

**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: 07 April 2010**

**BALCA Case No.: 2010-PER-00146**  
ETA Case No.: A-08343-12245

*In the Matter of:*

**WP REALTY INC.,**  
*Employer,*

*on behalf of*

**MICHAEL ACHURY,**  
*Alien.*

Certifying Officer: William Carlson  
Atlanta Processing Center

Appearances: Flavio Alfie, Esquire  
North Miami Beach, Florida  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Frank P. Buckley, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

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

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

**PER CURIAM.** 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.

On December 8, 2008, the Certifying Officer ("CO") accepted for processing the Employer's Application for Permanent Employment Certification on behalf of the Alien for the position of "Property Real Estate and Community Association Manager." (AF 5, 8).<sup>1</sup> The Employer indicated that this was a professional position. (AF 10). In the portion of the Form 9089 application where the applicant reports the name and dates of advertisement of the job opportunity in a newspaper or professional journal, the Employer indicated that its first advertisement was published in the San Francisco Chronicle, and that its second advertisement was published on Craigslist. (AF 10).

On September 30, 2009, the CO denied certification on the ground that Craigslist is not a newspaper or a professional journal. (AF 5-6). The Employer requested review of the denial by letter dated October 22, 2009. (AF 1). On appeal, the Employer argued that it was denied due process because it had not been provided adequate notice of the regulatory violation.

Under 20 C.F.R. § 656.17(e), most sponsoring employers – such as the Employer in the instant case – are required to attest to having conducted recruitment prior to filing an application for permanent employment certification. Among other requirements, applications involving both professional and non-professional occupations normally require the sponsoring employer to attest to having placed two print advertisements 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. 20 C.F.R. § 656.17(e)(1)(i)(B) and 656.17(e)(2)(ii). An employer sponsoring an alien for a professional position, however, is permitted in lieu of one of the Sunday newspaper advertisements to place an advertisement in the professional journal

---

<sup>1</sup> AF is an abbreviation for "Appeal File."

most likely to bring responses from able, willing, qualified and available U.S. workers if the job involved requires experience and an advanced degree. 20 C.F.R. § 656.17(e)(1)(i)(B)(4).

In the instant case, the Employer did not attempt on appeal to argue that Craigslist is a professional journal within the meaning of the regulation at 20 C.F.R. § 656.17(e)(1)(i)(B)(4). Rather, it relied solely on the argument that it is a denial of due process for a CO to raise an issue for the first time in a final decision. In this regard, the Employer cited a series of pre-PERM BALCA decisions. Those decisions, however, were rendered in a different regulatory environment. The pre-PERM regulations provided for a process where the CO would first issue a “Notice of Findings” providing notice to an employer of any deficiencies upon which the CO proposed to deny certification. The employer was expressly provided by regulation a period of time in which to rebut the Notice of Findings. If the CO found that the rebuttal was insufficient, a “Final Determination” denying certification was issued. It was in this context that BALCA held that a CO could not raise an issue for the first time in a Final Determination. *See, e.g., North Shore Health Plan*, 1990-INA-60 (June 30, 1992) (en banc). Although the Employer also cited *Medical Care Professionals, Inc.*, 2008-PER-247 (July 17, 2009), which was decided under the PERM regulations, that case is inapposite as it involved an argument raised by the CO for the first time on appeal.

The PERM regulations eliminated the NOF/Rebuttal procedure found in the pre-PERM regulations. The PERM regulations very purposefully were designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *HealthAmerica*, 2006-PER-1, slip op. at 8-9, 16 (July 18, 2006) (en banc). As the panel noted in *Kay Mays*, 2008-PER-11, slip op. at 5 (Aug. 27, 2008), BALCA cannot rewrite the PERM regulations to restore a NOF/rebuttal procedure. Thus, we find that the CO’s denial of the application without prior notice of the grounds for denial did not violate the regulations.

## **ORDER**

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

Entered at the direction of the panel by:

**A**

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 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.