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THE LONG, WINDY, BUMPY, AND OUTRAGEOUS ROAD TO LABOR CERTIFICATION FEAT. TWO SUNDAY ADS

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It's no secret that employers wishing to sponsor a foreign national for permanent employment must jump through many bureaucratic hoops that Congress once envisioned would ensure that foreigners are not stealing jobs from U.S. workers. One of those bureaucratic hoops in the PERM labor certification process is conducting a series of recruitment steps. In addition to conducting two mandatory recruitment steps, including placing a job order with the State Wage Agency and placing two print advertisements on two different Sundays in a paper of general circulation, employers must also select any three out of ten additional recruitment steps that are outlined in the regulations. Although well intentioned and enacted to ensure that employers first demonstrate that they were unable to find qualified U.S. workers, the Department of Labor ("DOL") continues to use these very technical requirements as a pretext to deny labor certifications, as was the case in *Matter of Kolla Soft, Inc., 2018-PER-00184 (March 30, 2022)*.

In *Matter of Kolla,* an Arizona based employer filed a PERM labor certification sponsoring a foreign worker for permanent employment for the position of software engineer. The DOL denied certification on the grounds that the employer failed to comply with the mandatory recruitment step of placing two Sunday ads because the newspaper *East Valley Tribune* used by the employer "is not a newspaper of general circulation in the area of intended employment most likely to bring responses from available U.S. workers." Pursuant to 20 C.F.R. § 656.17(e)(1)(i)(B), the employer must place "an advertisement on two different Sundays in the newspaper of general circulation in the area of

intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, willing, qualified, and available U.S. workers."

The DOL pointed to the newspaper's "About Us" section on its website which stated that the newspaper is delivered to selected areas in Mesa, Gilbert, Chandler, Tempe and Queen Creek only and not available for delivery or pick up in the Phoenix or Scottsdale area. On reconsideration, the employer argued that the *East Valley Tribune* "is distributed through Maricopa County, the largest populated county in Arizona which obviously includes the county's two largest cities, Phoenix and Scottsdale." According to the employer, it was a given that the newspaper would be available in the newspaper's two largest cities in its area of circulation in Maricopa County. In support, the employer submitted an affidavit from the publisher of the *East Valley Tribune* stating that its newspaper is available for home delivery and in the cities of Phoenix and Scottsdale, Arizona, and is a newspaper of general circulation throughout Maricopa County, Arizona. The employer also urged the DOL to consider the fact that the *East Valley Tribune* has placed numerous PERM advertisements and that its status as a newspaper of general circulation has never been previously questioned. The employer even submitted evidence that the newspaper updated its "About Us" section on its website and that it now includes Scottsdale as an area of home delivery and retailer distribution as well as evidence that the *East Valley Tribune* is the third largest newspaper in Arizona.

Unconvinced by the employer's arguments and mountains of persuasive evidence, the DOL affirmed the denial on reconsideration. According to the DOL, the regulations require "that the mandatory advertisements appear in the newspaper most appropriate to the occupation and the workers most likely to apply for the job opportunity," and the *East Valley Tribune* was not the most appropriate newspaper to advertise the job opportunity because with three day per week publishing and a circulation of 97,573 copies, it was the third largest newspaper in the area of intended employment. Upon administrative review, the Board of Immigration Appeals ("BALCA") found that the employer provided sufficient evidence on reconsideration demonstrating that the *East Valley Tribune* is a newspaper of general circulation in the area of intended employment. It ultimately affirmed the denial, however, due to the employer's failure to state why the *East Valley Tribune* is the "*most appropriate* to the occupation and the workers likely to apply for the job opportunity and *most*

likely to bring responses from able, willing, qualified, and available U.S. workers" (emphasis included). Absent such evidence, the BALCA found that the record demonstrated that *The Arizona Republic*, a daily newspaper in Phoenix, Arizona published seven days a week with circulation of 321,600 copies, rather than the *East Valley Tribune*, which is published three days each week and a circulation of 97,563 copies, "is the most appropriate newspaper to advertise the job opportunity and most likely to solicit responses from U.S. workers." Similarly, in a prior decision, *Matter of Intercontinental Enterprises, Inc.*, 2011-PER-02756 (July 30, 2012), the BALCA similarly concluded that the employer had not satisfactorily compiled with the Sunday ad requirement because even though it placed the ads in *The Washington Examiner* which had a "reasonably large circulation", the employer failed to establish that it was the best choice for the job at issue.

Business immigration practitioners who have failed to consider the significance of the regulation's requirement that Sunday ads be placed, not only in a newspaper of general circulation but also, in a newspaper "most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, willing, qualified, and available U.S. workers" may be feeling unsettled by the decision in *Matter of Kolla*. It appears that the employer in *Matter of Kolla* was no stranger to the PERM labor certification process and had placed ads in this particular newspaper before without issue. Perhaps this particular labor certification was intended for a position that the employer had never filled before or maybe this unlucky employer's labor certification simply fell onto the desk of a particularly picky certifying officer at the DOL. Admittedly, the BALCA does seem to have a point given that there exists a daily newspaper in Phoenix which is published more frequently and circulated to a higher volume of readers. Maybe if the employer had proffered a good enough reason for choosing the newspaper that it did to advertise for the position, for instance, because that particular newspaper was read by a higher number of U.S. workers seeking software engineer positions, the case would have turned out differently. By contrast, the BALCA held in *Matter of Gallup McKinley Schools*, 2013-PER-03215 (Oct. 3, 2017), that ads placed in local or ethnic newspapers, which employers may place to satisfy one of the additional recruitment steps, need not comply with the same standard as the Sunday ad. In that decision, the BALCA concluded that because the regulation at 20 C.F.R. § 656.17(e)(1)(ii)(I) does not contain similar to § 656.17(e)(1)(i)(B)(1),

i.e., language requiring that the ad be placed in a newspaper "most likely to bring responses from able, willing, qualified, and available U.S. workers", it does not follow that an employer must abide by the "most likely" standard when selecting a local or ethnic newspaper. But still, if the employer places such an ad in bad faith, the DOL can deny the labor certification under the catch all provision at 20 C.F.R. § 656.24(b)(2) which provides, in pertinent part, that the "Certifying Officer makes a determination either to grant or deny the labor certification on the basis of whether or not: . . . here is in the United States a worker who is able, willing, qualified, and available for and at the place of the job opportunity."

As business immigration attorneys based in New York City with corporate clients in New York City, we hardly ever see employers place Sunday ads in newspapers other than the *New York Times*. There is no doubt that the *New York Times* is a newspaper of general circulation in New York, the tri-state area, and maybe even the entire United States, but the decision in *Matter of Kolla* has left us wondering whether the *New York Times* is always the most appropriate newspaper. In light of this decision, we cannot forget to take into account that Sunday ads must not only be placed in newspapers of general circulation but also in newspapers that are *most appropriate* to the occupation and the workers likely to apply for the job opportunity and *most likely* to bring responses from able, willing, qualified, and available U.S. workers. While an ad in the New York Times may be the most appropriate for most professional positions, an ad for the position of a welder, for instance, may be more appropriately placed in a different newspaper of general circulation in New York, such as the New York Post or the Daily News.

At the same time though, we cannot help but balk at this decision and the government's strict reading of the regulations and its pretextual use of them to close the door on employment of foreign workers every chance they get. As lawyers, we understand and appreciate the need to comply with the letter of the law, but also cannot help but wonder if the government lives under a rock. While we agree that U.S. workers should be given first dibs on available jobs, we also recognize and see firsthand how tight the U.S. job market continues to be and that there are plenty of jobs to go around for both U.S. and foreign workers. The regulations have been carefully crafted to protect the very important obligation that employers first attempt to find U.S. workers by requiring, not one, not two, not three, but rather, five recruitment steps, thus

ensuring that available and qualified U.S. workers will be informed of the job opportunity before a labor certification is filed. Yet, even in today's modern, digital age, the government, with its rose-colored glasses, continues to place an unnecessarily high importance on two Sunday ads as if today's technologically savvy workforce still flocks to the newsstands each Sunday to look for open job positions. The reality of searching for a job is markedly different today than what the legislators envisioned when they drafted the regulations. It also bears reminding that the labor certification process is not designed for employers to hire U.S. workers. Although the employer is required to conduct a good faith test of the U.S. labor market, if a qualified U.S. worker does apply, the employer is not required to hire the U.S. worker and is only precluded from filing the labor certification. Of course, based on the lessons learned from the Facebook settlement, if the employer does not hew closely to how it would normally recruit for U.S. workers, the Department of Justice's Civil Rights Employee and Immigrant Rights Section can accuse an employer with discriminatory practices under INA § 274B(a)(1).

While we understand that compliance with the law, however absurd, is necessary, and will continue to advise clients to purchase ad space in newspapers, we also disagree with the government's reluctance to ease up on these very technical, outdated requirements. Instead of finding insufficiencies between a newspaper with a circulation of 321,600 copies that is published seven days a week and a newspaper with a circulation of 97,573 copies that is published three days a week, the regulation's purpose may be better served by the government's focus on how much traffic a particular job search website gets, for instance. The government's focus on these insignificant details, on the ground that they are accurate measures of how likely workers are to apply for a job opportunity, is truly misguided. Instead of spending time and resources to review cases like *Matter of Kolla*, and not simply granting labor certifications when an employer facially meets all requirements, the government may stand to benefit and get a much needed wake up call by obtaining statistics on how many U.S. workers actually read the Sunday paper to find work. Until that happens, denials of labor certifications like that in *Matter of Kolla* will continue and will further confirm our suspicion that the government's primary concern is not that job opportunities are taken away from U.S. workers but that the road to permanent employment remain rampant with obstacles.

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