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BALCA EN BANC ON WHETHER THE ADDITIONAL RECRUITMENT STEPS FOR PROFESSIONAL OCCUPATIONS MUST COMPLY WITH 656.17(F)

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BALCA (Board of Alien Labor Certification Appeals) has been examining the issue of whether a Certifying Officer (CO) may deny an Application for Permanent Employment Certification (ETA Form 9089) for 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). In an *en banc* decision, *Symantec Corporation,* 2011-PER-01856 (Jul. 30, 2014), BALCA held that the additional forms of recruitment do not have to comply with 20 C.F.R. § 656.17(f).

The filing of a labor certification with the Department of Labor (DOL) is often the first step when an employer sponsors a foreign national for permanent residency. The purpose of the labor certification process, known today as PERM, is to ensure that the employer has tested the US labor market for qualified and available US workers at the prevailing wage rate prior to filing an I-140 petition to classify the foreign national under either the employment second preference or the employment third preference. If the application is for a professional occupation, the employer must conduct the recruitment steps within 6 months of filing the ETA Form 9089. Two of the steps, a job order and two print advertisements, are mandatory for all applications involving professional occupations, except applications for college or university teachers selected in a competitive selection and recruitment process as provided in § 656.18. Then, under 656.17(e)(1)(ii), the employer must also select three additional recruitment steps from the alternatives listed in paragraphs 656.17(e)(1)(ii)(A)-(J).

Section 656.17(f) lists the advertising requirements for advertisements placed

in newspapers of general circulation or in professional journals. These requirements are that these ads must name the employer; direct applicants to report or send resumes, as appropriate for the occupation, to the employer; provide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought; 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; not contain a wage rate lower than the prevailing wage rate; not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089; and not contain wages or terms and conditions of employment that are less favorable than those offered to the alien. The regulations do not address what content must be included in advertisements placed as additional recruitment steps.

In a previous blog, I briefly discussed BALCA's decision in *Matter of Credit Suisse Securities*, 2010-PER-103 (Oct. 19, 2010) that the regulations at 656.17(f) govern all forms of advertisements including the additional recruitment steps. In that case, BALCA held that the advertisements must have the purpose and effect of appraising US workers of the job opportunity and in order for this to happen, the additional recruitment steps must contain sufficient information about the position.

In *Symantec Corporation*, 2011-PER-01856 (Feb. 11, 2014) the question was raised again. In this case, the employer filed an ETA Form 9089 for the position of "Financial Programmer Analyst." The application was audited and the employer timely responded to the audit. The CO then denied the application because the employer's advertisement placed on a job search website, as one of the three additional forms of recruitment required for professional occupations, contained a travel requirement not included in the ETA Form 9089 in violation of 656.17(f)(6) in that it contained job requirements or duties which exceeded the job requirements or duties listed on the ETA Form 9089.

The employer filed a request for reconsideration and argued that the requirements of 656.17(f), upon which the CO relied in issuing the denial, are limited to advertisements placed in newspapers and professional journals, and do not apply to additional recruitment steps found in section 656.17(e)(1)(ii). The employer also cited the Preamble to the regulations, which states that the additional recruitment steps need only advertise the *occupation* involved in the application, and not the specific job opportunity. The employer also argued that

its website advertisement was for multiple positions and the travel requirement expressed by the phrase "may be required to be available at various, unanticipated sites throughout the United States" did not create a travel requirement for all of the multiple open positions listed in the advertisement. The employer stressed that the use of the term "may" indicated that travel "might or might not be part of the job."

The CO denied the employer's request for reconsideration and forwarded the case to BALCA arguing that US workers could consider the phrase travel "may be required" to be a term and condition of employment which could have deterred them from applying for the position. A BALCA panel of three administrative law judges decided the case. They acknowledged *Credit Suisse* but noted that it was not an en banc decision and that BALCA, while it recognized, from a policy standpoint, that applying the content requirements to additional recruitment steps would further ensure that the job opportunity is open and available to US workers, does not have the authority to read into the regulations an additional requirement not stated therein. BALCA reversed the CO's denial of the ETA Form 9089 and held that based on the plain language of the regulations and the regulatory history, the advertising content requirements of 656.17(f) do not apply to the additional recruitment steps.

Unwilling to accept this, the CO petitioned for en banc review arguing that the panel's holding conflicted with BALCA precedent and that en banc review was necessary to maintain uniformity in the Board's decisions. BALCA granted the CO's petition, vacated the panel's decision, ordered a rehearing *en banc,* and permitted the parties to file supplemental briefs. BALCA *en banc* considered the specific question of whether advertisements placed to fulfill the additional recruitment steps must also comply with the detailed content requirements listed in 656.17(f).

BALCA *en banc* pointed out that the regulations explicitly identify three situations in which an employer must comply with the advertising requirements in 656.17(f): (1) 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); (2) 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 (3), when an employer posts a Notice of Filing

announcing its intent to file an ETA Form 9089 under the basic labor certification process, § 656.10(d)(4). BALCA noted that in all three situations the regulations at 656.17(f) were cross-referenced and that no such cross reference exists in the regulations governing additional recruitment for professional occupations suggesting that the DOL did not intend to impose the content requirements on all types of advertisements.

BALCA *en banc* also referenced the Preamble to the PERM regulations. When the DOL proposed amending the labor market test to include three additional forms of recruitment, it received a number of comments opposing the proposal. Commenters were concerned that additional recruitment steps would be costly and unduly burdensome. The DOL responded to these concerns and pointed out that the additional recruitment steps represent real world alternatives and only require employers to advertise for the occupation involved in the application rather than for the job opportunity involved in the application as is required for the newspaper advertisement. The Board pointed out that this clearly shows that the DOL was seeking to alleviate the burden of requiring three additional recruitment steps. BALCA *en banc* expressly disagreed with the conclusion in *Credit Suisse* and found that unambiguous regulations must be interpreted in a manner that is consistent with the common understanding of the terms used.

BALCA *en banc* further pointed out that if the CO does not believe that the existing recruitment regulations provide for an adequate test of the labor market then the recruitment regulations may be amended through a new notice and comment rulemaking process. But the CO may not disregard the plain language of the regulations for policy or other considerations. The *en banc* panel reversed the CO's denial decision and directed the certification of Symantec's ETA Form 9089.

For PERM practitioners, what is the practical take away lesson from *Symantec*? Does the fact that 656.17(f) does not apply to the additional forms of recruitment mean that these additional forms of recruitment can indeed contain job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089? Can the three additional forms of recruitment contain requirements that are more restrictive than the minimum requirements listed on the ETA Form 9089? In footnote No. 4 to its decision in Symantec BALCA en banc mentioned that the CO, in his argument, relied 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, and stated that this conclusion is not binding upon the *Symantec en banc* Board 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. This could be seen as somewhat confusing to PERM practitioners. How can BALCA hold that 656.17(f) does not apply to the additional recruitment steps but then fail to address the *East Tennessee en banc* decision stating that the additional recruitment steps must abide by 656.17(e)? Which *en banc* decision governs?

I think that PERM practitioners ought not to read too much into *Symantec's* footnote No. 4. The en banc panel in *Symantec* points out that recruitment must be conducted in good faith and that the Board believed that the employer had indeed done this. The Board paid much attention to the fact that the employer's additional recruitment was for multiple positions with varying requirements and that the employer had indicated the word "may" at the start of each sentence thereby indicating that not all of the requirements applied to each of the multiple positions. The Board stated that the CO does not have to certify an application if he has reason to believe that the employer's recruitment efforts were not sufficient to warrant certification and the CO may instead exercise his broad discretion to order supervised recruitment under 20 C.F.R. §656.21. Accordingly, pursuant to the *en banc* decision in *Symantec*, while the three additional forms of recruitment do not have to comply with 656.17(f) and may be significantly broader or perhaps substantially briefer than the mandatory advertisements and the Notice of Filing, there nevertheless cannot be any information listed on these additional advertisements that is not included on the ETA Form 9089 as this would indicate bad faith on the part of the employer and possibly trigger supervised recruitment.

Viewing *Symantec* more broadly, BALCA clearly articulated that 656.17(f) was unambiguous, thus precluding the DOL from interpreting the regulation more broadly and insisting that the additional recruitment steps also conform to the requirement for the mandatory advertisements and the Notice of Filing. Pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997), courts are required to give deference to an agency's interpretation of its own ambiguous regulation unless such an interpretation is clearly erroneous. By holding that 656.17(f)'s plan language is unambiguous, the DOL will not be able to take cover under *Auer* by

interpreting its regulations willy-nilly to the detriment of employers who recruit in good faith based on the plain language of a regulation but are then snared by the DOL's different interpretation of its regulation. *Auer* was similarly criticized by Justice Scalia in his dissent in *Decker v. Northwest Environmental Defense Center.* If the DOL desires that the additional recruitment steps conform to the requirements for the mandatory advertisements and Notice of Filing, then it ought to amend the regulation through notice and comment so that it clearly imposes such a requirement.