SPECIAL RECRUITMENT PROCEDURES: NEW DEVELOPMENTS

by Alexander Dgebuadze and William P. McKinney[*]

In labor certification law, members of the teaching profession employed by U.S. colleges and universities are subject to the "special rule" whereby the secretary of the Department of Labor (DOL) may approve a labor certification on behalf of a beneficiary who is found more qualified than U.S. applicants.[1] All other professions are subject to the general rule providing that the secretary must deny a labor certification if a minimally qualified U.S. worker is available to accept the job.[2] Specifically, under 20 CFR §656.18(b), a U.S. college or university recruiting for a teaching position must document that

> ... the alien was selected for the job opportunity in a competitive recruitment selection process through which the alien was found to be *more qualified* than any of the United States workers who applied ...

The statutory provision underlying this regulation provides:

> (i) In general.—Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the [Secretary of Homeland Security] that—
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> > (I) there are not sufficient workers who are able, willing, *qualified* (or *equally qualified* in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and the place where the alien is to perform such skilled or unskilled labor ...
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> (ii) *Certain aliens subject to special rule*.—For purposes of clause (i)(I), an alien described in this clause is an alien who—
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> > (I) is a member of the teaching profession, or
> >
> > (II) has exceptional ability in the sciences or the arts[3] (emphasis added).

The special rule concerning the educators resulted from a 1976 congressional amendment to the Immigration and Nationality Act that was based on Congress's expressed concern that DOL had hampered the efforts of academia to retain outstanding candidates for teaching and faculty positions. The rationale for this amendment was as follows:[4]

> The Committee continues to be disturbed by the administration of the labor certification requirement by the Department of Labor and plans to review this entire program during the next Congress. *The Committee, however, is particularly troubled by the rigid interpretation of this section of law as it pertains to research scholars and exceptional members of the teaching profession. More specifically, the Committee believes that the Department of Labor has impeded the efforts of colleges and universities to acquire outstanding educators or faculty members who possess specialized knowledge or a unique combination of administrative and teaching skills*. As a result, this legislation includes an amendment to section 212(a)(14) which requires the Secretary of Labor to determine that "equally qualified" American workers are available in order to deny a labor certification for members of the teaching profession or those who have exceptional ability in the arts and sciences. (emphasis added).

Thus, the legislative history, statute, and regulations make it clear that American universities and

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[1] 20 Code of Federal Regulations (CFR) §656.18(b).

[2] 20 CFR §656.17(h)(i).

[3] *See* Immigration and Nationality Act (INA) §212(a)(5)(A).

[4] H.R. Rep. No. 94-1553, 94th Cong., 1st Sess., U.S. Cong. and Adm. News (1976) 6083, discussed in *Dearborn Public Schools*, 91-INA-222, 5 (BALCA Dec. 7, 1993) (*en banc*), *available at www.oalj.dol.gov/* (input "Dearborn Public Schools" in "Employer/Respondent" field.

colleges must be able to attract and retain "outstanding [international] educators or faculty members" to further national education and research priorities set by Congress. This special legislative rule provides colleges and universities with needed flexibility in structuring their requirements without regard to their baseline qualifications for the job. Therefore, an academic employer may choose the candidate who is best qualified for the job opportunity and whose qualifications exceed those of other applicants.

A radically different standard applicable to all other occupations and industries does not allow employers to choose the best qualified candidate, but only a minimally qualified one.[5] In other words, colleges and universities are specifically exempt from the strictures of the "minimum requirements" rule and may, in fact, reach for the best qualified individual. Of course, American employers do so routinely when recruiting and hiring domestic workers, as no employer would settle for someone who just meets the minimum threshold requirements. This same freedom to choose the best available talent among domestic, as well foreign candidates, extends to academia, but not to the American business.

DOL's administration of the "special recruitment" labor certification process comported with the above principles and relatively uncontroversial until very recently. However, there have been new developments in this arena, including: (1) the Board of Labor Certification Appeals' (BALCA or Board) consideration of a hybrid university recruitment case where recruitment was conducted under the basic labor certification process[6]; (2) a spate of recent Program Electronic Review Management (PERM) denials challenging the employers' use of certain national professional journals; and (3) the use of electronic national journal advertisements instead of print journals.[7] Specifically, DOL has raised the following issues: (1) whether and when job preferences are permitted, and what is the difference between *using* and *advertising* preferences in the selection process; (2) what is an appropriate journal for conducting special recruitment; and (3) whether electronic journal ads are acceptable to satisfy the regulations.

This article will review the implications of these developments on PERM applications filed by U.S. colleges and universities. It will analyze appropriate case law, regulations, and agency statements, and offer practical tools and recommendations for filing successful PERM cases for international teaching faculty of U.S. academic institutions.

EAST TENNESSEE STATE UNIVERSITY AND ITS AFTERMATH

May Colleges and Universities Use Preferences in Advertisements for Faculty Members and Teachers?

Historically, it was an accepted recruitment practice among colleges and universities to advertise job *requirements* together with *preferences* to inform potential applicants of their desired qualifications and criteria in hopes of securing the most qualified candidate for a job.[8] However, when completing the "requirements" section of DOL's Form ETA 9089, Application for Permanent Employment Certification, employers would duly record solely their baseline academic and professional *requirements*, and would not necessarily transfer their advertised preferences to the applications. Such practice seemed sensible and directly responsive to DOL's application form. Specifically, while ads would often contain softer preferential criteria, most universities and colleges would include only the specific level and field of a degree required and omit preferences because they are not truly *required* for the position.

The *East Tennessee State University* decision may have changed these existing practice standards, at least as they pertain to PERM applications for teaching faculty filed under the basic labor certification process, by resurrecting the old basic labor certification rule that preferences equal requirements.[9]

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[5] 20 CFR §656.17(h)(i).

[6] *See Eastern Tennessee State University*, 2010-PER-00038 (BALCA Apr. 18, 2011).

[7] *See University of Texas at Brownsville*, 2010-PER-00887 (BALCA July. 20, 2011).

[8] *See* Brief of Amicus Curiae, American Immigration Lawyers Association in the *Matter of East Tennessee State University*, 2010-PER-00038 (BALCA Apr. 18, 2011), at 5, 10–11, *published on* AILA InfoNet at Doc. No. 10101962 (*posted* Oct. 19, 2010).

[9] *See* 20 CFR §656.21(b)(2)(iv) (stating that "If the job opportunity has been or is being described with an employer preference, the employer preference shall be deemed to be a job requirement ..."), *available at www.gpoaccess.gov/cfr/index.html* (follow "Code of Federal Regulations" hyperlink; then follow "Browse and/or search the CFR" hyperlink; then

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While many colleges and universities choose to apply for labor certifications on behalf of their teaching staff and faculty using the special recruitment process, the standard basic process is also available to them. In fact, under the basic process, university teachers may qualify under the same, "more qualified" standard,[10] as opposed to the "minimally qualified" standard required of all other professions. Employers may opt for this strategy for a variety of reasons, such as missing the 18-month window of filing eligibility,[11] or choosing the most economical recruitment option. Whatever the reason, the basic recruitment process enables universities to select the best qualified candidate and thus still take advantage of the more liberal selection criteria.

The employer in *East Tennessee State University* filed a labor certification case for a faculty member under the basic process. The University listed requirements of a baseline master's degree, "near-native or native" language fluency, and various preferred qualifications (*e.g.*, "Ph.D preferred," "with specialty in Applied Linguistics, Second Language-Acquisition, or Hispanic/Romance Linguistics helpful").[12] The employer included its requirements *and preferences* in advertisements and search committee materials, indicated that "knowledge" of a foreign language was required, but excluded the preferences from the Form ETA 9089.[13]

BALCA began its analysis[14] by citing to 20 CFR §656.17(f)(6), which states that advertisements must "[n]ot contain any job requirements which exceed the job requirements or duties listed on the ETA 9089 form."[15] It found that the employer violated this provision and provided the following rationale in affirming the Certifying Officer's (CO) denial:[16]

> ... Section 656.17(f)(6) plays an important administrative processing function ... When a CO receives a PERM application, he or she is relying on the employer to make an accurate and complete statement of the job requirements so that a determination can be made ... whether the requirement is normally required for the occupation and is within the Specific Vocational Preparation assigned by the O*NET Job Zones.... Thus, the requirement of Section 656.17(f)(6) that all job requirements be listed in the Form ETA 9089 serves an important function in the administrative review of a labor certification that cannot be lightly dismissed on the ground that a requirement not listed on the From 9089 was an obvious element of the job.

BALCA's view, however, is not as solid as it may appear. If this were an application filed under the special recruitment procedure of 20 CFR §656.18(b), a discrepancy so offensive to BALCA in this matter would likely not raise problems. Forcing employers to list their preferences on the form when filing applications for employment of college or university teachers under 20 CFR §656.18(b) would fly in the face of statutory language and legislative history permitting colleges and universities to choose among the best and highest skilled candidates. BALCA seemed tentative about its pronouncement's reach and impact on employers. On the last page of the decision, in a footnote, the Board pointed out that this "holding was limited to applications filed under the basic labor certification process at 20 CFR §656.17."[17]

In other words, preferences do not need to be included in the form if recruitment occurs under 20 CFR §656.18(b), but they must be included if recruitment is conducted under 20 CFR §656.17. Both recruitment methodologies are appropriate to "special recruitment" labor certification applications, and the only discernible difference between them is that the beneficiary is *already selected and employed* by the university, as in the latter case. BALCA considers it plausible that the employer recruiting under the

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click on CFR Title 20 for April 2, 2001, then follow "500-599" hyperlink; then follow "656" hyperlink; then click on "TXT" or "PDF" for 656.21).

[10] *See* 20 CFR §656.18(b) and (d).

[11] *See* 20 CFR §656.18(c).

[12] *See Eastern Tennessee State University*, 2010-PER-00038, 3, 5 (BALCA Apr. 18, 2011).at 3, 5.

[13] *Id.*, at 8.

[14] As a threshold issue, BALCA had to decide whether the "more qualified" standard applied to "special recruitment" cases, irrespective of which recruitment procedure was chosen, since the employer recruited pursuant 20 CFR §656.17, as expressly permitted by 20 CFR §656.18(b) and (d). It agreed with AILA and the employer that the preceding panel decision in this matter was erroneous and re-affirmed the principle that the "more qualified" standard was applicable to all "special recruitment" cases. But in an apparent contradiction to this affirmation, BALCA proceeded to analyze the matter as if it were filed under 20 CFR §656.17, subjecting the application to *all* provisions found in that section. *Id.*, at 6–7 and 8–18.

[15] *Id.*, at 8.

[16] *Id.*, at 9–10.

[17] *Id.*, at 18, n.14

basic process might alter the requirements to fit the selected candidate's special skills. This, in turn, may "chill" the outside candidates' interest in the job resulting in the artificially circumscribed pool of applicants. Aligning its analysis with PERM's[18] basic labor certification rules on the "actual minimum requirements," BALCA implies that recruiting long after the beneficiary is hired is less likely to be in good faith and more likely to overlook an applicant who is as qualified for the job as the beneficiary. But the Board fails to consider the fact that the applicant may have been selected as the best possible candidate on two occasions: initially, prior to being hired and, later, when the employer re-advertised. The employer's secondary effort appears to validate its initial selection that the applicant is, indeed, its best choice.

The effect of BALCA's logic is to severely restrict employers' ability to choose the best possible talent for faculty positions, particularly where they must re-recruit using the basic labor certification process. Here, the employer properly re-tested the labor market, thus twice concluding that the selected candidate was more qualified than others. The employer would not have re-recruited unless it had concluded that the applicant was the best candidate for the job, having already proven his abilities. Thus, BALCA's affirmance of the denial seems contrary to the statute and regulations and tends to undermine the very freedom that academia requires to advance knowledge and educate future generations by selecting and retaining the best teachers.

East Tennessee State University's main rationale for superimposing DOL's basic labor certification standards on "special recruitment" applications is as follows:[19]

> We decline ... to find that the statutory exception permitting *selection* of an alien as the most qualified candidate for a college or university teaching position means that an employer has license to include preferences in an advertisement used to support a labor certification application, because inclusion of preferences may have the effect of discouraging qualified U.S workers from applying for the position. While an employer recruiting under the basic process for a college or university professor can certainly use its preferences in *evaluating* the relative qualifications of all applicants, *in order to ensure that the applicant pool is not improperly restricted, an employer may only include its requirements in its advertisements, not its preferences*. *See* 20 CFR §656.10(c)(8)... .
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> The treatment of preferences as requirements is consistent with an employer's duty to recruit U.S. workers in good faith.... Allowing employers to include preferences in their advertisements would present employers a virtually unchecked opportunity to stack the deck against qualified U.S. workers by listing all of the alien's qualifications under the guise of the employer's preferences....
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> Thus, the regulatory requirement that recruitment, whether in print advertisements, posted notices or other types of media, must not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA, is just as valid in the context of university and college teaching positions as for other positions. So too, is the principle that employer preferences stated in recruitment will be treated as requirements for purposes of the PERM application. The fact that the employer may select the alien if he or she is more qualified than each U.S. applicant for a college or university teaching position does not extinguish the reasons for requiring the employer to list all of its requirements on the Form 9089 and for the Department's treatment of preferences used in advertisements as requirements for purposes of assessing a PERM application (emphasis added).

Thus, BALCA spends considerable time discussing its rationale for borrowing the "preferences equals requirements" principle from PERM's basic labor certification regulations, and imposing it on colleges and universities looking to fill their teaching vacancies. The length of this discussion, however, betrays the defensiveness of its stance, and the muddled nature of its analysis. For instance, does it mean that, moving forward, colleges and universities recruiting under the basic process are forbidden to use preferences altogether? The answer appears to be "no." BALCA's holding seems to be that preferences used in advertising materials must be noted in the forms, in compliance with the *former* 20 CFR §656.21(b)(2)(iv), a pre-PERM regulation. This regulation did *not* apply to the former "Special Han-

[18] ETA, Final Rule, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New Systems, 20 CFR Part 656; 69 Fed. Reg. 77326 (Dec. 27, 2004).

[19] *See Eastern Tennessee State University*, 2010-PER-00038, 10–13 (BALCA Apr. 18, 2011).

dling" procedures and was *not* carried over into the PERM regulations.

Further, consistent with existing practices, employers should ensure that their requirements and preferences are tailored to the position in question, and not to the selected candidate's special talents or skills. They must also be prepared to support each requirement and preference with a "business necessity" statement, in compliance with 20 CFR §656.17(h). But again, all requirements and preferences used in recruitment must be part of the application form, as well.[20]

Alternatively, employers may be well-advised to describe their desired qualifications, skills, and abilities as requirements only, excluding qualifiers such as "preferred," "helpful," "a plus," or "a bonus," *i.e.*, anything that does not clearly and directly confirm that they are indeed requirements. These recommendations are applicable *only where universities and colleges recruit for teaching positions under the basic labor certification recruitment procedure*.

What About Colleges and Universities that Conduct Recruitment Under the "Special Recruitment" Process of 20 CFR §656.18?

Based on *East Tennessee State University*, this group of employers may choose to continue their current practices without change.[21] These entities may list their requirements and preferences in advertising materials, and may choose to exclude their preferences from application forms. However, the Board's analysis of preferences versus requirements is phrased in a way that leaves room for an even more rigid interpretation of the "special recruitment" regulations[22] Because of that, the authors recommend that university and college employers consider revising their advertisements to include requirements only, and to report only their actual requirements on the forms.

How Does Advertising Preferences Differ From Using Them to Evaluate a Candidate's Qualifications?

Among the more curious pronouncements of *East Tennessee State University* is that colleges and universities recruiting under the basic labor certification process *may* use their preferences in *evaluating* the qualifications of the applicants. This is despite the fact that they *may not* use them in *advertisements*, so as not to restrict the pool of U.S. applicants.[23]

The employer in *East Tennessee State University* correctly pointed out that "encouraging college and university employers to leave their preferences out of their advertisements," would deprive the applicants of the notice of the criteria "the employer plans to use in assessing which candidate is most qualified."[24] The Board dismissed such concerns as "self-serving," stating that

> A potential motive of using preferences to filter out unwanted applications from U.S. workers is a much greater harm than any beneficent purpose of informing potential applicants of the criteria that will be used to judge their applications.[25]

Here, BALCA is content that employers may use their preferences to evaluate the candidates, but not to include them in advertisements. This is a peculiar reaction of a judicial-administrative body usually known for its careful analysis and judiciousness. Thus, BALCA is aware of the issue implicit in denying the value of apprising the applicants of the job opportunity's selection criteria, but chooses to place a greater emphasis on a technical and potentially questionable value of leaving the preferences out of the advertisements.

The Board is correct that excluding preferences from advertisements expands the pool of applicants[26]—lowering requirements or removing prefer-

[20] In light of *East Tennessee State University*'s holding regarding foreign language requirements, it is wise to list specific language requirements in box H.14, in addition to checking the appropriate "knowledge" box, and to devise procedures for testing candidates' linguistic abilities through in-person interviews or written tests, as appropriate.

[21] *Id.*, at 18, n.14.

[22] *Infra*, at 9.

[23] *See Eastern Tennessee State University*, 2010-PER-00038, 11 (BALCA Apr. 18, 2011).

[24] *Id.*, at 14.

[25] *Id.*

[26] Indeed, in BALCA's view, "While [prohibiting employers from advertising their preferences, but allowing them to use them in the selection process] may pose a burden on colleges and universities because they may receive more applications for teaching positions that they will have preferred, and therefore will have to explain why those applicants are not as qualified as the alien, this is what is required under the Program Electronic Review Management (PERM) program to

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ential criteria will do just that. But this is indeed a small benefit considering that the employer's unadvertised preferences will serve to disqualify all but the preferred candidate. It is as though BALCA is encouraging employers to manipulate the process by publicizing sanitized, bare-bones qualifications and surprising the applicants with a long list of flexibly-drafted preferences during the evaluation process. Do BALCA judges believe that an employer's opportunity and motive to "stack the deck against"[27] U.S. applicants in this scenario is truly lessened? We, of course, need not assume a sinister motive to disqualify U.S. applicants (and BALCA is careful not to state otherwise). Colleges and universities cannot thrive on mediocrity and must pursue the best qualified candidate no matter his or her country of nationality. In the real world, academic employers look to a wide array of criteria and skills, both required and preferred, by which to judge the relative qualifications of all applicants. By using the unadvertised criteria, employers are in essence given a free reign to expand their preferences as a means of pursuing the most qualified candidate. Thus, in theory, instead of discouraging the reliance on preferences, the decision might have an effect of encouraging their wider use.

What are the practical implications of using the undisclosed preferences in evaluating the applicants' qualifications? Under 20 CFR §656.17(f)(6), employers may not advertise requirements in excess of those included on the application form, but they have the option of drafting their advertisements broadly by leaving out the details of the job.[28] These details are used to evaluate the applicants and must be fully disclosed on the form. Stated another way, requirements can be less detailed in advertisements and may even be completely excluded, as long there is a logical nexus between the advertisements and the sponsored position.[29] However, employers may also choose to list all job requirements and details in advertisements, provided they are then reported in the form. BALCA's decision in *East Tennessee State University* re-interprets this regulation to require that details (*e.g.*, preferred qualifications) be excluded from advertisements. In essence, "may" leave out becomes "must" leave out. As thus re-interpreted, 20 CFR §656.17(f)(6) stands for the proposition that advertisements must not contain the employer's preferences, but must instead be included on the Form ETA 9089. Considering the "preferences equals requirements" principle, BALCA has effectively written a *mandatory requirements asymmetry* into the regulations: college and university employers filing "special recruitment" applications under the basic process *must not* include *requirements* in advertisements. In other words, BALCA appears to needlessly impede the efforts of colleges and universities in obtaining outstanding faculty by improperly re-writing the regulation, without perfecting the means of protecting U.S. workers.

In its zeal to restrict the advertising standards for colleges and universities, BALCA has failed to consider these logical steps, leaving room for employer confusion, compliance errors, and implementation difficulties. It also left the door open for further restricting academic employers' options by extending the *East Tennessee State University* holding to "special recruitment" advertising standards of 20 CFR §656.18(b). The Board does not articulate its reasons for why its reach should be limited to "special recruitment" application filed under the basic labor certification process.[30] Thus, in the authors' view, BALCA's expansive explanation for instituting this newly developed restriction may affect the future of the "special recruitment" regulation regardless of which recruitment procedure is pursued.

BALCA pays lip service to the legislative history of the "equally qualified" statutory exception, stating that it "endeavored not to interpret the regulations in an overly restrictive fashion."[31] It proceeds to quote the congressional report, which addressed the DOL's practices "imped[ing] the efforts of colleges and universities to acquire outstanding educa-

ensure that there are no equally qualified U.S. workers." *See id.*, at 15. ASK AUTHOR for what word comes between "the" and "in" in the BALCA statement.

[27] *Id.*, at 12.

[28] 69 Fed. Reg. 77326, 77347 (Dec. 27, 2004) (stating that ".. lengthy, detailed advertisements are not required by the regulation. The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment; rather employers need only apprize applicants of the job opportunity.... If an employer wishes to include additional information about the job opportunity, such as the minimum education and experience requirements or specific job duties, the employer may do so, provided these requirements also appear on the ETA Form 9089" (emphasis added).

[29] *Id.*, at 18, n. 14.

[30] *Id.*

[31] *Id.*, at 16–17.

tors of faculty members.[32] Because this ruling seems to impede the efforts of colleges and universities to purse outstanding teachers, the Board's policy rationale for doing so is that "35 year Congressional criticism of the Department of Labor in regard to processing of labor certification applications for especially skilled educators and faculty does not necessarily reflect Congress' current view of the Department's regulatory procedures."[33] This divination of true Congressional intent is another sign that BALCA may further restrict this field of labor certification law.

In sum, the "equally qualified" review standard remains applicable regardless of which recruitment methodology is used. But the changes wrought by *East Tennessee State University* will require careful, case-by-case analysis of every PERM application for an academic teacher to ensure procedural and substantive compliance and ultimate success in each case. Based on "special recruitment" regulations and BALCA's analysis in *East Tennessee State University*, the authors offer the following are recommendations for use of preferences in labor certifications:

- The "preferences equals requirements" principle now applies to college and university employers recruiting under the basic labor certification process;
- Preferences used in advertising materials do not need to be included in the form if recruitment occurs under 20 CFR §656.18(b);
- Preferences used in advertising materials must be included in the form if recruitment occurs under 20 CFR §656.17;
- Where universities and colleges recruit for teaching positions under the basic labor certification recruitment procedure:
  - Employers are advised to ensure that the requirements and preferences continue to reflect the teaching position in question, and not the selected candidate's special talents or skills. They must also be prepared to support each requirement and preference with a "business necessity" statement, in compliance with 20 CFR 656.17(h);
  - Alternatively, employers are advised to describe desired qualifications, skills, and abilities as requirements only, excluding qualifiers such as "preferred," "helpful," "a plus," or "a bonus," *i.e.*, anything that does not clearly and directly confirm that they are indeed requirements.
- Where universities and colleges recruit for teaching positions under the "special recruitment" procedures, they may continue current practices without change, *i.e.*, these entities may list their requirements and preferences in advertising materials, and may choose to exclude the preferences from the form; and
- Due to the uncertainty in BALCA's imposition of a *mandatory requirements asymmetry* on college and university employers recruiting teachers under the basic process, employers may be better off considering a *second* competitive recruitment procedure pursuant to 20 CFR §656.18(b), rather than re-recruiting pursuant to 20 CFR §656.17 as authorized by §656.18(b) and (d).

"SPECIAL RECRUITMENT" ADVERTISING

• What Is an Appropriate Journal for Conducting Special Recruitment?

Most university and college employers use the *Chronicle of Higher Education* as the journal of choice to recruit faculty. There is no question that the *Chronicle* is a perfectly acceptable journal for a labor certification application based on special recruitment. But what about other, lesser known journals?

In recent years, DOL issued a series of denials questioning the nature of the journals used for recruitment and rejecting the journals used by employers as publications "not normally used" in a specific academic field.[34] These denials were based on the consular officer's improper application of basic labor certification standards of 20 CFR §656.17 to applications for employment of college and university teachers under 20 CFR §656.18.

PERM regulations make several distinctions between the basic and special recruitment processes. For instance, under 20 CFR §656.17(e)(1)(i), the regulations provide that "two print advertisements ... are mandatory for all applications involving professional occupations, *except applications for college*

[32] *Id.*

[33] *Id.*, at 17.

[34] *See*, *Matter of [Name Not Provided]* A 09148 47433 (ETA June 16, 2009), *Matter of [Name Not Provided]* A 09176 52307 (ETA July 9, 2009).

or university teachers selected in a competitive selection and recruitment process as provided in Sec. 656.18." (emphasis added). Further, 20 CFR §656.17(e)(1)(i)(B)(4) states that, "[i]f the job involved in the application requires experience and an advanced degree, *and a professional journal normally would be used* to advertise the job opportunity, the employer may, in lieu of one of the Sunday advertisements, place an advertisement in the professional journal…." (emphasis added.) It is under this section that the regulations impose the standard of "most likely to bring responses from able, willing, qualified, and available U.S. workers."[35] 20 CFR §656.17(e)(4). DOL appears to utilize the "normally used" standard as the threshold for identifying whether or not a journal advertisement is appropriate to replace one of the two mandatory print advertisements.[36]

Conversely, special recruitment regulations do not require that the academic employer select a journal "which would normally be used to advertise" for a particular teaching position. The special recruitment procedures delineated at 20 CFR §656.18(b)(3) simply require that "one advertisement for the job opportunity [be] placed in a national professional journal" and impose no other qualifications or requirements.

Thus, as long as the employer utilizes a national professional journal, the advertising requirement of §656.18(b)(3) is satisfied.

May a College or University Use an Electronic or Web-Based National Professional Journal When Conducting Recruitment for a Teaching Position?

Until recently, DOL's answer to this question was an unequivocal "no." The agency published the following on its website:

> The employer may not use an electronic national professional journal to satisfy the provision found at 20 CFR §656.17(e)(1)(i)(B)(4) permitting the use of a journal as an alternative to one of the mandatory Sunday advertisements for professional positions. The employer *may not use an electronic national professional journal to satisfy the provision found at §656.18(b)(3) requiring an advertisement in a journal under optional special recruitment procedures for college and university teachers*. *The employer must use a print journal to satisfy these two requirements*[37](emphasis added).

The Board considered an earlier version of this response[38] in *University of Texas at Brownsville*,[39] noting that "FAQ responses cannot create a substantive rule adverse to an applicant without first undergoing notice and comment rulemaking."[40] In that case, the employer advertised a teaching position in an online national journal and was denied certification by the consular officer, who argued that online only advertising was not in compliance with the agency's FAQs. BALCA explained that PERM regulations at 20 CFR §656.17(e)(1)(B)(4)[41] and 20 CFR §656.18(b)[42] do not explicitly require that national journal advertisements appear in print form only. The Board concluded that a denial of certification on the ground that the employer utilized an online journal ad was improper.[43]

The decision is premised on the finding that DOL did not follow the the notice and comment rulemaking process under the Administrative Procedure Act to promulgate a substantial rule change, and announced the change through the means of an FAQ[44] without required public discourse. Thus, denying certification where the employer met the national

[35] 20 CFR §656.17(e)(4).

[36] 20 CFR §656.17(e)(1)(i)(B)(4).

[37] *See* DOL's Frequently Asked Questions, Round 9 (Nov. 29, 2006), *published on* AILA InfoNet at Doc. No. 06120460 (*posted* Dec. 4, 2006).

[38] *See* DOL's Frequently Asked Questions, Round 2 (Apr. 7, 2005), *available at www.foreignlaborcert.doleta.gov/pdf/perm_faqs_4-6-05.pdf*.

[39] H.R. Rep. No. 94-1553, 94th Cong., 1st Sess., U.S. Cong. and Adm. News (1976) 6083, discussed in *Dearborn Public Schools*, 91-INA-222, 5 (BALCA Dec. 7, 1993) (*en banc*), *available at www.oalj.dol.gov/* (input "Dearborn Public Schools" in "Employer/Respondent" field.

[40] *Id*.

[41] "If the job involved in the application requires experience and an advanced degree, and a professional journal normally would be used to advertise the job opportunity, the employer may, in lieu of one of the Sunday advertisements, place an advertisement in the professional journal most likely to bring responses from able, willing, qualified, and available U.S. workers."

[42] "[D]ocumentation of the competitive recruitment and selection process must include .... [a] copy of at least one advertisement for the job opportunity placed in a national professional journal ..." *See* 20 CFR §§656.18(b) and (b)(3).

[43] *See University of Texas at Brownsville*, 2010-PER-00887, 5–6 (BALCA July. 20, 2011).

[44] *Id*.

journal publication requirement through an online posting was abuse of agency discretion.[45]

Following this decision, DOL issued a new FAQ, which expressly allows online national journal advertisements:

> **Answer**: Yes, an employer may use an electronic or web-based national professional journal to satisfy the regulatory provision at 20 CFR §656.18(b)(3), which requires use of a national professional journal for advertisements for college or university teachers. The advertisement for the job opportunity for which certification is sought must be posted for at least 30 calendar days on the journal's website. Documentation of the placement of an advertisement in an electronic or web-based national professional journal must include evidence of the start and end dates of the advertisement placement and the text of the advertisement.

The FAQ implements the decision in *University of Texas at Brownsville* by allowing the use of online journal advertisements, but requiring that the advertisement appear online for 30 days, which is not supported by the regulations and was not mandated by BALCA.[46] Thus, if an employer submits an application based on a two-week online posting, the consular officer may attempt to deny it, and the matter may need to be resolved by BALCA.

On the other hand, a 30-day posting does not seem overly burdensome, considering that the cost of such an ad is many times less than a full-fledged print ad in a national journal.[47] As a practical matter, employers may wish to post 30-day online advertisements until this issue is clarified by DOL or BALCA in the course of an appeal.

CONCLUSION

Although "special recruitment" regulations are not lengthy or complicated, recent DOL decisions indicate a degree of uncertainly and confusion stemming from interpretative differences between the Board, the consular officer, the employer, and the immigration bar. The article analyzed these differences and described the various scenarios and strategies for filing successful special recruitment applications.

[45] *Id.*, at 6.

[46] The FAQ originally contained the phrase "The electronic or web-based journal's job listing must be viewable to the public without payment of subscription and/or membership charges" (updated version *published on* AILA InfoNet at Doc. No. 11090164 (*updated* Sept. 28, 2011)). The phrase is no longer featured in the current FAQ posted on DOL website. *See* DOL, Office of Foreign Labor Certification, *available at www.foreignlaborcert.doleta.gov/faqsanswers.cfm#cutrec6*.

[47] A response to a recent inquiry to the Chronicle of Higher Education (*jobs@chronicle.com*) confirmed CHE online ads run for 30 days and the cost of such advertisements is $260 (as of Oct. 4, 2011). E-mail from *Chronicle of Higher Education*, Oct. 4, 2011.