



Issue Date: 24 April 2014

**BALCA Case No.:** 2011-PER-02871  
**ETA Case No.:** A-08330-09117

*In the Matter of:*

**DELTA SEARCH LABS, INC.,**  
*Employer, Pro Se*

*on behalf of*

**SHAMA JAFFREY,**  
*Alien.*

**Certifying Officer:** William Carlson  
Atlanta National Processing Center

**Appearances:** Gary M. Buff, Associate Solicitor  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

**Before:** McGrath, Geraghty, Calianos  
Administrative Law Judges

**TIMOTHY J. McGRATH**  
Administrative Law Judge

**DECISION AND ORDER**  
**REVERSING DENIAL OF CERTIFICATION**

This matter arises under section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). For the reasons set forth below, we reverse the denial of the Employer’s Application for Permanent Employment Certification.

**BACKGROUND**

On December 4, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Marketing Manager.” (AF 1, 247-59). On September 24, 2009, the CO issued an Audit Notification and on October 19, 2009, the Employer requested an extension of time to submit materials for the Audit

Notification; this request was granted on November 2, 2009. (AF 242-46). The Employer provided their response to the Audit Notification on November 24, 2009. (AF 54-241). On July 22, 2011, the CO denied the application for two reasons, including the Employer's improper use of a recruitment medium required by 20 C.F.R. § 656.17(e)(1)(i)(B) as an additional recruitment step necessitated for recruiting professional occupations within 20 C.F.R 656.17(e)(1)(ii). (AF 52-53).<sup>1</sup>

On February 8, 2011, the Employer submitted a request for reconsideration. (AF 18). On August 22, 2011, the Employer submitted a second Request for Reconsideration arguing they had satisfied the requirement of conducting three additional recruitment steps by placing one advertisement in a local daily newspaper, *The Boston Globe*, in addition to placing the listing on a job search website, and using the employee referral program with incentives. (AF 18-51; AF 4-17).<sup>2</sup> The Employer argues that the PERM regulations do not prohibit an employer from using the same newspaper as both a newspaper of general circulation and a local newspaper. (AF 5). The Employer further states that although the same newspaper was used, the Sunday and Tuesday editions of the newspaper reached different populations, as evidenced by their circulation figures.<sup>3</sup> (AF 5-6). The Employer chose *The Boston Globe* as a local paper based on a careful analysis of the local publications most likely to produce responses from able, willing, and qualified U.S workers. (AF 5-6). The Employer argues *The Boston Globe* is an appropriate medium for both the mandatory requirement and the additional recruitment step, as the paper's daily circulation caters locally to the city of Boston and surrounding communities with an average daily circulation more than 44% greater than its closest competitor, *The Boston Herald*. (AF 5). The Employer further compared *The Boston Globe*'s 200,000 daily circulation to other local papers, including *The Brookline Tab*, *The Cambridge Chronicle*, and *The Somerville Journal*, the largest of which has a daily circulation of only 15,500 readers. (AF 5). Comparatively, *The Boston Globe*'s Sunday circulation is 356,652 readers, an increase of more than 150,000 readers over its daily circulation. (AF 6).

On September 19, 2011, the CO forwarded the case to BALCA. (AF 1-2). In the CO's transmittal letter, he again stated that denial is valid under 20 C.F.R. § 656.17(e)(ii), for the Employer's failure to provide three additional recruitment steps. (AF 1). The CO found that although the employer attempted to satisfy one of the additional three recruitment steps by placing the advertisement in a local daily newspaper, by using the same advertising medium for the mandatory requirement and additional step, the Employer duplicated a previously used

---

<sup>1</sup> Denial was also made based on the Employer's failure to provide dated copies of employer notices or memoranda advertising an employee referral program with incentives and what those incentives are, nor did they provide proof that the job announcement was provided to employees. (AF 53). In its request for reconsideration, the Employer explained that during the audit they provided the CO with a copy of the Employee Referral policy, which states the incentives and date, and additionally stated the company had provided a certified statement indicating the posting had been visible to employees and furthermore made reference to the posting's eligibility under the referral program. (AF 7). The CO accepted the employer's information concerning the employee referral program. (AF 1).

<sup>2</sup> Sunday advertisements placed on September 21 and September 28, 2008; Tuesday advertisement placed on September 23, 2008. (AF 5).

<sup>3</sup> As of 2011, *The Boston Globe* reported a circulation of 219,214 for their Daily newspaper and 356,652 for the Sunday Edition. (AF 5-6).

mandatory recruitment step which, by definition, cannot be considered an *additional* recruitment step. (AF 1).

On December 30, 2011, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on January 17, 2012. The CO did not file a Statement of Position. On February 15, 2012, the Employer requested a thirty day extension, which was approved in the same month. On December 16, 2013, BALCA issued an Order Requiring Certification on Mootness. On January 6, 2014, the Employer certified that the job identified on the PERM application is still open and available and that the alien identified in the PERM application remains ready, willing, and able to fill the position.

## **DISCUSSION**

When an employer files an application for labor certification, it must attest that it conducted certain recruitment steps prior to filing its application. 20 C.F.R. § 656.17(e). If the position on the application is for a professional occupation, pursuant to 20 C.F.R. § 656.17(e)(1), the Employer must conduct two mandatory recruitment steps (placement of a job order and two print advertisements in a newspaper of general circulation or professional journal), and select three additional recruitment steps. 20 C.F.R. § 656.17(e)(1). These additional three recruitment steps can be fulfilled using the list of ten alternatives as provided under 20 C.F.R. § 656.17(e)(1)(ii)(A)-(J). One of the options is to place an advertisement in a local or ethnic newspaper, and the regulations provide that this recruitment step can be documented by providing a copy of the page in the newspaper that contains the employer's advertisement. 20 C.F.R. 656.17(e)(1)(ii)(I).

In the instant case, the CO denied the application because the Employer's additional local advertisement was published in a weekday edition of *The Boston Globe*, the same newspaper the Employer used to published its mandatory Sunday newspaper advertisements. The CO does not argue that *The Boston Globe* is not both a local newspaper and a newspaper of general circulation. Rather, the CO merely states that the same newspaper cannot be used to meet both recruitment steps. The Employer argues that the regulations do not contain language disallowing the use of the same recruitment medium to satisfy the additional recruitment step. (AF 5). The Employer avers that their use of the same newspaper during two different circulation periods (weekday and Sunday) satisfies both the mandatory recruitment requirement and the additional step for professional occupations.

The regulations require each mandatory recruitment step and additional recruitment step be separate and distinct. Although not binding, the Department's permanent labor certification program FAQs, posted on the Office of Foreign Labor Certification's website, offer guidance and provide:

Generally, all the required steps must be different. Steps can not be duplicated nor can one step be used to satisfy two requirements, except in the case of copies of web pages generated in conjunction with the newspaper advertisements which can serve as documentation of the use of a web site other than the employer's.

For example, the employer cannot count two advertisements in a local and/or ethnic newspaper, or two postings on a web site, as two steps.<sup>4</sup>

In clarifying why advertisement mediums should be distinct in order to be counted as additional steps, the FAQs reiterate that the use of three additional recruitment steps ensures that the greatest number of able, willing, qualified, and available U.S. workers are given notice of the job opportunity.

**Why must the advertisement medium be different in order for advertisements to be counted as additional steps? For instance why is it not permissible to count advertisements on two separate web sites as two steps or to place a third advertisement in the same newspaper of general circulation rather than using a local or ethnic publication and have it count as an additional step?**

As with all the recruitment requirements, the purpose of requiring the employer to use three additional recruitment steps is to ensure that the greatest number of able, willing, qualified, and available U.S. workers are apprised of the job opportunity. It should be noted that each of the steps may target slightly different applicant populations. Using at least three of the additional steps normally used by businesses to recruit workers is a means of apprising a greater number of U.S. applicants of the job opportunity and more adequately substantiates an employer's claim there are no available U.S. workers for the job offer.<sup>5</sup>

However, we are not convinced that the Employer's advertisements, in this instance, served in a manner hostile to the intent of the regulations. The FAQs state that a third advertisement in a newspaper of general circulation cannot be substituted for an advertisement in a local or ethnic newspaper, however, they do not address the issue of whether one publication could, based on its daily and weekend circulation figures, serve as both a local and general circulation publication.

Furthermore, the Employer is correct that the regulations do not specifically prohibit an employer from using the same newspaper as both a newspaper of general circulation and a local or ethnic newspaper, provided the newspaper satisfies both categories. We find nothing in the preambles to the Proposed Rule or the Final Rule supporting the CO's position that the same newspaper cannot be both general circulation and a local newspaper. The Proposed Rule did not include local and ethnic newspaper advertisements among the additional recruitment step options. Proposed Rule, *Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States*, 67 Fed. Reg. 30466 (May 6, 2002). In response to comments received during rulemaking, the Employment and Training Administration ("ETA") added this option to the Final Rule with little explanation, stating only that local and ethnic newspapers can be used as an additional recruitment step "to the extent they are appropriate for the job opportunity." Final Rule, *Labor Certification Process for the*

---

<sup>4</sup> See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#profno2>; 20 C.F.R. 656.17(e)(1)(ii)(C).

<sup>5</sup> See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#adcont6>

*Permanent Employment of Aliens in the United States*, 69 Fed. Reg. 77326, 77345 (Dec. 27, 2004). The regulatory history does not contain any explanation regarding how such determination might be made.

The Employer in this case is not trying to use one of its two mandatory Sunday advertisements to satisfy the requirement of a local newspaper advertisement; rather, it placed a third advertisement in what it purports, based on circulation data, to be a local newspaper. Again, as the CO did not challenge the Employer's assertion that *The Boston Globe* is both a newspaper of general circulation and a local newspaper, it would be inappropriate for this Panel to do so now. Furthermore, the Employer presented at least some information to the CO supporting its contention. Employer avers that *The Boston Globe*, with a Sunday circulation of 356,652 readers and a daily circulation of 219,214 readers is a newspaper of general circulation on Sundays and a local newspaper during the week. This Panel makes no findings as to whether *The Boston Globe* is in fact a newspaper of general circulation as well as a local paper, we merely hold that in this instance the CO could not have denied the Employer's application for failure to conduct an additional recruitment step without first determining that *The Boston Globe* was not a local or ethnic newspaper.

Therefore, as we find that Employer satisfied both the mandatory requirement to advertise twice in a newspaper of general circulation and the separate additional requirement to advertise in a local or ethnic newspaper, we reverse the CO's denial of certification.

### **ORDER**

It is **ORDERED** that the denial of labor certification in this matter is hereby **REVERSED**.

For the Panel:

**TIMOTHY J. McGRATH**  
Administrative Law Judge

Boston, MA

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.