

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 May 2012

BALCA Case No.: 2012-PER-00558
ETA Case No.: A-09267-65896

In the Matter of:

SYMRISE INC.,
Employer

on behalf of

THOMAS JOST MANGOS,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Marc I. Walsh, Esquire
Barst Mukamal & Kleiner LLP
New York, New York
For the Employer

Gary M. Buff, Associate Solicitor
Clarette H. Yen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson and Vittone**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
VACATING 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.

BACKGROUND

On September 25, 2009, the Certifying Officer (“CO”) accepted for filing the Employer’s application for permanent labor certification for the professional occupation of Engineering Manager in Teterboro, New Jersey. (AF 296-308). The Employer stated that it placed two Sunday newspaper advertisements in The Record on June 28, 2009 and July 5, 2009 and that as one of its three additional recruitment steps, it placed an advertisement with a local or ethnic newspaper on July 1, 2009. (AF 299-300). On May 6, 2010, the CO issued an Audit Notification directing the Employer to provide copies of its recruitment documentation. (AF 293-295).

After obtaining an extension, the Employer filed its audit response materials on July 2, 2010. (AF 39-292). Included in the Employer’s audit response materials were copies of newspaper advertisements placed in The Record/Herald News on June 28, 2009 and July 5, 2009. (AF 70, 72). The Employer also included an advertisement and an affidavit from North Jersey Media Group, Inc., stating that the Employer’s advertisements were published in The Record, “a newspaper of general circulation and published in Hackensack, in the county of Bergen and circulated in Bergen, Passaic, Hudson, Morris and Essex Counties” on June 28, 2009, July 1, 2009, and July 5, 2009. (AF 73).

The CO denied the Employer’s application on April 15, 2011. (AF 37-38). The CO provided the following reason for the denial:

For professional occupations, the additional recruitment steps provision requires the employer provide three recruitment steps “in addition” to the mandatory steps, i.e., the job order and the two print advertisements. The employer has used the same recruitment medium The Record to publish both the required advertisements in a newspaper of general circulation and the additional recruitment advertisement placed in a local newspaper. The duplication of a previously used recruitment

step cannot, by definition, be considered as an additional recruitment step. The use of additional recruitment steps are used as mandatory alternatives to the basic recruitment process for professional occupations. As with all the recruitment requirements, the purpose of requiring the employer to use three additional recruitment steps is to ensure that the greatest numbers 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 application 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 [that] there are no available U.S. workers for the job offer.

(AF 38). The regulatory authority cited for the denial was 20 C.F.R. § 656.17(e)(ii), which states, in part, "The employer must select three additional recruitment steps from the alternatives listed in paragraphs (e)(1)(ii)(A)-(J) of this section." *Id.*

The Employer filed a request for reconsideration on May 16, 2011, contending that its weekday advertisement in The Record is an additional recruitment step distinct from its Sunday advertisements in The Record. (AF 2-36). The Employer noted that DOL considers newspaper advertisements that are published both electronically and in the Sunday classifieds to be separate recruitment steps, even though the advertisements are associated with the same newspaper. The Employer also stated that in 2008, The Record had the highest daily circulation among 26 different local newspapers. (AF 4). The Employer submitted documentation showing that the circulation of The Record/Herald News between Wednesday and Saturday was 180,715, while the Sunday edition of The Record/Herald News was 196,851. (AF 10). The documentation showed that the paper's circulation is in Bergen and Passaic County. *Id.* In contrast, the South Bergenite, which is a local newspaper in Bergen County,¹ had a circulation of 26,327. *Id.*

The CO denied the Employer's request for reconsideration on November 17, 2011, stating that the regulations "distinguish mandatory recruitment conducted through a newspaper of general circulation from additional recruitment conducted through a local or ethnic newspaper." (AF 1). The CO noted that the Office of Foreign Labor Certification's ("OFLC") Frequently Asked Questions ("FAQs") clarify that employers may not place a third

¹ Official notice is taken that Teterboro, New Jersey is located in Bergen County, New Jersey. 29 C.F.R. § 18.45.

advertisement in the same newspaper of general circulation that the employer used to conduct mandatory recruitment and also count it as an additional recruitment step. *Id.*

The CO forwarded the appeal file to BALCA, and the Board issued a Notice of Docketing on March 8, 2012. The Employer filed a Statement of Intent to Proceed on March 15, 2012, and an appellate brief on April 19, 2012.² In its brief, the Employer argues that neither the PERM regulations nor any agency guidance prohibit an employer from using the same newspaper as both its newspaper of general circulation and its local newspaper, to the extent that the newspaper fits both categories. The Employer also argues that although the same newspaper was used, that the Sunday newspaper advertisements and the Wednesday newspaper advertisement reached slightly different populations. The Employer contends that because of The Record's wide readership, using The Record as a local newspaper ensured that the greatest number of able, willing, qualified, and available U.S. workers were apprised of the job opportunity. Additionally, the Employer notes that DOL considers a newspaper advertisement that is published both in print form and on the newspaper's website to be both a newspaper advertisement and a website advertisement. The Employer asserts that this principle of "dual-use" of a newspaper advertisement is equally applicable in the context of a local newspaper advertisement.

The CO filed a brief on April 24, 2012, asserting that the three additional recruitment steps at Section 656.17(e)(1)(ii)(A)-(J) were never intended to overlap with the mandatory recruitment steps. The CO cites language in the preamble to the Proposed Rule explaining that under the new PERM system, an employer would be "required to select three additional pre-filing recruitment steps among commonly used professional recruitment channels, such as job fairs, job search web sites and private employment agencies." The CO notes that while it recognizes a newspaper advertisement that is posted on the newspaper's website as a website advertisement, the CO states that this is the only such "dual-use" exception. In addition, the CO contends that the fact that The Record may have higher circulation rates than the other local Bergen County newspapers is irrelevant, because the regulations do not consider circulation rates

² The Employer also petitioned for en banc review when it filed its appellate brief. We decline to review this matter en banc at this time, but will permit the parties the opportunity to file a petition for en banc review upon issuance of this decision.

a factor in determining the appropriateness of the local or ethnic newspaper selected for the additional recruitment step.³

DISCUSSION

An employer that wishes to sponsor a foreign worker for a professional occupation must conduct several domestic recruitment steps prior to filing its application for permanent labor certification to ensure that there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work. An employer must conduct the mandatory recruitment steps of placing a job order with the State Workforce Agency (“SWA”) serving the area of intended employment and must place an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment. 20 C.F.R. § 656.17(e)(1)(i)(A),(B). Additionally, an employer must conduct three additional recruitment steps from ten options provided for under the regulations. 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).

The CO denied this application because the Employer’s local advertisement was published in The Record, the same newspaper where the Employer published its Sunday newspaper advertisements. However, the CO does not argue that The Record does not qualify as both a newspaper of general circulation and a local newspaper. Rather, the CO’s position is simply that employers placing a newspaper advertisement in a local newspaper cannot use the same newspaper as its general circulation advertisement, regardless of whether the newspaper can properly be considered both a newspaper of general circulation and a local newspaper. The FAQ response upon which the CO appears to rely provides:

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

³ We note that while the CO’s brief argued that the CO correctly denied the Employer’s application, the CO requested that BALCA remand the Employer’s application to the CO. In light of the content of the CO’s brief, this request may have been an error. Nevertheless, because we find that the CO has not made an actual finding regarding whether The Record can properly be considered both a newspaper of general circulation and a local newspaper, we find that remanding this matter to the CO is the most appropriate course of action.

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 recruitment step?

As with all the recruitment requirements, the purpose of requiring the employer to use three additional recruitments 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.⁴

We note that an FAQ response is not a regulation and therefore cannot impose substantive requirements on an employer. That being said, we do not necessarily interpret this FAQ response to be in conflict with the additional recruitment step regulations. This FAQ response merely reiterates that an employer cannot place three advertisements in a newspaper of general circulation, rather than placing two advertisements in a newspaper of general circulation and one advertisement in a local or ethnic newspaper. This FAQ response does not reach the issue of whether a local newspaper can ever be one and the same as a newspaper of general circulation. As such, it is not clear to us that this FAQ response is even applicable to the situation in the case before us.

Moreover, we find nothing in the preambles to the Proposed Rule or the Final Rule to support the CO's position. 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* ["PERM"], 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 Permanent Employment of Aliens in the United States* ["PERM"], 69 Fed. Reg. 77326, 77345 (Dec. 27, 2004). The regulatory history does not contain any explanation regarding how such determination might be made.

⁴ <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#adcont6> (last visited Apr. 24, 2012).

In the case at bench, the CO never challenged the Employer's position that The Record is both a newspaper of general circulation and a local newspaper. Based on the information in the record, it would appear that The Record, with a circulation of 196,851 on Sundays in Bergen and Passaic Counties, is a newspaper of general circulation where the job is located. The CO contends that it is contrary to the intent behind the additional recruitment steps to permit the Employer to use the same newspaper for both its Sunday advertisements and its local advertisement. The CO also dismisses The Record's high circulation rate as irrelevant, asserting that Section 656.17(e)(1)(ii) does not consider circulation rates to be a factor in determining the appropriateness of the local or ethnic newspaper. While this is true, the regulations are wholly devoid of *any* factors used in determining whether a newspaper is a "local" newspaper. A reasonable interpretation of the meaning of "local" newspaper may include newspapers that are circulated on a city-wide, county-wide, or perhaps even a state-wide basis, but excludes newspapers that are circulated nationwide. As The Record is published and circulated in Bergen County, it appears that it could be considered a local newspaper.

The Employer in this case is not attempting to use one of its two Sunday advertisements to meet the requirements of its local newspaper advertisement; rather, it placed a third advertisement in what it purports to be both a newspaper of general circulation and a local newspaper.⁵ There has been no finding by the CO that The Record is either not a newspaper of general circulation or not a local newspaper. Accordingly, we vacate the CO's denial and remand for the CO to determine whether The Record meets the criteria of both a local newspaper and a newspaper of general circulation.

⁵ We do not view the Employer's recruitment to be in conflict with another OFLC FAQ response that provides that recruitment steps cannot be duplicated. See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#profno2> (last visited Apr. 24, 2012). The Employer in this case is not attempting to use one of its two Sunday advertisements in lieu of its local newspaper advertisement; rather, the Employer has placed a Wednesday advertisement in a newspaper that may qualify as both a newspaper of general circulation and a local newspaper.

ORDER

IT IS ORDERED that the Certifying Officer's denial of labor certification in the above-captioned matter is **VACATED** and **REMANDED** to the Certifying Officer for further processing consistent with this Decision.

For the panel:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

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.