U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 May 2007

BALCA Case No.: 2007-PER-00020
ETA Case No.: A-05277-38867

In the Matter of:

DEMOS CONSULTING GROUP, LTD.,
Employer,

on behalf of

KAUSHIK DEKA,
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Tullio Capasso, Esquire
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC
Boston, Massachusetts 0211
For the Employer

Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
Frank P. Buckley, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

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.[1] The issue in this case is whether the application is in violation of 20 C.F.R. § 656.17(h)(4), which provides:

> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
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> (ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

BACKGROUND

The Employer – a software developer -- filed its application for alien employment certification on October 28, 2005 for the position of Senior Quantitative Analyst/Developer. (AF 16-34). The position's educational requirement was a Master's Degree in Computer Science or, alternatively, Computer Information System or Engineering. The position's experience requirement was three years of experience in the job offered or, alternatively, three years of experience in a position in software development with distributed multi-tier client server applications. (AF 17-18). The job duties were:

> Research and develop breakthrough quantitative solutions to banking and back-office operations. Analyze business requirements and write technical specifications for development projects. Develop viable statistical and queuing theory solutions to complex business problems and implement them in an enterprise-wide software product using algorithms in software engineering, C++/Java, MS SQL/IIS and Crystal, MATLAB, CPLEX, CSIM, COM, Windows Kernel programming and MINITAB/STATIT. Interface with all levels of management to communicate progress and status on project developments. Participate in project design and development meetings. Publish white papers on

[1] The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

> technical issues and breakthrough research to ensure the firm's visibility and also to facilitate corporate learning.

(AF 26). Specific skill requirements were:

> The experience must include 1 year w/ the following: using algorithms in software engineering, C++/Java, MS SQL/IIS and Crystal, MATLAB, CPLEX, CSIM, COM, Windows Kernel programming and MINITAB/STATIT. Must also have knowledge of stochastic modeling, forecasting, linear optimization and queuing theory.

(AF 18). The Alien had worked for the Employer as "Sr. Quantitative Analyst/I" since September 15, 2002. (AF 21).

The CO denied the application on January 17, 2006 on the ground that the application was in violation of 20 C.F.R. § 656.17(h)(4)(ii). (AF 13-15). Specifically, the CO found that the Alien currently worked for the Employer and only qualified for the position by virtue of the alternative experience requirement. The application did not indicate, as required by section 656.17(h)(4)(ii), that the Employer would accept applicants with any suitable combination of education, training or experience. The CO informed the Employer that, in addition to taking an appeal, it had the option of submitting a new, corrected application.

The Employer filed a motion for reconsideration/request for BALCA review by letter dated February 13, 2006, in which the Employer argued that it was not required to state that it was willing to accept applicants with any suitable combination of education, training or experience because the Alien met all the primary job requirements prior to joining the Employer's workforce . (AF 2-12). The Employer detailed the Alien's work experience with Microland in India as a Software Engineer from September 15, 1997 to July 14, 1998 where he worked on software development and distributed multi-tier client server applications; with the University of Missouri as a Graduate Research Assistant from August 15, 1998 to August 2000 on a 20 hour a week schedule, where his work exposed him to software development involving multi-tier server-client applications, and

to stochastic modeling, forecasting, linear optimization and queuing theory; with Sprint's Broadband and Wireless Group as a Network Engineer from October 15, 2000 to January 14, 2001, where his work included experience with software development with multi-tier client server applications; and with Motorola Broadband Communications Sector from January 15, 2001 to August 14, 2002 as a Software Engineer, where his work included experience with multi-tier client server applications and with using algorithms in software engineering, C++/Java, MS SQL/IIS and Crystal, MATLAB, CPLEX, CSIM, COM, Windows Kernel programming and MINITAB/STATIT. The Employer therefore argued that, before the Alien started work for it, he had at least three years and seven months of experience in a position in software development with multi-tier client server applications, at least one year of experience using algorithms in software engineering, C++/Java, MS SQL/IIS and Crystal, MATLAB, CPLEX, CSIM, COM, Windows Kernel programming and MINITAB/STATIT, and demonstrated knowledge of stochastic modeling, forecasting, linear optimization and queuing theory through his graduate study.

The CO denied reconsideration on February 22, 2007 on the ground that the Employer had failed to establish that the Alien qualified for the position through the primary requirements. (AF 1).

The CO then forwarded the case to BALCA. BALCA issued a Notice of Docketing on February 28, 2007. The CO filed an Appellate Brief urging that the CO's denial be affirmed because the Employer's motion for reconsideration/request for BALCA review only showed that the Alien had over three years of experience with software development with distributed multi-tier client server applications, which was the alternative requirement rather than the primary experience requirement as stated in the ETA Form 9089. The CO argued that the regulation at 20 C.F.R. § 656.17(h)(4)(i) makes it clear that "alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought," and therefore "alternative experience" is separate and distinct from "primary experience."

The Employer did not file a brief or statement of position in response to BALCA Notice of Docketing.

DISCUSSION

In the proposed PERM regulations, the Employment and Training Administration proposed to eliminate the use of alternative experience requirements. ETA, *Proposed Rule, Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 67 Fed. Reg. 30466 at 30473 (May 6, 2002). However, during Notice and Comment rulemaking, ETA was persuaded to allow employers to state such requirements. ETA, *Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 69 Fed. Reg. 77326 (Dec. 27, 2004). The Preamble to the Final Rule stated:

> 8. Alternative Experience Requirements
>
> We received over 35 comments in response to the proposal to eliminate the use of alternative experience requirements as a means of qualifying for the employer's job opportunity. The vast majority of commenters were opposed to the proposal. These commenters noted alternative experience and educational requirements are a necessary part of recruitment and their elimination would prevent employers from staffing positions in accordance with real-world business practices whereby employers typically interview job candidates and evaluate their skill sets to determine whether the candidate can perform the job. One commenter observed today's resumes do not list past positions, but rather the skills and accomplishments of the individual candidate. ACIP commented that large employers normally use alternative experience or educational requirements when hiring both foreign nationals and U.S. workers because, in their experience, there is more than one possible route to gain the education and skills needed to perform the duties of a position. A university and a high-tech company noted emerging technology and cutting-edge research thrive in an interdisciplinary environment where individuals from seemingly different backgrounds may occupy the same position.
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> Several commenters observed the proposal seemed counter-productive to protecting the U.S. labor force. AILA and other commenters noted by eliminating alternative requirements, DOL was actually limiting the pool of U.S. workers who may qualify for a position. A few commenters,

including AILA, thought it unfair that the proposed rule would prohibit employers from considering any alternative experience possessed by foreign nationals, while at the same time force employers to consider an alternate array of experience and education possessed by U.S. workers, thereby ignoring the reality of the international job market.

Several commenters, including AILA, a high-tech employer, and a few universities, disagreed with DOL's statement in the NPRM that alternative requirements are a phenomenon of lesser-skilled positions. Other commenters stated the NPRM was drawn more broadly than necessary to address DOL's concerns about individuals circumventing the Other Worker visa quota limits. These commenters suggested DOL deal directly with the Other Worker problem by examining whether an alternative requirement was bona fide, reasonable, and/or normal for the occupation and not by eliminating alternatives altogether.

An immigration law firm pointed out the issue of alternative requirements was addressed by BALCA in the *Matter of Francis Kellogg*, (94-INA-465, February 2, 1998) (en banc). *Kellogg* adopted a reasonable solution that required the employer to accept any and all experience that would reasonably prepare an applicant for the position and not permit an employer to accept only the specific related experience the alien might have, without regard to whether the other experience would prepare the applicant for the position in question. This commenter observed DOL has never implemented the rationale expressed by BALCA in *Kellogg* on a nationwide basis.

Six commenters supported the elimination of the alternate experience requirement. Several SWAs stated that alternative experience requirements enabled foreign workers to easily qualify for available job openings and should be eliminated. FAIR commented that alternative requirements have almost always been used by employers to disguise what are really unskilled jobs as skilled positions in order to promote alien relatives and cronies ahead of law-abiding U.S. applicants. The AFL-CIO said alternative requirements allowed employers to tailor job requirements to the qualifications and experience of the foreign worker rather than the requirements of the job.

We are persuaded by the majority of commenters that there may be legitimate instances when alternative job requirements, including experience in a related occupation, can and should be permitted in the permanent labor certification process. However, we do not agree that proposed § 656.17(g)(4)'s limitations on what an employer may require as an alternative experience requirement must be consistent with the definition of related occupation in § 656.17(j) of the NPRM, because these two sections have distinctly different purposes. Section 656.17(j), now (k) addresses the qualifications of U.S. workers laid off by the employer-applicant. Section 656.17(g), now (h), on the other hand, addresses the qualifications of the alien beneficiary and is designed to

> prevent an employer from allowing the alien beneficiary to benefit from training and/or experience opportunities not offered to U.S. workers.
>
> Under § 656.17(h)(4) of this final rule, an employer may specify alternative requirements provided the alternative requirements meet the criteria set forth by BALCA in the *Kellogg* case. In *Kellogg*, BALCA indicated that alternative requirements and primary requirements must be substantially equivalent to each other with respect to whether the applicant can perform the proposed job duties in a reasonable manner. There may also be other equally suitable combinations of education, training or experience which could qualify an applicant to perform the job duties in a reasonable manner, but which the employer has not listed on the application as acceptable alternatives. Therefore, even when the employer's alternative requirements are substantially equivalent but the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, the alternative requirements will be considered unlawfully tailored to the alien's qualifications unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

69 Fed. Reg. at 77352-77353.

Thus, section 656.17(h)(4)(ii) was clearly intended to implement in the PERM regulations the pre-PERM ruling in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc), that "where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [the pre-PERM regulation at § 656.21(b)(5)], unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable."

Our review of the job requirements in this case compared with the Alien's background indicates that the job requirements were largely tailored to the Alien's qualifications. It also leads to the conclusion that the Alien only potentially qualified for the position through the alternative experience requirement.[2] The CO correctly argued

[2] The Form 9089 indicates that the Alien worked in the Senior Qualitative Analyst position with the Employer from September 2002. Thus, at that time that the job was advertised in May 2005 the Alien would not have yet had three years of experience in the job offered. Moreover, if the Alien gained his

that the ETA Form 9089 plainly shows that the primary job requirement in this case was three years of experience in the job offered, and that the alternative requirement was three years of experience in a position in software development with distributed multi-tier client server applications. If the alternative requirement was the exact equivalent of the primary requirement there would have been no reason to list it as an alternative requirement.

Since the Alien only qualified for the position under the alternative experience requirement, under section 656.17(h)(4)(ii), the Employer's application was required to state that any suitable combination of education, training, or experience was acceptable. It did not, and we therefore find that the CO properly denied certification.

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

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qualifying experience while working for the Employer, the application might run afoul of section 656.17(i)(2), which requires that an employer not require of domestic worker applicants training or experience beyond what the alien possessed at the time of hire.

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.