BALCA Holds That Foreign Language Requirement Did Not Need To Be Listed In The Advertisements

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Despite the fact that the PERM regulations took effect on March 28, 2005, almost 13 years ago, PERM practitioners continue to struggle with the Department of Labor (DOL) regarding what must be listed in PERM advertisements. Issues surrounding this ongoing battle were discussed in my blogs here, here, here and here. As they say, the struggle is real!

An employer has to conduct a good faith recruitment of the labor market in order to obtain labor certification for a foreign national employee. When a DOL Certifying Officer (CO) chooses to deny a PERM application due to lack of information in the advertisements, there are a few typical sources of authority that could be cited to justify that denial. Under 20 C.F.R. §656.17(f)(7), advertisements must "not contain wages or terms and conditions of employment that are less favorable than those offered the alien." Based on this authority, a CO could find that an employer failed to inform US workers of conditions of employment that might have made the position more attractive to them, such as a work from home benefit. Under 20 C.F.R. §656.24(b)(2), the CO must make a determination as to whether there "is in the United States a worker who is able, willing, qualified and available for and at the place of the job opportunity." Based on this authority, the CO can hold that this decision is impossible to make since the employer failed to provide US workers with a sufficient understanding of the job opportunity thus rendering them incapable of making an informed decision as to whether they would qualify for the offered position. Accordingly, the CO cannot make a determination as to whether or not qualified US workers exist. Another favorite source of authority is 20 C.F.R. §656.10(c)(8), which requires an employer to attest that "the job opportunity has been and is clearly open to any US worker." The CO will cite this regulation to make the point that, since the employer neglected to sufficiently inform US workers about the job opportunity, then it was clearly not open to all US workers.

Most recently, in Matter of Unicolor, Inc. 2013-PER-00065 (Jan. 26, 2018) the Employer advertised for a permanent position classified under the occupational title of "Sales Representative, Wholesale and Manufacture." The PERM was audited. The CO then denied the PERM under 20 C.F.R. §§656.24(b)(2)(ii) and 656.10(c)(8) and (9), finding that because the Employer failed to include "must be able to read, write, and speak the Korean language" in its Sunday print advertisements and in its job order, the Employer had not provided U.S. applicants with a sufficient understanding of the job opportunity to make an informed decision as to whether they would qualify for the position. The Employer's newspaper advertisements had simply stated, "Sales Representative. Apply by mail only to Unicolors, Inc." In its request for reconsideration the Employer argued that the Preamble to the Final Rule of 20 C.F.R. Parts 655 and 656 gives the Employer the flexibility to draft appropriate advertisements that comply and that lengthy, detailed advertisements are not required by the regulation. The Employer argued that its advertisements sufficiently apprised the potentially qualified applicants of the job. The case was appealed to the Board of Alien Labor Certification Appeals (BALCA).

In describing its responsibility in adjudicating the appeal, BALCA cited a prior case which states, "When the CO relies on §656.10(c)(8) as a basis for denying an application due to deficiencies in an employer's recruitment advertising, the Board must determine whether any discrepancies between the job requirements listed in the Form 9089 and the Employer's recruitment

advertisements 'so misinformed potential job applicants about the [position] that this aspect of recruitment undermines the attestation that the job opportunity is clearly open to any U.S. worker.'" *Enterprise Software Solutions, Inc.*, 2012-PER-02118 (Nov. 16, 2016) (citing *Cosmos Foundation, Inc.*, 2012-PER-01637, slip op. at 7 (Aug. 4, 2016)).

BALCA found that its recent panels, in applying this §656.10(c)(8) analysis, reversed PERM denials when the Employer's advertisements merely omitted information. BALCA referred to *Cosmos Foundation, Inc.*, where the Employer advertised for the position of Social Studies Department Chair asking simply for 24 months of experience. On the PERM application, the Employer indicated that it would accept 24 months experience in the offered position or as a "Teacher in Social Studies [or any subfield of social sciences] at the middle or high school levels." The CO reasoned that the Employer had not provided U.S. workers with a sufficient understanding of the job opportunity to make an informed decision as to whether they would qualify for the position. However, BALCA pointed out that the Employer's advertisements did not actually misinform US workers about the job opportunity or deter qualified candidates from applying. A US worker with relevant teaching experience would still apply for the position whether or not that worker had experience as a Social Studies Department Chair or as a "Teacher in Social Studies [or any subfield of social sciences] at the middle or high school levels." BALCA found that the Employer's omission of the acceptable alternate job experience in its advertisements did not "chill" potentially qualified candidates' interest in the job opportunity.

BALCA also referred to *DNG Technologies, Inc*. 2012-PER-01647 (Feb. 25, 2016) where the CO denied the PERM application finding that the Employer's advertisement on its website failed to apprise interested applicants of the geographic area of employment. The CO argued that §656.10(c)(8) requires website advertisements to comply with the criteria set forth in §656.17(f), including §656.17(f)(4), which mandates that advertisements 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." But BALCA pointed out that the Board has ruled §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*) (which I previously blogged about here). Because §656.17(f)(4) does not govern the additional forms of professional recruitment, it does not necessarily follow that omitting the area of geographic employment from an employer's website advertisement establishes that the job was not clearly open to US workers. BALCA stated that the relevant inquiry under §656.10(c)(8) is whether the Employer's website advertisement 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 US worker. BALCA found that interested applicants were not misinformed about the location of the offered position, they simply were not informed about the geographic area of employment and although a statement of the location of the employment might have been useful information for job seekers, its omission did not support a determination that the job opportunity was not clearly open to US workers.

Based on these two cases, BALCA found that the Employer in *Unicolor*s merely omitted the information that the qualified candidate must be able to read, write, and speak the Korean language. The Employer, while it could have been more specific in its advertisements, did not overstate or mischaracterize the job requirements and the regulations do not require that the Employer enumerate every job requirement in its advertisements. Killing any potential argument that Korean speakers who were out there just dying for a job where they could utilize their Korean were deterred from applying for the offered position simply because the Employer failed to inform

them that applicants for the Sales Representative position needed to be fluent in Korean, BALCA pointed out that the regulations do not require that employers craft their advertisements to foreclose all possible reasons why a qualified applicant may not apply for a certain job. A US worker with the ability to read, write and speak Korean would still apply for the job if they were interested in a position as a Sales Representative!

It can become truly exhausting to always prepare PERM applications defensively; to always try to stay one step ahead of the DOL and to imagine new reasons for denial. It is therefore quite encouraging to read these types of BALCA decisions which reward employers for their good faith recruitment and where the US worker is not painted as so easily “deterred’, “confused” and “adversely affected.” Having said that, PERM practitioners know well that in trying to ensure a smooth PERM process, the best course of action is to include as much relevant information in the advertisements as possible and to endeavor to keep advertisements identical across the board. But for the times when that is not the case, these decisions provide some hope.