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-00110
ETA Case No.: A-07060-15537

In the Matter of:

GLOBALNET MANAGEMENT L.C.,
Employer,

on behalf of

TOMAZ LOGAR,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Jeffrey A. Devore, Esquire
Devore & Devore, P.A.
Palm Beach Gardens, Florida
For the Employer

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, 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.

STATEMENT OF THE CASE

Globalnet Management L.C. ("Employer") filed an Application for Permanent Employment Certification on behalf of the Alien for a "Market Research Analyst" position. (AF 17-32). The Employer required a Bachelor's degree in Business Administration and 2 years of experience. (AF 19). Alternatively, the Employer noted in section H that it would accept a High School diploma and 14 years of experience. *Id.* It also noted that it would accept 168 months (14 years) of experience in "any suitable combination of education, training or experience." *Id.*

On August 3, 2007, the CO denied certification (AF 14-16) on the ground that "[t]he alternative requirements listed in Form ETA 9089 Items H-8 and H-10 are not substantially equivalent to the primary requirements listed in H-4 and H-6. Specifically, the employer's combination of education and experience, a High School Diploma and 14 years of experience in the job offered; OR the employer's alternative experience of 168 months in any suitable combination of education, training or experience, is not substantially equivalent to the employer's primary requirements of a Bachelor's degree in Business Administration and 24 months experience in the job offered." (AF 16). The CO cited 20 C.F.R. § 656.17(h)(4)(i) as its authority for denial, which states that "alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought." *Id.*

The Employer submitted a Request for Review on August 24, 2007. (AF 3-13). In this request, the Employer pointed to the Department of Homeland Security regulations regarding Bachelor's degree equivalencies. The Employer specifically referred to 8 C.F.R. §214.2(h)(4)(iii)(D)(5), which states:

> For purposes of determining equivalency to a baccalaureate degree in the specialty, [through a combination of education, specialized training, and/or work experience in areas related to that specialty], three years of specialized training and/or work experience must be demonstrated for each year of college level training the alien lacks.

(AF 3-4). The Employer argued that its alternate requirements were equivalent to its primary requirements when using the formula provided in this regulation. (AF 4). Specifically, the Employer explained that the amount of work experience that would be the equivalent to its primary requirement of a four year Bachelor's degree plus 2 years of experience was 14 years or 168 months. *Id.* The Employer emphasized that its minimum requirements for the position were identical whether an applicant qualified based on education, training, experience or a combination of the three. The Employer also cited *Francis Kellogg*, 1994-INA-465 (Feb. 8, 1998) (*en banc*), arguing that its alternative job requirements were acceptable because it stated on that the application that "applicants with any suitable combination of education, training or experience are acceptable."

On November 26, 2008, the CO issued a letter of reconsideration, finding that the Employer's alternative requirements were not substantially equivalent to the Employer's primary requirements, in violation of 20 C.F.R. § 656.17(h)(4)(i) of the Department of Labor's Permanent Labor Certification regulations. (AF 1). The CO stated "When validating the equivalency of the employer's alternative requirements against the primary requirements, the Specific Vocational Preparation level is calculated utilizing the guidance provided in the administrative directive, Field Memorandum No. 48-94, issued May 16, 1994." *Id.* The CO contended that, based on these guidelines, 14 years of work experience is <u>not</u> substantially equivalent to a Bachelor's degree and 2 years of work experience. *Id.* Rather, 4 years of work experience is the substantial equivalent of a Bachelor's degree and 2 years of work experience. *Id.*

The matter was forwarded to BALCA on November 26, 2008 and a Notice of Docketing was issued on December 12, 2008. The Employer notified BALCA on December 23, 2008, that it would like to proceed with the appeal and on January 23, 2008, it filed an appellate brief. In this brief, the Employer argued that "the 1994 pre-Perm Legal Memorandum that served as the basis for the CO's determination provides

guidance for determining SVP levels, not whether an employer's primary and alternative job requirement are substantially equivalent." The Employer further asserted that "[t]he seminal decision setting forth the guidelines on the employer's use of primary and alternative requirements on Applications for Permanent Employment Certification is found in the BALCA decision *Matter of Francis Kellogg*." The Employer then argued that, according to *Kellogg*, "in order to determine if the primary and alternative requirements are substantially equivalent, the requirements are to be analyzed in such a manner as to determine whether an applicant who qualifies for the position by virtue of the alternate requirements can perform the job in question in a reasonable manner. If the applicant can, then the primary and alternate requirements are substantially equivalent." The Employer again referred to 8 C.F.R. §214.2(h)(4)(iii)(D)(5) and argued that "although USCIS regulation may not be binding in labor certification proceedings, they have been recognized by BALCA as authoritative," and cited to *Syscorp International*, 1989-INA-212 (Apr. 1, 1991). The Employer also noted that since the Alien is currently in H-1B status, it relied upon the USCIS regulations in determining that the Alien's education and prior work experience were the equivalent of a Bachelor's degree plus 2 years of experience, and that this position was both justifiable and reasonable and complies with the *Kellogg* standard.

The CO filed a brief urging that the denial be affirmed because the PERM program has set out minimum and maximum experience requirements and a structure for determining the equivalency of educational degrees with years of experience, and the Employer failed to adhere to these requirements. While the DHS regulation the Employer cites governs the determination of equivalency when DHS is issuing an H-1B, "it explicitly states that the equivalencies are to be used for the purposes of paragraph 8 C.F.R. § 214.2(h)(4)(iii)(C)(4)." The CO then asserted that "The Labor Certification Process for Permanent Employment of Aliens in the Unites States (PERM) program has its own equivalencies embodied in its own regulations." The CO further contended that the PERM regulations "outline minimum and maximum experience requirements for positions of different levels under the specific vocational preparation (SVP) definition. 20 C.F.R. § 656.3." The CO explained: "Under this definition a Market Research Analyst is a Level 7, which allows the employer to require 'Over 2 years and up to and

including 4 years' of experience." *Id.* The CO pointed out that the SVP definition helps ensure that the job requirements are tailored to the position rather than to the alien the employer is seeking to hire. Responding to the Employer's argument in citing to *Kellogg*, the CO noted that this case held that alternative requirements have been accepted by BALCA when they are found to be substantially equivalent to the job offered and expansive rather than restrictive of the potential applicant pool. The CO pointed out that, in this case, the requirement of 14 years of experience significantly restricts the applicant pool and contravenes the SVP requirement. The CO further contended that the SVP applies to both primary and alternative requirements and acts as a guide when determining alternative requirements. The CO explained that under the SVP requirement, a bachelor's degree is equivalent to 2 years of experience, thus a Bachelor's degree plus 2 years of work experience falls within the SVP range (2 + 2 = 4) for a Level 7 position. 20 C.F.R. § 656.3. However, the CO noted that the alternative requirement of 14 years of experience is far outside the SVP range of up to 4 years for this position.

DISCUSSION

20 C.F.R. § 656.17(h)(4)(i) of the Department of Labor's Permanent Labor Certification regulations requires: "Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought." In describing the scope of Part 656, section 656.1(a)(2)(b) states: "The regulations under this part set forth the procedures through which such immigrant labor certifications may be applied for, and granted or denied."

In 20 C.F.R. § 656.3, the PERM regulations outline minimum and maximum experience requirements for positions of different levels under the specific vocational preparation (SVP) definition. Field Memorandum No. 48-94 (May 16, 1994) expands on the SVP requirements and offers guidance in determining the appropriate SVP level based on the required experience and level of education. The SVP levels help to ensure

that the job requirements are tailored to the position rather than to the alien the employer is seeking to hire.

In the instant case, the Employer incorrectly cited to Department of Homeland Security regulations regarding Bachelor's degree equivalencies, notably 8 C.F.R. §214.2(h)(4)(iii)(D)(5). As the CO pointed out, this DHS regulation governs the determination of equivalency when DHS is issuing an H-1B. Section 214.2(h)(4)(iii)(D) explicitly states that the equivalencies are to be used "for the purposes of paragraph 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) of this section." These regulations do not apply to the Department of Labor's Permanent Labor Certification program.[1]

Applying the PERM regulations and the SVP guidelines set out in the Field Memorandum, the Market Research Analyst position, as described by the Employer on its PERM application, is a Level 7. Under the SVP guidelines, the employer may require "over 2 years and up to and including 4 years" of experience. Section 8 of the guidelines specifically states that a Bachelor's degree is the equivalent to 2 years of experience. Therefore, the Employer may require either 2 years of experience and a Bachelor's degree or 4 years of experience. These guidelines apply to both the primary and alternative requirements for the position, which section 656.17(h)(4)(i) requires, "must be substantially equivalent." As the CO pointed out in his letter of reconsideration, 14 years of work experience is not substantially equivalent to a Bachelor's degree and 2 years of work experience. Moreover, in *Kellogg*, the Board held that alternative requirements are acceptable when they are substantially equivalent to the job offered and expansive rather than restrictive of the potential applicant pool. As the CO asserted in his brief, in this case, the requirement of 14 years of experience significantly restricts the applicant pool and contravenes the SVP requirement.

[1] In arguing in favor of applying the DHS regulation, the Employer asserted that "although USCIS regulation may not be binding in labor certification proceedings, they have been recognized by BALCA as authoritative," and cited to *Syscorp International*, 1989-INA-212 (Apr. 1, 1991). However, the Board qualified this finding in *Syscorp* by stating that the USCIS equivalency determinations would only be persuasive "in the absence of any contrary regulatory guidelines promulgated by the Secretary of Labor." In this matter, there are contrary regulatory guidelines. The 1994 Field Memorandum includes guidelines which specifically discuss equivalency determinations for a Bachelor's degree in the labor certification process. Thus, we find this argument to be invalid.

Accordingly, we 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 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.