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BALCA CLARIFIES DOL'S POSITION ON PROOF OF PUBLICATION OF THE SWA JOB ORDER AND ADS PLACED BY PRIVATE EMPLOYMENT FIRMS UNDER PERM

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As usual, BALCA (Board of Alien Labor Certification Appeals) decisions are very important for practitioners as they offer crucial insights into how to avoid some of the pitfalls in preparing and filing a labor certification application under Program Electronic Review Management (PERM) or into what arguments can be made in response to the unfortunate receipt of a PERM denial notice. BALCA recently issued some notable decisions.

DOCUMENTATION OF THE SWA JOB ORDER

While the Department of Labor ("DOL") is obsessed about the employer presenting proof of publication of its recruitment, BALCA recently held, in an en banc decision, *A Cut Above Ceramic Tile*, 2010-PER-00224 (Mar. 8, 2012), that based on the history of the PERM regulations and the plain language of 20 C.F.R. §656.17(e)(2)(i), proof of publication of the State Workforce Agency ("SWA") job order is not required supporting documentation.

The PERM regulations at 656.17(e)(2)(i) require an employer filing a PERM application to place a job order with the SWA serving the area of intended employment for a period of 30 days. That same section of the regulations also states, "he start and end dates of the job order entered on the application serve as documentation of this step." Pursuant to 656.10(f), all documentation supporting the PERM application must be retained for five years after filing the application. 656.17(a)(3) mandates that the employer must furnish "required supporting documentation" to the Certifying Officer ("CO") if the PERM application is audited. A substantial failure by the employer to provide the required documentation will result in a denial of the PERM application.

656.20(b).

In *A Cut Above Ceramic Tile*, the employer attested, on an ETA Form 9089 filed on January 8, 2007, that, as part of its domestic recruitment efforts for the position of Tile Setter, it placed a job order with the SWA in the area of intended employment from July 13 to August 12, 2006. On June 11, 2009, the DOL issued an audit notification, which included the request for a copy of the job order placed with the SWA downloaded from the SWA internet job listing site; a copy of the job order provided by the SWA; or other proof of publication from the SWA containing the content of the job order. As part of its audit response, the employer included a copy of its completed Employer Job Order Information Sheet from VaEmploy.Com, the SWA for the state of Virginia. Citing 656.20(b) as authority, the CO denied the PERM application based on the employer's failure to provide proof of publication of the SWA job order containing the content of the job order, as requested in the audit notification letter. The CO found that the employer's submission of the Employer Job Order Information Sheet did not show the final content of the job order as run by the SWA.

The Employer filed a motion for reconsideration of the PERM denial arguing that the PERM regulations provide that the SWA job order is documented by the start and end dates entered on the ETA Form 9089. The employer also argued that it had tried to obtain proof of publication from the SWA but had been informed that proof of the publication of its job order had been deleted. The CO affirmed the denial and forwarded to case to BALCA which also affirmed the denial and held that the employer's documentation only showed that the job order was placed for the required 30-day period but did not provide proof of its contents.

The Employer then filed a petition for en banc review which BALCA granted to resolve the issue of whether a CO may deny certification of a PERM application based on the employer's failure to provide proof of the publication of the SWA job order. BALCA invited the American Immigration Lawyers Association (AILA) to file an amicus brief which it did. There was a conflict between BALCA panels because, in another case, *Mandy Donuts Corp*., 2009-PER-481 (Jan. 7, 2011), a BALCA panel compared the PERM regulations at 656.17(e)(2)(i) on placement of the job order and the regulations at 656.17(e)(1)(i)(B)(3) and 656.17(e)(2)(ii)(C) on placement of a newspaper advertisement and pointed out that the PERM regulations for documentation of proof of newspaper advertisements specifically require the employer to provide copies of the newspaper pages in

which the advertisement appeared or proof of publication furnished by the newspaper. The panel held that the PERM regulations only require "placement" of the job order for 30 days which is documented by the start and end dates entered on the PERM application.The en banc panel in *A Cut Above Ceramic Tile* agreed with the *Mandy Donuts* panel and held that the distinction in the regulations is clear. The drafters of the regulation could easily have included a requirement that employers provide proof of publication of the SWA job order. In fact, the regulations governing the placement of a job order for the H-2B temporary nonagricultural labor certification program, also administered by the Employment and Training Administration ("ETA") specifically require that the employer maintain a copy of the SWA job order or other proof of publication containing the text of the job order. 656.15(e)(1). The en banc panel reasoned that the ETA intentionally drafted the H-2B and the PERM SWA job orders regulations differently. In fact the ETA specifically stated in its response to comments regarding the audit process, that the employer is only required to provide the start and end date of the job order on the application to document the job order has been placed and the gathering of additional information on the job order from the SWA will not be necessary. See ETA, Final Rule, Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States , 69 Fed. Reg. 77326, 77359 (Dec. 24, 2004). Essentially, the CO does not have the power to request just any type of documentation and the employer's application may only be denied under 656.20(b) when the absent documentation is required.

While this en banc decision may appear attractive, and is certainly useful when inheriting flawed cases, practitioners ought to continue the practice of printing copies of the job order to demonstrate good faith recruitment. The BALCA en banc panel made sure to comment, in note 5, that "the spirit and the context of the PERM regulations, which are grounded in attestations backed up by retained documentation to support attestations, strongly suggest that an employer should retain and be able to produce documentation about the content and dates of action on all elements of recruitment. We would anticipate that most employers recruiting in good faith will have retained documentation in some form to show the content of the job order, and if so be able to produce it." However, it is now clear that failure to produce the SWA job order cannot be the sole basis for a PERM denial.

THE USE OF PRIVATE EMPLOYMENT FIRMS TO CONDUCT RECRUITMENT

Under 656.17(e)(1)(ii), when conducting recruitment for a professional position, the employer must conduct three additional recruitment steps to advertise the position. The employer may choose from ten forms of recruitment including the use of a private employment firm or placement agency. 656.17(e)(1)(ii)(F) states:

The use of private employment firms or placement agencies can be documented by providing documentation sufficient to demonstrate that recruitment has been conducted by a private firm for the occupation for which certification is sought. For example, documentation might consist of copies of contracts between the employer and the private employment firm and copies of advertisements placed by the private employment forms for the occupation involved in the application.

In *Credit Suisse Securities*, 2010-PER-103 (Oct. 19, 2010), BALCA rejected the employer's argument that 656.17(f), requiring that advertisements placed in newspapers of general circulation or in professional journals state the name of the employer and provide a description of the vacancy specific enough to apprise U.S. workers of the job opportunity, was not applicable to the additional recruitment steps for professional occupations, and held that the regulation in fact governs all forms of advertisement. However, not all the additional recruitment methods for professional positions readily lend themselves to these requirements. For instance, when recruiting through private employment firms, it makes no business sense to indicate the name of the employer because an applicant could then bypass the headhunter and apply directly to the employer. Indeed, in *Credit Suisse Securities*, BALCA acknowledged in note 7 that the requirements of 656.17(f) only applies to advertisements, and that it was not making a determination with respect to job fairs, on-campus recruiting, private employment firms and campus placement offices.In *World Agape Mission Church*, 2010-PER-01117 (Mar. 23, 2012), the employer conducted recruitment for the professional position of "Pastor (Associate)" recruiting through a private employment agency as one of the three additional recruitment steps for professional positions. The CO issued an audit notification and, as part of its response to the audit notification, the employer submitted a letter from the private employment agency certifying that the agency had checked its database for any qualified applicants and had posted the job posting online. The job posting listed the job title, salary information, a job description, experience and education requirements, and

that the position was full-time. The job posting was identifiable by a job number. The CO argued that the employer's name must be included in an advertisement to ensure that the results of an employer's test of the labor market are legitimate. The CO cited 656.17(f)(1), requiring that advertisements placed in newspapers of general circulation "name the employer."BALCA noted its decision in *Credit Suisse Securities* but held that an advertisement placed by a private employment agency is different than one placed directly by the employer. BALCA referenced its decision in *HSB Solomon*, 2011-PER-2599 (Oct.25, 2011) that 656.17(f) does not apply to advertisements placed by private employment firms. However, *World Agape Mission Church* makes it clear that the employer still has a duty to recruit in good faith and to make the job opportunity clearly open to all U.S. workers even when using a private employment agency. Of particular note was the fact that the job posting provided applicants with sufficient information like the job title, job duties, and education/experience requirements, and even if it did not list the name of the employer, it listed a job number which matched the job number listed in the letter from the employment agency certifying its recruitment. This allowed the CO to match the listing to the agency's advertisement even without the inclusion of the employer's name in the posting.**SUPERVISED RECRUITMENT**

As the supervised recruitment train keeps barreling through, we have to keep on the lookout for any BALCA decisions to help guide us through the process. BALCA recently issued two decisions worth reading.In *Kennametal, Inc.*, 2010-PER-01512 (Mar. 27, 2012), BALCA held that the employer had improperly rejected U.S. workers because it did not consider the possibility that certain applicants could become qualified after a reasonable period of on-the-job training. But most interestingly, BALCA held that the employer's rejection of applicants for not possessing the requisite bachelor's degree was unlawful and specifically listed examples of applicants who had an associates' degree and 10 to 24 years of experience. BALCA held that because the employer indicated in its advertisements that it would "accept a combination of education, training and experience" (well-known to practitioners filing PERM applications as the *Kellogg* language based on *Matter of Francis Kellogg*, 94-INA-465 (Feb. 2, 1998) (en banc), the employer should have considered these applicants and interviewed them to further evaluate their skills. This is particularly interesting in light of the fact that the DOL routinely requests that employers list the *Kellogg* language in the supervised recruitment advertisements even where it is not applicable.

Now, employers have to be alert to the fact that the DOL could then use that same *Kellogg* language against them to argue that they unlawfully rejected U.S. workers.In *JP Morgan Chase & Co*, 2011-PER-00635, BALCA upheld the CO's denial of the PERM application under supervised recruitment because the employer did not list the addresses of the U.S. worker applicants in the body of its recruitment report as required under the supervised recruitment regulations at 656.21(e)(3) despite the fact that the employer had submitted copies of all the resumes which listed the U.S. addresses of the applicants.