

# PUBLICATION

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## Not So Fast to Online Professional Journal Ads for PERM

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**Everyone who wallows in the world of PERM is abuzz about a recent BALCA case that overruled DOL's rejection of an employer's use of an online "national journal" advertisement. (Matter of University of Texas at Brownsville, 2010-PER-0087 (BALCA, July 20, 2011)). I say be careful—watch, wait, and run print ads until further notice.**

PERM is that arcane process in which employers conduct stylized recruitment to show the Department of Labor that no minimally qualified worker is available for a job so that a qualified foreign national can be sponsored for permanent residence based on that job. DOL is ruthless in denying PERM applications years after the recruitment took place on the basis of arcane technicalities that only lawyers could keep up with, sending the employer and foreign worker back to square one to get a new place in the years-long queue for employment-based green cards. Employers can appeal denials to the Board of Alien Labor Certification Appeals (BALCA) within DOL.

On any one case, three judges of BALCA decide an appeal, but there are many more than three judges on BALCA, and they don't seem to see things all the same way anymore than federal district judges or federal appeals judges do. The planets seemed to align auspiciously in a recent case in which a university sponsoring a professor had placed an ad in a journal called "Inside Higher Ed." This journal, like many others these days, apparently only runs job advertisements on the web, not in any print version. After all, what job hunters want weeks-old information about opportunities? But DOL is stuck in the mud and has always insisted that a print ad is required to play the PERM game.

The university had advertised for candidates and found the alien most qualified (which is enough only for university teacher cases, based on a longstanding regulation). When the university responded to a DOL audit of its recruitment process, it apparently forgot to mention that it had also run the ad in the old stable, the Chronicle of Higher Education (which, for whatever reasons including perhaps that it knows what DOL requires and therefore what employers hiring foreign nationals want, still includes job ads in its print version). The university only showed DOL about the online ad from Inside Higher Ed. DOL denied the PERM for lack of a print ad in a professional journal.

The employer filed an appeal. It did not use magic words including "reopen" or "reconsider" but only said "appeal," so that DOL refused to consider any new evidence (i.e., the CHE print ad) before sending the case on to BALCA. The BALCA panel of judges (read: Dr. Jeckyl) had to agree that the record was set, so the CHE print ad was out, so it was forced to decide the question we have all been asking: what is wrong with an online ad? The panel ruled that "the king has no clothes" (my words, not BALCA's)—that is, nothing is wrong with an online ad, and by the way the DOL regulation does not require print ads in professional journals, and by the way DOL cannot make up rules by posting stuff in FAQs on its web site (consider the irony: maybe DOL needs to distribute its FAQs to all employers in print!). University wins.

It is tempting to think that the wicked witch of print ad requirements is dead, but not so fast. A "Mr. Hyde" may rule on the next case in the hopper about online vs. print ads, and in the next case DOL might put up more of a fight than this time (where it seems not to have defended its position with any rationale). We will keep urging

employers to use print ads until DOL throws in the towel for all to see. Meanwhile, I can imagine that someone in the DOL Solicitor's Office is working on a regulation requiring professional advertisements to be in print. Who knows why, they won't say.