U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 August 2009

BALCA Case No.: 2009-PER-00132
ETA Case No.: A-07066-17216

In the Matter of

AGMA SYSTEMS LLC,
Employer,

on behalf of

BIJO THOMAS,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Ramesh Gurnani, Esquire
Gurnani & Gurnani
Edison, New Jersey
For the Employer

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

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This matter involves an appeal of the denial by an Employment and Training Administration, Office of Foreign Labor Certification, Certifying Officer ("CO") of permanent alien labor certification 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.

BACKGROUND

On April 12, 2007, the CO accepted for processing the Employer's application for permanent employment certification for the position of "Software Engineer (Applications)." (AF 1, 49-60). On the ETA Form 9089, the Employer stated an education requirement of a Master's Degree in Computer Science. (AF 49; Form 9089, Items H4 and H4-B). The Employer did not require experience in the job offered. (AF 50; Form 9089, Item H6). The Employer indicated that it would also accept a Master's Degree in Engineering. (AF 50; Form 9089, Items H7 and H7-A). The Employer also indicated that an acceptable alternative combination of education and experience was a Bachelor's Degree, with five years of experience. (AF 50; Form 9089, Items H8, H8-A, and H8-C). The Employer indicated that experience in an alternative occupation was acceptable – specifically 36 months of experience in the occupation of "Computer Software developing and/or consulting." (AF 50; Form 9089, Items H10 and H10-A). The Employer indicated that these requirements were normal for the occupation. (AF 50; Form 9089, Item H11).

The Form 9089 indicated that the Alien qualified for the position by virtue of the alternative combination of education and experience requirement. (AF 53; Form 9089, Items J17 through J20). The form indicated that the Alien possessed a Bachelor's Degree in Computer Science and Engineering, (AF 52; Form 9089, Item J11) and prior to working for the petitioning Employer, had worked from February 1, 2006 to August 31, 2006 at Computech Computers Inc. as a "Sr. Documentum Admn.;" from October 25, 2005 to January 31, 2006 at Fourth General Services as a "Senior Documentum Admin.;" and at Computech Computers Inc. from August 1, 2001 to October 19, 2005, as a "Software Engineer." (AF 54, 58; Form 9089, Items K, Jobs 2, 3 and 4).[1]

[1] Documentum appears to be an enterprise content management application of EMC Corporation. *See* www.emc.com/products/family/documentum-family.htm (visited July 1, 2009)

On August 17, 2007, the CO denied the application on the ground that the application did not state that any suitable combination of education, training or experience would be acceptable, as required by 20 C.F.R. § 656.17(h)(4)(ii). (AF 45-47).

On September 7, 2007, the CO received a request for reconsideration/review from the Employer. (AF 3-47). The Employer's attorney initially stated that the clear reading of the Form 9089 was that the position's requirements were either a Master's Degree in Computer Science or Engineering and three years of experience in Computer Software Developing and/or Consulting, or a Bachelor's Degree in Computer Science or Engineering and five years of experience in Computer Software Developing and/or Consulting. The Employer argued these were not really "alternative" requirements, but rather reflected Master's degree equivalency issues as explained in the "Yates" memo. (*See* AF 24-29; Memo from the Acting Associate Commissioner, Office of Programs and Deputy Executive Associate Commissioner, Office of Field Operations to Service Center Directors and Regional Directors (U.S. Dept. of Justice, Immigration and Naturalization Service Mar. 20, 2000)). The Employer's attorney wrote:

> 20 C.F.R. 656.17(h)(4)(ii) does not apply in the instant application because the advanced degree in the stated majors and 3 years of experience is the minimum requirement. However, the alternative is based on what education and experience combination is equivalent to a Masters degree in terms of a Bachelor's degree and additional experience rather than a true alternative.

(AF 5). The Employer argued that the regulation at 20 C.F.R. § 656.17(h)(4)(ii) was "an attempt by the USDOL to capture the essence of the BALCA decision in … *Francis Kellogg*, [1994-INA-465 (Feb. 2, 1998)(en banc)]" and that the essence of that decision was to prevent an employer from tailoring alternative requirements, which were substantially different from the primary job requirements, to the alien's specific qualifications. Here, "[w]e are dealing with an information technology industry position equivalent to that of a computer programmer, which the *Kellogg* decision uses as an example of when alternative requirements may actually, legitimately serve a business

purpose and thus, not be subject to the requirement as laid out at [20] C.F.R. § 656.17(h)(4)(ii)." (AF 5). The Employer's motion for reconsideration/review indicated the Employer found the language accepting a candidate with any suitable combination of education, training or experience not to be acceptable, as it is a "wishy-washy" and subjective standard. The Employer did not include the *Kellogg* language because it was uncomfortable with it. (AF 6).

The Appeal File contains two versions of the CO's ruling on the motion for reconsideration. The first is dated December 24, 2008. (AF 1-2). In this version, the CO recited the Employer's primary requirements as a Master's Degree in Computer Science or Engineering and zero years of experience as a Software Engineer (Applications), and its alternative requirements as either a Bachelor's Degree in Computer Science or Engineering and five years of experience as a Software Engineering (Applications), or a Bachelor's Degree in Computer Science or Engineering and three years of experience in an occupation of Computer Software developing and/or consulting. Because the Alien qualified for the job only by virtue of the alternative requirements, the *Kellogg* language was required to be indicated on the application.

The second version of the denial of reconsideration is dated January 6, 2009, and is similar, except that it recited the Employer's primary requirements as a Master's Degree in Computer Science or Engineering and three years of experience in Computer Software developing and/or consulting, and its alternative requirements as either a Bachelor's Degree in Computer Science/Engineering and five years of experience as a Software Engineering (Applications), or a Bachelor's Degree in Computer Science/Engineering and five years of experience in Computer Software developing and/or consulting. This version of the denial is also numbered AF 1-2.

The CO referred an Appeal File to the Board, which issued a Notice of Docketing on January 22, 2009. The Employer filed an appellate brief. In its brief the Employer characterized its job requirements as a Master's Degree in Computer Science or Engineering and three years of experience in Computer Software Developing and/or

Consulting, or a Bachelor's Degree in Computer Science or Engineering and five years of experience in Computer Software Developing and/or Consulting. The Employer then stated that the CO appeared to have three variations on the requirements, and suggested that the Form design caused the CO to misinterpret the requirements. (Employer's Brief at 5). The Employer argued that its requirements were clearly indicated on the Form pursuant to the instructions as they applied to Question H on the Form 9089.

The Employer's brief argued that "[t]he *Kellogg* language is not required in the instant application since … [the] employer's primary requirement is normal for the job in the United States and the alternative requirement is exactly equivalent … to the primary requirement – as stated by the [Yates memo]." (Employer's Brief at 6). The Employer noted that at the time the brief was written the only BALCA decision interpreting the Kellogg issue under the PERM regulations was *Demos Consulting Group, Ltd.*, 2007-PER-20 (May 16, 2007), which was distinguishable because in that case the primary and alternative requirements were not exactly equivalent, and there was a reason in the instant application to list the alternative requirements – i.e., to be in compliance with the Yates memo.

The Board has no record of receiving an appellate brief from the CO.

DISCUSSION

The job requirements

The Background section of this decision notes the variations in interpretations of the Employer's job requirements in this matter. Upon review of this matter, it appears to us that the current version of the Form 9089 is not perfectly designed for an employer who needs to present job requirements where it is not requiring experience in the particular job offered, but is requiring experience in the field. Consequently, it has been difficult to reconcile the Employer's answers to Form 9089 Section H questions and the Employer's characterization of its job requirement, even taking into consideration its

argument that the instructions to Part H of the form should make its statement of its requirements clear. The lack of clarity about the Employer's requirements may have been the result of deficiencies with the form and instructions, or the Employer's misinterpretation of the form and instructions, or some combination of the two.

For purposes of this appeal, however, we will accept the Employer's characterization that its requirements were a Master's Degree in Computer Science or Engineering and three years of experience in Computer Software Developing and/or Consulting, or a Bachelor's Degree in Computer Science or Engineering and five years of experience in Computer Software Developing and/or Consulting.

The Kellogg Regulation

The PERM regulation at 20 C.F.R. § 656.17(h)(4) provides:

> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
>
> (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.

As noted in *Demos Consulting Group, Ltd.*, 2007-PER-20 (May 16, 2007), this regulation was 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."

The appeal in this matter focuses on the part of the *Kellogg* decision that observed that some employer have alternative job requirements that are substantially similar and "legitimate."[2] The pertinent portion of the *Kellogg* decision is as follows:

> … Permitting an employer to advertise with qualifications greater than that possessed by the alien, but allowing the alien to qualify with lesser qualifications which are listed in the guise of "alternate" qualifications, is a violation of § 656.21(b)(5). Thus, we hold that any job requirements, including alternative requirements, listed by an employer on the ETA Form 750A must be read together as the employer's stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, shall be those defined for the job in the D.O.T., and shall not include requirements for a language other than English (20 C.F.R. § 656.21(b)(2)). …
>
> However, there are legitimate alternative job requirements, which can, and should be permitted in the labor certification process. For example, where an employer offers a job as a computer programmer, either a degree in computer science or mathematics, or even programming experience without a degree, might be considered as equivalent, and thus equally acceptable, in a given case. But, these alternatives must be substantially equivalent to each other with respect to whether the applicant can perform in a reasonable manner the duties of the job being offered. Thus, where an employer's primary requirement is considered normal for the job in the United States and the alternative requirement is found to be substantially equivalent to that primary requirement (with respect to whether the applicant can perform in a reasonable manner the duties of the job offered), the alternative requirement must also be considered as normal for a § 656.21(b)(2) analysis.

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[2] Shortly after the Employer filed its appellate brief in this matter, this panel issued its decision in *Federal Insurance Co.*, 2008-PER-37 (Feb. 20, 2009), in which we found that the Form 9089 and its instructions failed to provide a reasonable means for an employer to comply with 20 C.F.R. § 656.17(h)(4)(ii)'s mandate to include the *Kellogg* language on the face of the application. Thus, due process was violated where the CO denied the application for failure to write the *Kellogg* language on the application. Following *Federal Insurance Co*., the Board reversed the denial of certification in a number of appeals in which the denial of certification was based on the absence of the *Kellogg* language on the application. In the instant case, the CO's initial denial was also based on the absence of *Kellogg* language. But *Federal Insurance Co*. does not fit the appeal in this case because in its motion for reconsideration the Employer indicated that it expressly determined that it would not agree to the *Kellogg* language. Its defense to the absence of that language on the application was not the deficiency in the form and instructions to state where to place the language, but that the regulation at 20 C.F.R. § 656.17(h)(4)(ii) did not apply to its application.

> Further, as we have noted, in all three of these cases the alien does not meet the primary job requirements, but only potentially qualifies for the job offered because the employer has chosen to list alternate job requirements. Indeed, such is true in the entire line of alternate requirement cases such as *Best Luggage* and its progeny. In such cases, it may be easily argued that there are other equally suitable combinations of education, training or experience which could qualify an applicant to perform the duties of the job offered in a reasonable manner, but which have not been listed on the ETA 750A as acceptable alternatives. Thus, U.S. applicants who possess such other qualifications are excluded from applying for the job offered. This clearly raises the issue of whether the alternate job requirements are unlawfully tailored to the alien's qualifications. This may be true even if the alternate requirements are substantially equivalent to the first requirements and even if the requirements otherwise comply with § 656.21(b)(2).
>
> Therefore, we hold 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 § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

USDOL/OALJ Reporter at 6-7 (footnote omitted) (citations in the quotation are to pre-PERM regulations).

In the instant case, the Employer argues that its job requirements are not only substantially similar, but pursuant to the Yates memo, effectively identical. Stated another way, the Employer is arguing that it does not have a "primary" and "alternative" requirement, but only two sets of requirements that are effectively equivalent. As such, it is not qualifying the Alien with lesser qualifications in the guise of "alternate" qualifications, but only complying with the way it needs to describe the job requirements to comply with the Yates memo.

We are not as certain that the Employer was compelled to comply with the Yates memo in completing a Form 9089, or that that the Yates memo and the *Kellogg* decision are innately intertwined in regard to issues of equivalency and job requirements. The

Yates memo addressed the question of what qualifications a petitioner must have to qualify for an EB-2 advanced degree professional visa. The *Kellogg* decision addressed, in the context of a labor certification application before the Department of Labor, the issues of whether an employer is describing its actual minimum requirements, whether alternative job requirements were being tailored to the alien's particular qualifications, and whether U.S. applicants were being afforded the same flexibility in qualifying education and experience as was afforded to the alien.

We need not resolve any purported inconsistency between USCIS and DOL requirements in today's decision, however, because upon review of the Employer's application, we find that the *Kellogg* language requirement is not applicable. This is because we accept the proposition that a Master's Degree in Computer Science or Engineering and three years of experience in Computer Software Developing and/or Consulting -- and a Bachelor's Degree in Computer Science or Engineering and five years of experience in Computer Software Developing and/or Consulting -- are substantially equivalent requirements. In this instance, the Employer does not have a "primary" requirement (even though the Form 9089 more or less forced it to list one of the requirements as such on the form). Rather, it has two sets of requirements that are essentially the same. Because there is no "primary" requirement, section 656.17(h)(4) is not invoked. In other words, the Employer's application presents precisely the kind of alternative requirements for a computer programmer position that the *Kellogg* decision recognized as "legitimate." Moreover, we find no indication in this matter that the job requirements were tailored to the Alien's special qualifications.

Accordingly, we find that the Employer's application did not violate the regulations by failing to include the *Kellogg* language, and therefore we reverse the CO's denial of certification.

ORDER

IT IS ORDERED that permanent alien labor certification be **GRANTED**.

For the Panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

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.