



BALCA SAYS THERE IS NO NEED TO LIST EVERY BENEFIT OF EMPLOYMENT IN JOB ADVERTISEMENTS

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To practitioners who file numerous PERM applications, the Department of Labor's (DOL) philosophy of solely protecting the U.S. labor market without regard to employers' efforts, its constantly shifting goal posts, and its frightful game of "gotcha" which we involuntarily enter whenever we file a PERM application, have sadly all become par for the course. But, every so often, a valiant employer fights back and in recent times we have seen the Board of Alien Labor Certifications (BALCA) demonstrate more reason in its decisions. [Matter of Emma Willard School](#), 2010-PER-01101 (BALCA, September 28, 2011) reveals the most recent case of the DOL's game of "gotcha." In that case, BALCA held, reversing the Certifying Officer (CO), that there is no obligation for an employer to list every item or condition of employment in its advertisements and listing none does not create an automatic assumption that no employment benefits exist. As a background, an employer has to conduct a good faith recruitment of the labor market in order to obtain labor certification for a foreign national employee. Obtaining labor certification is often the first step when an employer wishes to sponsor a foreign national employee for permanent residence. 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."

In *Emma Willard School*, the employer, a boarding school, conducted a recruitment effort for the position of "Spanish Instructor" and timely filed an ETA Form 9089. The CO issued an audit notification requesting that the employer submit "a detailed explanation indicating the reason the foreign worker currently resides with the employer." In its timely response, the

employer submitted documentation of the school's philosophy, which states that the school "offers housing as a resource that benefits the faculty, staff, and program" and that a "significant majority" of teachers and key administrators live in school owned housing. The school's housing guidelines indicated that the school provided on-campus housing, off-campus housing and dormitory apartments to selected faculty and staff as a benefit of employment.

The CO denied the PERM application citing six reasons for denial, all related to the employer's failure to indicate, in its advertisements and Notice of Filing, the benefit of employer-subsidized housing. Four of the reasons for denial fell under 20 C.F.R. §656.17(f)(7). According to the CO, because the employer's advertisements in the newspaper of general circulation, in a local or ethnic paper, on the employer's website and on job search websites did not indicate that the employer offered subsidized housing, the advertisements did not comply with 20 C.F.R. §656.17(f). Because the Notice of Filing also did not list this benefit, one denial reason fell under 20 C.F.R. §656.10(d)(4), which requires that the Notice of Filing contain the information required for advertisements. The final reason for denial fell under 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 held that because the employer did not list the benefit of subsidized housing in its recruitment, the recruitment contained terms and conditions of employment that were less favorable than those offered to the alien, thereby disaffirming the employer's attestation that the job is open to any US worker.

The employer submitted a request for reconsideration of the denial arguing that the regulations do not mandate that benefits be listed in advertisements. The CO forwarded the case to BALCA. In its brief to BALCA, the employer made the obvious point that many advertisements do not list employment benefits such as health insurance and vacation.

BALCA analogized the issue to the case of an employer not listing the offered wage in its advertisements. The choice not to list the offered wage would not lead to an assumption, on the part of the US worker, that the employer is offering no wage. Similarly, the employer's choice not to list employment benefits would not lead a US worker to assume that there are no benefits involved in the position. BALCA held that the employer's recruitment did not contain terms or conditions less favorable than those offered to the alien simply because the employer did not list wages or benefits of the position.

At every step of the persnickety PERM process the DOL claims it is only doing its job to protect US workers, but here it appears that BALCA is finally giving US workers the credit they deserve for being intelligent enough to recognize that a tiny advertisement could not possibly list ALL the terms and conditions of employment. Perhaps BALCA recognized that any US workers who were interested in the position with *Emma Willard School* would have naturally contemplated whether the boarding school provided boarding to its employees! Therefore, the employer's decision not to list the subsidized housing benefit in the ad in no way deterred US workers from applying for the position.

Yet, careful not to paint with too broad a brush, BALCA made sure to limit its decision to the facts of the case and to state that "this decision should not be construed as support for an employer never having to offer or disclose a housing benefit to US workers." Despite BALCA's timidity, this decision is significant and bears on other situations as well. For instance, an employer whose PERM application was denied because the recruitment did not list a "work from home" benefit, might be able to argue, under *Emma Willard School*, that it was not required to list all benefits in its recruitment. While the DOL may argue that a "work from home" benefit is different from the subsidized housing benefit, the employer choosing to not list the "work from home" benefit should not serve to deter any US workers from applying for the position especially if the advertisement was placed in a national magazine. US workers are savvy and well aware of the increasing flexibility offered by employers with regard to where they perform the duties of the job. A prospective applicant can also inquire about this, and the advertisement on its own, without the listing of a "work from home" benefit should not deter US workers from applying for the position.

When will the DOL come to realize that US workers are smart enough to discern job advertisements themselves, and do not need this kind of misguided protection resulting in the needless denial of a labor certification for a much needed foreign national worker?