond its de novo review authority to consider a different legal rationale than that applied by the CO for whether labor certification should be granted on the facts of the case, we believe that panel took an overly constricted view of de novo review. Rather, we find that BALCA has the authority to analyze an issue raised before the CO under a different provision of the PERM regulations than the one cited by the CO, provided that doing so would not prejudice an employer’s procedural due process rights.

denial on a different paragraph of the same regulation relied on by the CO did not prevent the Employer from obtaining a labor certification that should have been granted.⁸

Was Employer's Newspaper Advertisement Compliant With § 656.17(f)(4)?

The regulation at § 656.17(f)(4) states that an advertisement to which it applies must “[i]ndicate 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.” We agree with the Employer and AILA that the regulation focuses on the geographic area of employment, and not on the specifics of the travel required. We agree with the CO and AILA that § 656.17(f)(4) requires a fact-specific analysis.

However, in the instant case, the newspaper advertisement placed by Employer cannot reasonably be construed as identifying the geographic area of employment sufficient to apprise applicants of travel requirements. The only parts of the newspaper advertisement that even arguably implied that the position involved travel outside College Station, Texas was the fact that the job title is “Customer Support Engineer” and the fact that the listed job duty was “[m]aintain and repair Arbin battery testing systems.” The job title itself does not convey that it involves travel. Although the Employer provided information to the CO with its motion for reconsideration showing that its battery testing systems are essentially immobile and must be maintained and repaired on site (*see* AF 4-5), what matters is what was conveyed in the newspaper advertisement. The record does not show that it is a generally known fact that service on Arbin battery testing systems requires travel. Although some savvy job applicants may have understood, when putting the job title and duty together, that the job involves travel to customer sites, the newspaper advertisement simply does not convey that factor sufficiently to meet the regulation’s “with enough specificity” requirement. Accordingly, the newspaper advertisement in this case did not indicate the geographic area of employment with enough specificity to apprise applicants of the job’s travel requirements.

Other Briefed Issues

In addition to the matters discussed above, the Board asked the parties to brief whether “travel” is a benefit or a requirement under the regulations, or neither. We find that whether travel is viewed by job applicants as a positive or negative factor is a highly subjective matter for the applicant; it does not matter for determining whether an employer complied with § 656.17(f)(4). That regulation only requires disclosure of the geographic area of employment sufficient to apprise applicants of a travel requirement. What the applicant is likely to make of that information does not help the adjudicator decide whether an employer sufficiently apprised applicants of a travel requirement. Nor would applicants’ subjective view of travel as a positive or negative aspect of a position particularly assist the adjudicator in deciding whether an

⁸ The Board recognizes that the Employer’s briefing of whether its advertisement complied with § 656.17(f)(4) arguably put it in a worse position on appeal than if it had addressed only § 656.17(f)(3). The Board has de novo review authority, however, and may consider any regulation applicable to the issue raised by the CO. In cases where it is not clear that an employer was provided an adequate opportunity to brief the applicability of a regulation to an issue raised by the CO, the Board could ask for additional briefing or consider a remand to the CO for reconsideration.

employer complied with § 656.17(f)(3). *See* n.5, *infra* (regulation does not require listing of every job duty, job requirement, and condition of employment).

The Board also asked the parties to brief whether the CO should take into consideration whether there may be some job duties/titles that so inherently require movement outside of the office that “travel” is not needed to be disclosed. The Board gave the examples of a plumber or delivery person. AILA urges the Board to recognize that some job opportunities exist where “movement outside of the office is so clearly part of the role that travel need not be disclosed, and travel requirements must be included in the newspaper advertisements only if they affect the geographic area of employment or restrict where applicants will likely have to reside to perform the job opportunity.” AILA also urges the Board to recognize that *de minimis* travel need not be disclosed because *de minimis* travel does not affect the geographic area of employment or where an applicant would need to reside to perform the job opportunity. (AILA Amicus Brief at 8-11). The CO, in contrast, notes correctly that the regulation is phrased as “*any* travel requirements.” These points are well-taken. Upon close review of the record, however, we cannot find this issue was presented under the facts of *Arbin*. Thus, any pronouncement on this question in this appeal would be dicta. We note only that, while § 656.17(f)(4) refers broadly to “*any* travel requirements,” we anticipate that COs will exercise their discretion on which issues to raise with appropriate restraint.

ORDER

Based on the foregoing, **IT IS ORDERED** that the CO’s denial of labor certification is **AFFIRMED**.

Entered at the direction of the Board by:

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