**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: 17 November 2016**

**BALCA No.:** **2016-PER-00332**
ETA No.: A-14175-81336

*In the Matter of:*

**TEK SERVICES LLC,**
*Employer,*

*on behalf of*

**DARAM, VIKRAM REDDY,**
*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearance: Manjunath A. Gokare,
Alpharetta, Georgia
*For the Employer*

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and William T. Barto, *Administrative Law Judge*s

# DECISION AND ORDER
# DIRECTING GRANT OF CERTIFICATION

**PER CURIAM.** This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the "PERM" labor certification regulations at 20 C.F.R. Part 656.[1]

[1] "PERM" is an acronym for the "Program Electronic Review Management" system established by the regulations that went into effect on March 28, 2005.

## BACKGROUND

The Employer filed an *Application for Permanent Employment Certification* ("Form 9089") sponsoring the Alien for permanent employment in the United States for the position of "Computer Systems Analyst."(AF 126-138).[2]

The CO denied the application because the Employer's website advertising and job order did not specify a particular salary but rather indicated that the Employer was offering a "competitive salary." The CO concluded that:

> While the offered wage is not required in the advertisements, any discussion concerning wages must include a description specific enough to apprise the U.S. worker of the job opportunity. Listing "competitive salary" in the advertisement places a potential obligation on the U.S. worker to reasonably determine the wage rate for the position. Further, listing "competitive salary" in the advertisements prevents potentially qualified U.S. applicants from making an informed decision on whether he/she would be interested in the actual job opportunity, and may deter a number of such applicants from applying.

(AF 58).

The CO determined that the Employer's actions violated both 20 C.F.R. § 656.17(f)(3) and § 656.24(b)(2). In addition, the CO found that the Employer's use of the "competitive salary" language prevented the CO from determining if the advertising contained a wage below the prevailing wage resulting in a violation of 20 C.F.R. § 656.17(f)(5) or a wage less favorable than that offered the alien in violation of 20 C.F.R. § 656.17(f)(7).

The Employer filed a request for reconsideration contending that the regulations, as elaborated on in a DOL FAQ, did not require that advertising contain a wage rate and that the "competitive salary" language was a customary hiring practice that would not discourage any domestic worker from applying. (AF 18).

The CO reconsidered his decision but affirmed. Relying on 20 C.F.R. §§ 656.17(f)(3) and 656.24(b)(2) he concluded that:

> Listing "competitive salary" as the salary on the newspaper advertisements places a potential obligation on the U.S. worker to reasonably determine the wage rate for the position. The term "competitive salary" is also a relative term that can reflect the employer does not want to announce the salary in its advertisements. Further, listing "competitive salary" in the advertisements prevents potentially qualified U.S. applicants from making an informed decision on whether the individual would be interested in the actual job opportunity, and may deter a number of such applicants from applying. The wage listed as "competitive salary" places too much burden on the U.S. applicant to determine what the position will

[2] Citations to the Appeal File are abbreviated as "AF" followed by the page number.

> pay, and thus can be a deterrent to the employer receiving applications from qualified U.S. workers. The U.S. applicants are therefore unable to reasonably determine, and to be fully apprised of, the offered wage for the position.

(AF 14).

Finally, without citation to a specific regulatory provision, the CO concluded:

> An employer seeking labor certification for a foreign worker must not merely engage in a recruitment effort and show that no qualified U.S. worker is available; it must also establish that it has a bona fide job opportunity that is open to qualified U.S. workers. The Department considers the totality of the circumstances of the application and recruitment to determine if the job is clearly open to U.S. workers. The employer was not required to list the term "competitive salary" in the newspaper advertisements and the employer also had the ability to specify the offered wage amount in the advertisement. Further, the employer entering an offered wage salary of $63,150k or "$63,150/yr." or even "$63,150 /year" instead of "competitive salary" would have resulted in the same or a lower advertisement cost to the employer. By not informing potential U.S. applicants of the opportunity on the newspaper advertisement as offered and indicated on the employers' application, the employer has not performed an adequate test of the United States labor market.

(AF 14).

The CO's letter also offered the Employer an opportunity to seek review with the BALCA. The Employer exercised that option. The appeal was docketed and the parties were given an opportunity to file briefs. The Employer did so. The CO did not.

## DISCUSSION

Section 656.24(b)(2)

The Board previously rejected the CO's reliance on this regulation in a decision involving the same employer and largely identical facts. *Tek Services LLC*., 2016-PER-00207 (November 16, 2016). We reach the same conclusion here.

Section 656.17(f)(3)

This provision establishes that "[a]dvertisements placed in newspapers of general circulation must … [p]rovide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought." The preamble to the final rule clarifies that § 656.17(f)(3) "does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment; rather, employers need only apprise applicants of the job opportunity. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the

employer will meet the requirement of apprising applicants of the job opportunity." 69 Fed. Reg. 77326, 77347 (Dec. 27, 2004). Since the competitive salary language provides additional information concerning the nature of the job opportunity, beyond what is required by the regulation, its inclusion cannot constitute a violation of this section.

We are unpersuaded by the CO's suggestion that the competitive salary language creates a "burden" on potential applicants that they identify the competitive wage; a burden which might discourage workers from applying or that the reference to a competitive wages somehow could prevent an individual from making an "informed decision" about whether they would be interested in the position. Potential applicants are unburdened since they are under no obligation to identify a competitive wage before they apply. As to making an informed decision, the competitive salary language is certainly more informative than an advertisement that is totally silent regarding the wage, an approach perfectly permissible under the regulation.[3] Equally inexplicable is the CO's conclusion that competitive salary "is also a relative term that can reflect the employer does not want to announce the salary in its advertisements." As noted above, the regulations permit advertisements to be silent regarding the wage. In that context, it is impossible to impute ill-motive to an employer's decision to include this innocuous reference to wages in its advertisements when it was free to say nothing on that subject. [4]

[3] The determination to allow employers to advertise without reference to wage was not casually adopted. The NPRM required wages to be included in the advertisements and this obligation was eliminated based upon evaluation of extensive comments. 69 Fed. Reg. 77326, 77348 (Dec. 27, 2004).

[4] As quoted above, the final paragraph of the CO's denial suggests an additional denial reason based on the fact that "the employer has not performed an adequate test of the United States labor market." Since the CO does not identity any regulatory predicate for such a requirement, we need not consider that argument. Arguably, the CO is addressing an employer's obligations under 20 C.F.R. § 656.10(c)(8). That assumption is reflected in the CO's reference to the need for the job to be open to all qualified U.S. workers. To the extent that this reference is sufficient to invoke that regulation, we would still reverse. Neither that section, nor anything else in the regulations, creates an undefined obligation to conduct an "adequate test" of the labor market. The PERM system contains detailed provisions delineating the nature of the employer's recruitment responsibilities. Compliance with those provisions is all that is required. Section 656.10(c)(8) encompasses an employer's obligation to conduct this recruitment in good faith. *East Tennessee State University*, 2010-PER-00038 (April 18, 2011) (*en banc*). In order to find a violation of that regulation, however, the employer's recruitment must "so misinform potential job applicants about the [position] that this aspect of the recruitment did not support the attestation that the job was clearly open to any U.S. worker." *The China Press*, 2011-PER-02924 (Aug. 20, 2015), *vacated on other grounds*, (Nov. 30, 2015). *See also*, *Cosmos Foundation*, 2012-PER-01637 (Aug. 4, 2016). The Employer's actions here do not come close to meeting that standard.

## ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2).

Entered at the direction of the panel by:

Digitally signed by TODD R. SMYTH
DN: CN=TODD R. SMYTH, OU=LEGAL COUNSEL, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

Todd R. Smyth
Secretary to the Board of Alien Labor Certification Appeals

**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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.