U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 16 November 2012

BALCA Case No.: 2012-PER-00417
ETA Case No.: A-09272-66622

In the Matter of:

INFOSYS TECHNOLOGIES LIMITED,
Employer

on behalf of

MUKHERJEE, ANKAN,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Michael Ungar, Esquire
Simmons & Ungar LLP
San Francisco, California
For the Employer

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

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER GRANTING 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 20 C.F.R. Part 656.

BACKGROUND

The Certifying Officer ("CO") accepted the Employer's labor certification application for processing on September 29, 2009. The Employer is sponsoring the Alien for the position of "Senior Systems Analyst." (AF 91-106).[1] Following review of audit response materials, the CO denied certification. (AF 8-9). The CO found that the geographic area of employment contained in the Employer's newspaper advertisement does not match the geographic area of employment described in ETA Form 9089 Section H in violation of 20 C.F.R. § 656.17(f)(4). Specifically, the Employer's advertisement described the geographic area as San Francisco, but the ETA Form 9089 describes the geographic area as Fremont. The CO also denied certification on the ground that the Employer failed to provide adequate documentation of the additional recruitment steps for professional occupations in violation of §§ 656.10 and 656.17(f)(4). Specifically, the recruitment conducted through hotjobs.yahoo.com describes the geographic area as San Francisco but the ETA-9089 describes the geographic area as Fremont. The CO found that the cities of San Francisco and Fremont are located in different Metropolitan Statistical Areas ("MSA") which are serviced by different tax bases, school districts, transportation systems, airports, and other differences that would be considered by applicants when determining where a person would need to reside to perform the job opportunity. (AF 1-2).

The Employer submitted a motion to take official notice of several documents and an appellate brief. The Employer argues in its appellate brief that the CO erred in determining that San Francisco and Fremont, California were in different MSAs. The Employer also argues that although the advertisements in the *San Francisco Chronicle* and on hotjobs.yahoo.com indicated that the position was located in San Francisco, the advertisements complied with the requirements of § 656.17(f)(4) and Department of Labor ("DOL") guidance for roaming positions, because both cities are located within the same MSA.

DISCUSSION

Motion To Take Judicial Notice

a. *Matters on Which Administrative Notice May Be Taken on Appeal*

The Employer moves the Board to take Official or Administrative Notice under 29 C.F.R. §§ 18.45 and 18.201 of the Minutes from Department of Labor Stakeholders Liaison Meeting, March 15, 2007; ETA Field Memorandum No. 48-94 from Barbara Ann Farmer; the instructions to Form ETA-9089 as they existed when the labor certification application was filed; the Frequently Asked Questions and Answers regarding Foreign Labor Certifications published on DOL's website; a printout from the Metropolitan Transportation Commission's website showing a chart listing the number of commuters from and to San Francisco and Alameda counties and vice versa; a print-out of excerpts from the Census Bureau's website of a listing of Metropolitan and Micropolitan Statistical Areas, and Components, December 2009, with codes; and a copy of

[1] In this decision, AF is an abbreviation for Appeal File.

the Federal Register notice dated Monday, June 28, 2010 listing the 2010 standards for delineating metropolitan and micropolitan statistical areas.

In *Albert Einstein Medical Center*, 2009-PER-379 (Nov. 21, 2011) (en banc), the Board observed that the regulations governing official notice at 29 C.F.R. §§ 18.45 and 18.201[2] were designed for ALJs conducting evidentiary hearings as opposed to the type of appellate review being done by BALCA, that the PERM regulations were very clearly designed to require all evidentiary development to occur before the CO, and that BALCA's scope of review is limited to the evidence and argument made before the CO. The Board noted that "[w]hile it is generally recognized that appellate courts have the discretion to take judicial notice of a fact for the first

[2] BALCA, which is housed within the Office of Administrative Law Judges (OALJ), United States Department of Labor, applies OALJ's Rules of Practice and Procedure at 29 C.F.R. Part 18 in reference to procedural matters not covered by the permanent labor certification regulations. The Part 18 rules governing official notice are at 29 C.F.R. §§ 18.45 and 18.201:

> **§ 18.45 Official notice.**
>
> Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice, at the hearing or by reference in the administrative law judge's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.
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> **§ 18.201 Official notice of adjudicative facts.**
>
> (a) *Scope of rule*. This rule governs only official notice of adjudicative facts.
>
> (b) *Kinds of facts*. An officially noticed fact must be one not subject to reasonable dispute in that it is either:
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> (1) Generally known within the local area,
>
> (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or
>
> (3) Derived from a not reasonably questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge.
>
> (c) *When discretionary*. A judge may take official notice, whether requested or not.
>
> (d) *When mandatory*. A judge shall take official notice if requested by a party and supplied with the necessary information.
>
> (e) *Opportunity to be heard*. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after official notice has been taken.
>
> (f) *Time of taking notice*. Official notice may be taken at any stage of the proceeding.
>
> (g) *Effect of official notice*. An officially noticed fact is accepted as conclusive.

time on appeal, ... the court's exercise of that discretion is circumscribed by respect for the initial adjudicator's factfinding role and avoidance of using that discretion solely to cure an insufficiency of evidence in the record.... Judicial notice should not be used as a way to evade procedural restrictions on appellate review, ... although it is sometimes considered permissible for an appellate court to take judicial notice of a fact for the first time on appeal if the purpose is to support an affirmance of the initial adjudicator's decision." Slip op. at 11 (citations and footnote omitted). The Board wrote:

> The Board recognizes that used with restraint, judicial notice is beneficial to fair and efficient appellate review. The Board's use of official notice in deciding permanent labor certification appeals is well established. ... Often, official notice is taken to make the discussion more easily understood by the reader or to flesh out what was assumed by the parties to be common knowledge. The vast majority of use of judicial notice in Board decisions has been to take notice of information contained in government publications, such as O*Net, the OCCUPATIONAL OUTLOOK HANDBOOK, Postal Service publications, Internal Revenue Service web postings, the U.S. Social Security Death Index, and so forth. But official notice has been taken on occasion of substantive adjudicative facts, such as prior filings with the Board by the same law firm, or the status of ETA's website at a time relevant to the appeal. BALCA has also occasionally taken judicial notice of substantive adjudicative facts in reversals or remands, such as in situations that could be characterized as clear government error or a violation of procedural due process. Nonetheless, we are wary of exercising the discretion of an appellate body to take judicial notice in a manner so as to undermine the PERM regulations' clear and strict restrictions on the scope of BALCA's review authority.

Einstein, 2009-PER-379, slip op. at 12 (footnotes omitted). The Board stated that its inquiry in determining whether to take official notice is twofold: "First, it must be determined whether the document contains the type of information that qualifies for administrative notice. Second, if the document qualifies for administrative notice, it must be determined whether the Board will exercise its discretion as an appellate body to take administrative notice. We will not do so where it would undermine the PERM regulations' restriction on the scope of BALCA's review." *Id.* at 13.

b. Rulings on Proffered Documentation

i. Information Appearing on AILA's Website

The DOL Stakeholders Liaison Meeting Minutes from March 15, 2007 (ITL EX 3)[3], presumably printed from the American Immigration Lawyers Association's website, is not appropriate for official notice. These are informal meeting minutes, and the DOL has not placed this information on its own website as official guidance. The meeting minutes are not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Accordingly, official notice of ITL EX 3 is not appropriate.

[3] In this decision, ITL is an abbreviation for Infosys Technologies Limited.

ii. Official Department of Labor Documents

The Employer submitted three exhibits that can be considered official Department of Labor information or guidance. The Employer submitted a copy of ETA Field Memorandum No. 48-94 from Barbara Ann Farmer, Administrator for Regional Management, providing guidance on labor certification issues. The remaining two documents submitted by the Employer, the instructions to Form ETA-9089 on OFLC's website (ITL EX 6), FAQ responses posted on OFLC's website (ITL EX 7), are available on the Department of Labor's website.

Administrative notice may be taken of these exhibits. The reliability of these documents is not subject to any dispute, since all are clearly official DOL guidance and documents. The accuracy of any of this documentation cannot, and has not, been questioned. Moreover, this is precisely the type of official Department of Labor authority over which the Board has historically taken official notice.

BALCA has historically expressed little concern in exercising discretion to take administrative notice of government publications. In the instant case, the documents in question are being used to elaborate on a legal argument that was made squarely before the CO when he denied certification. Furthermore, the CO has not opposed the Employer's motion; therefore we find that taking official notice of these documents does not undermine the PERM regulations' restriction on BALCA's scope of review.

iii. Information Appearing on the Metropolitan Transportation Commission website

The Employer requests that official notice be taken of the content on the Metropolitan Transportation Commission website, specifically a chart depicting county-to-county commuting in the San Francisco Bay area. (ITL EX 8). There is no reason to believe that the CO would have known or considered this information when making his determinations. Official notice of this documentation would undermine the PERM regulations' restriction on BALCA's scope of review. Accordingly, we will not take administrative notice of the content on the Employers' websites.

iv. Information Appearing on the Census Bureau website

The Employer requests that official notice be taken of the content on the Census Bureau's website, specifically excerpts from a list of Metropolitan and Micropolitan Statistical Areas and Components, December 2009, with Codes. (ITL EX 9).

Administrative notice may be taken of the excerpts from Metropolitan and Micropolitan Statistical Areas, and Components, December 2009, with codes published on the Census Bureau's website. The reliability of this document is not subject to any dispute, since it is clearly a publication of the federal government. The accuracy of this document cannot, and has not, been questioned. Moreover, this is the type of government documents over which the Board has historically taken official notice.

BALCA has historically expressed little concern in exercising discretion to take administrative notice of government publications. In the instant case, the document in question is being used to elaborate on a legal argument that was made squarely before the CO when he denied certification. Furthermore, the CO has not opposed the Employer's motion; therefore we find that taking official notice of this document does not undermine the PERM regulations' restriction on BALCA's scope of review.

v. Federal Register Publication

The Employer requests that official notice be taken of a copy of the Federal Register June 28, 2010 publication from the Office of Management and Budget providing the 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas. (ITL EX 10).

Administrative notice may be taken of the document in question. The reliability of this document is not subject to any dispute, since it is clearly a publication of the federal government. The accuracy of this document cannot, and has not, been questioned. Moreover, this is the type of government documents over which the Board has historically taken official notice.

BALCA has historically expressed little concern in exercising discretion to take administrative notice of government publications. In the instant case, the document in question is being used to elaborate on a legal argument that was made squarely before the CO when he denied certification. Furthermore, the CO has not opposed the Employer's motion; therefore we find that taking official notice of this document does not undermine the PERM regulations' restriction on BALCA's scope of review.

Mandatory Newspaper Advertisement

The CO denied certification because the newspaper advertisement failed to list the correct geographic area of employment with enough specificity to apprise applicants of any travel requirements and where an applicant would likely have to reside to perform the job opportunity as required by 20 C.F.R. § 656.17(f)(4). Specifically, the *San Francisco Chronicle* newspaper advertisements indicated the geographic area of employment as San Francisco, California instead of Fremont, California.

In its appellate brief, the Employer argues that the CO erred in determining that San Francisco and Fremont are not in the same MSA and that the CO's reasoning ignores the fact that the application is for a roaming position. The Employer explains that Fremont, the company's headquarters, is not the actual job location, but that the initial and subsequent job locations are unknown. The Employer asserts that it used its address in Fremont, California on ETA Form 9089 following DOL guidance to indicate that the position was roving in nature and the deficiency in this case lies with DOL's failure to provide guidance on how to harmonize the regulations' notice requirement with the ETA Form 9089's requirement that a physical location must be used in item H.1 and H.2.

Section 656.17(f)(4) requires newspaper advertisements to 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 duties of the job opportunity. Our analysis is guided by the purpose of the regulation which is to assist employers in adequately testing the labor market and not by the MSA analysis which is better suited and provided as guidance to Employers in determining where to place advertisements in compliance with § 656.17(e)(1)(i)(B).

In the case at bar, the advertisement placed in the *San Francisco Chronicle* indicated that the position was located in San Francisco and may require multiple long-term assignments within region. Although the Employer's headquarters are located in Fremont, California, the duties of the position may be performed at various unanticipated locations within the San Francisco region. Indicating that the position is located in San Francisco did not mislead any U.S. workers on the actual job location, since the advertisement clearly stated that the position may require long term assignments within the region. Any U.S. worker would be on notice that the duties of the position may be performed anywhere within the San Francisco area, which would include the Fremont area. Thus, the Employer's advertisement in the *San Francisco Chronicle* indicated the geographic location of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the duties of the job opportunity in compliance with §656.17(f)(4). As such, we reverse the CO's determination.

Additional Recruitment Steps

In addition to the mandatory recruitment steps, an employer filing a labor certification application for a professional position is required by § 656.17 to conduct three additional recruitment steps. In light of § 656.10(c)(8) which requires the employer to certify under penalty of perjury that the job opportunity has been and is clearly open to any U.S. worker, the requirements of § 656.17(f)(4) have been interpreted to apply to all other forms of advertisements placed by the employer to ensure that U.S. workers are adequately apprised of the job opportunity. *See Credit Suisse Securities (USA) LLC*, 2010-PER-103 (Oct. 19, 2010). Accordingly, all advertisements placed by the employer must 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.

In the case at bar, the Employer elected to place advertisements on hotjobs.yahoo.com, the website affiliated with the *San Francisco Chronicle;* a trade or professional organization; and the Employer's employee referral program. The CO denied certification because the advertisement on hotjobs.yahoo.com indicated that the job location was San Francisco and thus did not indicate the geographic location of employment as required by §656.17(f)(4) and *Credit Suisse Securities*.

Again, the Employer argues that the CO erred in determining that San Francisco and Fresno are not in the same MSA and that the CO's reasoning ignores the fact that the application is for a roaming position. The Employer explains that Fremont is not the actual job location, but that the initial and subsequent job locations are unknown. The Employer asserts that it used its

address in Fremont, California on the ETA Form 9089 following DOL guidance to indicate that the position was roving in nature and the deficiency in this case lies with DOL's failure to provide guidance on how to harmonize the regulations' notice requirement with the ETA Form 9089's requirement that a physical location must be used in item H.1 and H.2. The Employer erroneously argues that the regulations and the Board only require employers to indicate a location within the MSA to satisfy § 656.17(f)(4). The Employer further asserts that the Board held in *Quick Purchase Food*, 2010-PER-427 (April 6, 2011), that stating a location within the same "area of intended employment" satisfies § 656.17(f)(4).

While the regulations do not require that advertisements contain the specific address of the job opportunity, § 656.17(f)(4) does require that they indicate the geographic area of employment. In *Quick Purchase Food*, the panel turned to § 656.3 for guidance in clarifying the definition of geographic area of employment. While § 656.3 does not define geographic area of employment, it defines area of intended employment, as used in § 656.17(e)(1)(i)(B)(1)[4], as

> [T]he area within normal commuting of the place (address) of intended employment . . . . If the place of employment is within a Metropolitan Statistical Area (MSA) . . . any place within the MSA is deemed to be within normal commuting distance of the place of intended employment; however not all locations within a Consolidated Metropolitan Statistical Area (CMSA) will be deemed to be within normal commuting distance.

The panel noted that the phrase "area of intended employment" was substantially similar to "geographic area of employment" and thus used the definition of "area of intended employment" to guide their analysis. In *Quick Purchase Food*, Form ETA-9089 listed the employer's store address in Spartanburg, South Carolina as the worksite, but the advertisements listed the employer's corporate address in Inman, South Carolina as the worksite. The panel pointed out that the two cities were only 7.5 miles away, a drive estimated to take fifteen minutes and that both locations were within the same county. The panel held that since the entire county was within the same MSA, the two cities were within commuting distance and thus the advertisements met the goal of the regulation in allowing a potential applicant to identify the location of the job opportunity. In deciding this case, the panel also took into consideration the fact that the employer provided specific contact information including a phone number in which the potential employee could have made further inquiry if location were a stringent requirement in his or her job search. It is important to note that the panel made clear that the decision was a narrow decision premised on the specific facts put forth in that case.

While the panel in *Quick Purchase Food* used the definition of the term "area of intended employment" for guidance, it did not set a new rule or interpretation of the meaning of geographic area of employment. The MSA and commuting distance analysis set forth § 656.3 is better suited for and is provided as guidance to Employers in determining where to place print advertisements in compliance with § 656.17(e)(1)(i)(B).

[4] Section 656.17(e)(1)(i)(B)(1) requires that an advertisement be placed in the newspapers 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.

Our analysis is guided by the purpose of the regulation which is to assist employers in adequately testing the labor market. To achieve this purpose, an Employer must sufficiently apprise U.S. workers of the job opportunity. The requirements in § 656.17(f)(4) guide the employer in doing so, by requiring that advertisements 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.

In the case at bar, the advertisement placed on hotjobs.yahoo.com indicated that the position was located in San Francisco and may require multiple long-term assignments within region. Although the Employer's headquarters are located in Fremont, California, the duties of the position may be performed at various unanticipated locations within the San Francisco region. Indicating that the position is located in San Francisco did not mislead any U.S. workers on the actual job location, since the advertisement clearly stated that the position may require long-term assignments within region. Any U.S. worker would be on notice that the duties of the position may be performed anywhere within the San Francisco area which would include the Fremont area. Thus, the Employer's advertisement on hotjobs.yahoo.com indicated the geographic location of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the duties of the job opportunity in compliance with §656.17(f)(4) and *Credit Suisse Securities*. As such, we reverse the CO's determination.

ORDER

Accordingly, no other issues remaining to be resolved on appeal, **IT IS HEREBY ORDERED** that this matter is **REMANDED** to the Certifying Officer for the purpose of **GRANTING** certification.

For the panel:

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.