U.S. Department of Labor

Board of Alien Labor Certification Appeals
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BALCA Case No.: 2010-PER-00038
ETA Case No.: A-07204-58927

In the Matter of:

EAST TENNESSEE STATE UNIVERSITY,
Employer,

on behalf of

JEROME BANAYA MWINYELLE,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: William A. Stock, Esquire
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For the Employer

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Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Scott D. Pollock, Esquire
For Amicus Curiae, American Immigration Lawyers Association

Before: **Burke, Colwell, Johnson, Purcell and Vittone**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

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[1] regulations found at Title 20, Part 656 of the Code of Federal Regulations. En banc review was granted in the matter to address several issues relating to the regulatory requirements that apply to an employer seeking to fill a college or university teaching position under the basic recruitment process for professional positions rather than the competitive recruitment and selection process of the PERM regulations.

STATEMENT OF THE CASE

On August 21, 2007, the Certifying Officer (CO) accepted for filing the Employer's Form 9089 Application for Permanent Employment Certification for the position of Assistant Professor of Spanish. (AF 47-56).[2] The Employer indicated on the Form 9089 that it was using the basic recruitment process for professional occupations rather than the competitive recruitment and selection process available for applications involving employment of college and university teachers. (AF 50). The Employer listed the job requirements as a master's degree in Spanish and no experience, and indicated that the Alien possessed a master's degree in Spanish.[3] (AF 48, 51-52). The job duties

[1] "PERM" is an acronym for "Program Electronic Review Management" system. In this Decision and Order, we will refer to the regulations in effect on or after March 28, 2005 as the "PERM" regulations. The regulations in effect prior to that date will be referred to as the "pre-PERM" regulations.

[2] AF refers to the Appeal File.

[3] The Form 9089 indicates that the Alien qualified for the master's degree in Spanish requirement by virtue of a degree in Spanish he received from Temple University in 1995. (AF 51-52). The Form 9089 also indicates that the Alien possesses a Ph.D. in "Hispanic Linguistics." (AF 53). According to the

were listed as "Teach courses in Spanish language. Research and service expectations." (AF 49, H.11). The Employer answered "Yes" to the question on the Form 9089 of whether knowledge of a foreign language is required to perform the job duties. (AF 49, H.13). The Form states that if the answer to this question is Yes, the employer must be prepared to provide documentation demonstrating that the language requirements are supported by business necessity.

On November 2, 2007, the CO issued an Audit Notification instructing the Employer to submit its recruitment documentation. (AF 44–46). The Employer submitted its documentation on November 19, 2007. (AF 14–43). The Employer's notice of filing, website advertisements, and job order with the State Workforce Agency ("SWA") provided the following description of the position:

> Assistant Professor of Spanish, tenure-track. Teach courses in Spanish language (additional languages helpful). Research and service expectations. Near-native or native fluency. MA in Spanish required. PhD preferred with specialty in Applied Linguistics, Second Language-Acquisition, or Hispanic/Romance Linguistics helpful.

(AF 28, 32, 36-37). The Employer's newspaper advertisements listed the qualifications as "MA in Spanish required. PhD preferred with specialty in Applied Linguistics; near native or native fluency; second language-acquisition, or Hispanic/Romance Linguistics helpful." (AF 33-35, 38-42).

The Employer's audit response also included the recruitment report of the university's faculty search committee. (AF 8-9). In regard to the selection process, the report stated:

> We received ten applicants from this recruitment effort. Here is a list of the applicants and their degrees/specialties:

Employer's recruitment report, the Alien's Ph.D. in Hispanic linguistics was obtained at the University of Texas at Austin, with a specialization in applied linguistics/second language acquisition. (AF 3).

Applicant's Name [4]	Degree/Specialty
[Applicant 1]	EdD, Technology Education/Instructional Design
[Applicant 2]	EdD, Foreign Language Teaching/Spanish-English
[Applicant 3]	ABD, Classical Philology
[Applicant 4]	MA, Spanish Literature
[Applicant 5]	MsEd, Spanish / Linguistics
[Applicant 6]	DDS, Dentistry
[Applicant 7]	PhD, Interdisciplinary Studies/Organizational leadership
[Mwinyelle, Jerome B.]	PhD, Hispanic Linguistics/Applied Linguistics
[Applicant 9]	MA, French
[Applicant 10]	MA, Spanish

> After reviewing the ten applications, the search committee concluded that Dr. Jerome Banaya Mwinyelle was the only applicant that possessed the qualifications required. We required a Master of Arts in Spanish, PhD preferred with specialty in Applied Linguistics; near native or native fluency; Second Language Acquisition or Hispanic / Romance Linguistics helpful. Dr. Mwinyelle has a PhD in Hispanic Linguistics from the University of Texas at Austin specializing in Applied Linguistics / Second Language Acquisition and also has near native fluency in Spanish. Dr. Mwinyelle's credentials most closely fit the position announcement and the departmental needs and he is considered the most qualified compared with the rest of the applicants.

(AF 9).

[4] The names of the U.S. applicants have been redacted.

The CO denied the Employer's application on August 28, 2009, finding that the notice of filing, job order, newspaper advertisements, and additional professional recruitment steps all contained "job requirements which exceed the job requirements listed on the [application]" in violation of 20 C.F.R. § 656.17(f)(6). (AF 11-13). The CO concluded that the advertisements had added the following requirements, not listed on the Form 9089: "(a) additional languages helpful, (b) near-native or native fluency, (c) PhD preferred (d) with specialty in Applied Linguistics, Second Language-Acquisition, or Hispanic/Romance Linguistics helpful." (AF 12-13).

The CO also denied the application under 20 C.F.R. § 656.24(b) because the Employer rejected four candidates who each possessed a master's degree in Spanish and therefore were minimally qualified for the job. (AF 13). In addition, the CO determined that the Employer rejected U.S. workers for unlawful reasons in violation of 20 C.F.R. § 656.10(c). The CO stated that the Employer had not conducted competitive recruitment under 20 C.F.R. § 656.18, yet had selected the Alien because he was "considered the most qualified compared with the rest of the applicants." (AF 13) (quoting Employer's recruitment report). The CO stated that "[t]his determination was based upon the employer's list of 'preferred' attributes and not on the absolute minimum requirements as listed on the ETA Form 9089. Under the basic recruitment process, the employer can not reject qualified U.S. applicants for being 'less qualified.'" (AF 13).

The Employer requested review on September 16, 2009, arguing that the notice of filing, job order, newspaper advertisements, and additional professional recruitment steps did not contain requirements beyond those listed in the application, but rather, only included the Employer's *preferences*. (AF 1). Specifically, the Employer argued that the criteria of "additional languages helpful, PhD preferred with specialty in Applied Linguistics, Second Language-Acquisition, or Hispanic/Romance Linguistics helpful," were only preferences and not requirements. (AF 1). The Employer argued that near or native fluency in Spanish <u>was</u> a requirement because it had indicated in Box H-13 of the Form 9089 that knowledge of a foreign language is required to perform the job duties,

and that none of the four candidates listed by the CO were as qualified as the Alien because they did not have the required near-native or native fluency in Spanish. (AF 2).

The CO forwarded this matter to BALCA, and on July 12, 2010, a BALCA panel issued a Decision and Order Affirming Denial of Certification. The Employer filed a petition for en banc review of the decision on July 30, 2010. BALCA granted en banc review on August 18, 2010 and vacated the panel decision. The Board invited the American Immigration Lawyers Association (AILA) and the American Immigration Law Foundation to participate as amicus curiae. *See* 29 C.F.R. § 18.12. The Employer submitted its Brief En Banc on October 1, 2010, and AILA submitted its amicus brief on October 18, 2010. The Office of the Solicitor, United States Department of Labor, submitted the Certifying Officer's Brief En Banc, also on October 18, 2010.

DISCUSSION

I. Equally qualified standard

The CO may only certify a permanent labor application if there are not sufficient United States workers who are able, willing, qualified, and available at the time of the application. 20 C.F.R. § 656.1(a)(1). Under Section 212(a)(5) of the Immigration and Nationality Act (INA), U.S. workers are considered qualified for the job if they are at least minimally qualified for the job offered to the alien. For jobs involving a member of the teaching profession, however, U.S. workers are considered qualified for the job only if they are at least as qualified as the alien. 8 U.S.C. § §1182(a)(5)(A).[5] *See* 45 Fed. Reg.

[5] Section 212(a)(5) of the Immigration and Nationality Act provides, in relevant part:

> **(5) Labor certification and qualification for certain immigrants.**
> **(A) Labor certification**
> **(i) In general**

83926, 83931 (Dec. 19, 1980) (preamble to final rule implementing 1980 amendments to labor certification regulations). The PERM regulations similarly provide that in the case of a job opportunity as a college or university teacher, the U.S. worker must be at least as qualified as the alien.[6] 20 C.F.R. § 656.24(b)(2)(ii). This standard applies in the case of college or university teacher positions regardless of whether the employer used the basic process at 20 C.F.R. § 656.17 or the competitive process under 20 C.F.R. § 656.18. 20 C.F.R. § 656.18(d). However, an employer that files for certification of employment of college and university teachers must be able to document, if requested by the CO, that the alien was found to be more qualified than each U.S. worker who applied for the job opportunity. 20 C.F.R. § 656.18(d).

In the case before us, the position was for a university level Assistant Professor of Spanish, and the Employer was entitled to select the Alien over less qualified U.S. workers. Thus, the CO erred in denying certification under 20 C.F.R. § 656.24(b)(2)(i) on the ground that the Employer rejected four candidates who each possessed a master's degree in Spanish and therefore were minimally qualified for the job.

> 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 Attorney General that –
>
> (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 at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.
>
> **(ii) Certain aliens subject to special rule**.
>
> For purposes of clause (i)(I), an alien described in this clause is an alien who –
>
> (I) is a member of the teaching profession, or
>
> (II) has exceptional ability in the sciences or the arts.

8 U.S.C. § 1182(a)(5)(A).

[6] The Department of Labor's regulations limit application of the special handling regulations to college and university level teaching positions. *See Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993) (en banc).

II. Requirements in advertisements that were not included on the Form 9089

A. The Regulations

The CO's denial of certification was also based on a finding that the Employer's notice of filing, job order, newspaper advertisements, and additional professional recruitment steps contained job requirements which exceeded the job requirements listed on the application in violation of 20 C.F.R. § 656.17(f)(6).

Section 656.17(f)(6) provides that advertisements placed in newspapers of general circulation or in professional journals before filing the Application for Permanent Employment Certification must not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089. The regulations also provide that the notice of the filing of the application required by section 656.10(d) must contain the information required for advertisements by section 656.17(f). 20 C.F.R. § 656.10(d)(4). Moreover, although the regulations are silent as to the applicability of section 656.17(f) to the content of the additional recruitment steps for professional occupations, we agree with the holding of the panel in *Jesus Covenant Church*, 2008-PER-200 (Sept. 14, 2009) that such recruitment must not include requirements not listed on the Form 9089.[7]

B. Requirement of "near native or native fluency"

In the instant case, while the Employer's application indicated only that "knowledge" of a foreign language was required for the position, its newspaper advertisements required "near native or native fluency." The Employer argues that by

[7] Specifically, the panel in *Jesus Covenant Church* found that the attestation requirement that the job opportunity be clearly open to any U.S. worker required the employer to comply with the advertisement content requirement at § 656.17(f)(5) and not list a wage on the SWA job order that was less than the wage offered to the alien.

responding "yes" to the question in H.13 of the Form 9089 application — "Is knowledge of a foreign language required to perform the job duties?" — it indicated that near-native or native fluency was a requirement. We find, however, that "knowledge" of a language is not the equivalent of fluency, let alone "native" or "near-native" fluency. Standing alone, "fluency" already suggests polished speaking and writing proficiency.[8] The Employer's advertisements' use of the modifiers "native or near native," imply that the Employer was not seeking mere proficiency, but something more, such as a particular accent, or sensitivity to vocabulary, complicated grammar, cultural references, and/or dialects. These may well be valuable attributes for a Spanish professor. However, the Employer did not list this requirement on its application, and therefore, its advertisements contain requirements which exceed the requirements listed on the ETA Form 9089 in violation of 20 C.F.R. § 656.17(f)(6).[9]

Besides ensuring that the job opportunity is clearly open to U.S. applicants, the requirement at Section 656.17(f)(6) plays an important administrative processing function as well. 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 (among other determinations) whether the requirement is normally required for the occupation and is within the Specific Vocational Preparation assigned by the O*Net Job Zones.[10] *See* 20 C.F.R. § 656.17(h)(1). Thus, the requirement

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[8] "Fluent" is defined by the online Merriam Webster dictionary as capable of using a language easily and accurately. www.merriam-webster.com (visited Mar. 15, 2011). Similarly, the *Random House College Dictionary* (Rev. Ed. 1982) defines "fluent" as "1. spoken or written effortlessly: fluent French. 2 able to speak or write smoothly, easily or readily: a fluent speaker."

[9] We note that even if the Employer had indicated its requirement of "native" or "near native" Spanish fluency on its application, it is far from clear that the U.S. applicants do not meet this requirement. It appears that the Employer's search committee made its decision on a review of applications rather than personal interviews. Thus, contrary to the argument implied by the Employer in its request for review (AF 2), we find no evidence in the record before us that the committee actually assessed whether the U.S. applicants possessed near or near native fluency. Consequently, the record before us does not establish that the committee made an affirmative finding that the Alien's level of fluency was superior to that of the U.S. applicants.

[10] For example, the PERM regulations provide that foreign language requirements must be justified by business necessity. 20 C.F.R. § 656.17(h)(2). Perhaps the Employer in this case could have easily

of Section 656.17(f)(6) that all job requirements be listed in the Form 9089 serves an important function in the administrative review of a labor certification application that cannot be lightly dismissed on the ground that a requirement not listed on the Form 9089 was an obvious element of the job. Accordingly, the CO correctly denied the application based on the Employer's use of a job requirement — native or near native fluency — in the advertisements that was not identified as a requirement on the Form 9089.

C. Preferences As Requirements

The CO also found that the Employer violated Section 656.17(f)(6) because the Employer's advertisements included several preferences, such as for an applicant with a Ph.D. in applied linguistics, whereas the degree requirement stated on the Form 9089 was simply a master's degree in Spanish.

i. Whether the statutory provision allowing selection of the most qualified applicant for college and university teaching positions authorizes use of preferences in recruitment supporting a PERM application

The Employer does not dispute that it has long been the rule in basic labor certification processing that an employer may only include its requirements in its advertisements, not its preferences. (Employer's En Banc Brief at 6). Both the Employer and AILA, however, contend that in the case of occupations involving college or university teaching positions, employers should be able to advertise their preferences because of the statutory exception to the general rule that an alien cannot be selected over a minimally qualified U.S. worker. The Employer argues that this is because "[i]n the

established business necessity for its special "native or near native fluency" requirement based on the nature of the occupation. *See* 20 C.F.R. § 656.17(h)(2)(i). But if the CO had not audited the application, the CO would never have been alerted that the Employer was actually requiring "native or near native fluency," and would be unable to request the Employer to demonstrate the business necessity for this special requirement. Here, while the Employer's audit response contained a business necessity letter that justifies its foreign language requirement, the Employer did not provide justification for its "native or near-native fluency" requirement. (AF 31).

special handling context, preferences are the only way in which an employer can determine the most qualified candidate." (Employer's En Banc Brief at 11).

We decline, however, 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 C.F.R. § 656.10(c)(8).

The principle that preferences are treated as requirements for purposes of a PERM application reflects the effect that the inclusion of "preferences" may have on potential applicants, who could be less likely to apply for the position if they do not possess the preferred qualifications. In *Southern Connecticut State University*, 1990-INA-384 (Dec. 9, 1991), the panel found that although the labor certification application described a Ph.D. as "preferred," none of the Employer's advertisements for the position made it clear to potential U.S. applicants that persons without a doctoral degree would have been considered. Accordingly, the panel found that possessing a Ph.D. was a requirement for the position. In *The Frenchway*, 1995-INA-451 (Dec. 8, 1997), the panel found the problem with the employer's advertised preferences was that they constituted unstated job requirements to evaluate the U.S. applicants. Although these cases relied on 20 C.F.R. § 656.21(b)(2)(iv) (2004), a pre-PERM regulation not retained in the PERM regulations that provided that an employer's "preference" was deemed to be a job requirement, we find that this principle is implicit in the requirement that the position be clearly open to U.S. workers. *See* 20 C.F.R. § 656.10(c)(8); *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (en banc) (requirement that a position be clearly open to U.S. workers places a burden on the employer to recruit in good faith).

The treatment of "preferences" as requirements is consistent with an employer's duty to recruit U.S. workers in good faith. Good faith in recruitment means that an employer may not recruit in a manner that might chill a potentially qualified applicant's interest in the position or otherwise restrict the pool of potential applicants.[11] Stating preferences in advertisements may have such a chilling or restrictive effect on the recruitment. 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." By including very specific or specialized preferences, an employer could restrict the applicant pool in such a way that predetermines that the alien will best fit the employer's preferences, rendering him or her the most qualified. Presumably, most employers would not intentionally stack the deck against the U.S. applicants. Nevertheless, whether the tailoring is intentional or unintentional, the harm on the potential applicant pool is the same.

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

[11] This proposition in grounded in the principle that employers who apply for alien labor certification must recruit in good faith, and not place unjustified hurdles in the path of U.S. applicants in an apparent attempt to discourage their pursuit of the jobs. The source of the good faith requirement is 20 C.F.R. § 656.10(c)(8) (job must be clearly open to U.S. workers) and 20 C.F.R. § 656.10(c)(9) (U.S. workers who applied for the job opportunity must be rejected only for lawful job-related reasons). In the pre-PERM decision of *Compression Inc.*, 2002-INA-102 (Aug. 27, 2003), the panel explained:

> An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). If employers act in a way which indicates lack of good faith recruitment, such as actions which discourage U.S. workers from pursuing their applications, denial of certification is appropriate. *Vermillion Enterprises*, 1989-INA-43 (Nov. 20, 1989); *Berg & Brown, Inc.*, 1990-INA-481 (Dec. 26, 1991).

Compression, Inc., 2002-INA-102, slip op. at 10-11 (citations are to pre-PERM regulations; § 656.20(c)(8) is now codified at § 656.10(c)(8), and § 656.21(b)(6) is now codified at § 656.10(c)(9)).

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.

In the case at bench, the job description used in the recruitment, a baseline master's degree in Spanish requirement with very specific associated preferences, at least appears to have been designed to fit the Alien's qualifications precisely. It was almost a foregone conclusion that only the Alien would fit the selection criteria. The faculty search committee's report suggests that it was not clear in the minds of the committee that the preferences were not job requirements. The following language from the report suggests that the committee viewed the specific baseline master's in Spanish and the various stated preferences as one conflated set of requirements:

> After reviewing the ten applications, the search committee concluded that Dr. Jerome Banaya Mwinyelle was the only applicant that possessed the qualifications **required**. We required a Master of Arts in Spanish, PhD preferred with specialty in Applied Linguistics; near native or native fluency; Second Language Acquisition or Hispanic / Romance Linguistics helpful. Dr. Mwinyelle has a PhD in Hispanic Linguistics from the University of Texas at Austin specializing in Applied Linguistics / Second Language Acquisition and also has near native fluency in Spanish.

(AF 9) (emphasis added). As we noted above in our discussion of the requirement of near native or native fluency, the Employer "review[ed]" the other nine applications, and it is not apparent whether the committee even interviewed any other candidates for this position.

ii. Argument that fair notice of preferences is owed to U.S. applicants

The Employer argued that the "'preferences are requirements' rule does not fit the goals of special handling labor certification for college or university teachers, in which an employer is selecting the most qualified candidate [and therefore] advertisements for university or college professors should not only appraise U.S. workers of the job opening, but also of those criteria that will be used to judge their applications. […] [To hold otherwise] would have the perverse effect of encouraging college and university employers to leave their preferences out of their advertisements, which means they will not give fair notice of the factors the employer plans to use in assessing which candidate is most qualified." (Employer's En Banc Brief at 9).

The notion of fair notice to potential applicants, however, strikes us as a bit self-serving in the instant context. In theory, notice to the potential applicant pool makes sense. However, it runs the serious risk of impermissibly restricting the potential applicant pool. We find 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. Moreover, if an employer is recruiting in good faith, the employer's "preferences" may not always exactly match the alien's qualifications. Therefore, where an employer's "preferences" are not tailored to the alien's qualifications, the inclusion of preferences could dissuade individuals that are just as qualified as, if not more qualified than, the alien from applying for the position.

Amicus contends that real-world recruitment for teaching positions at colleges and universities requires the listing of preferences in advertisements. (Amicus brief at 10-11 and 19). Assuming that this is true, we reiterate that employers seeking permanent labor certification may have to conduct their recruitment in a manner different than they would normally in order to ensure that the position is clearly open to all qualified U.S.

workers.[12] Under the PERM program, while an employer can use preferences in its selection process to select the most qualified applicant, it may not place its preferences in its advertisements. While this may pose a burden on colleges and universities because they may receive more applications for teaching positions than 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 PERM program to ensure that there are no equally qualified U.S. workers. This correctly places the burden on the employer to demonstrate why U.S. candidates are not as qualified as the alien and therefore why the employer has met its burden of establishing eligibility for permanent labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b).

iii. Whether the Design of the Form 9089 Violates Procedural Due Process by Preventing a College or University from Listing Preferences for Teaching Positions

The Employer argues that it could not have included its preference for a Ph.D. in Hispanic linguistics on the Form 9089 because it is not an actual minimum requirement for the job, and listing it on the Form would have put the Employer in violation of 20 C.F.R. § 656.17(i)(1) and (2). (Employer's En Banc Brief at 12). In support, the Employer cited the panel decision in *Federal Insurance Co.*, 2008-PER-37 (Feb. 20, 2009).

In *Francis Kellogg*, 1994-INA-465 (Feb. 2, 1998) (en banc), a pre-PERM decision, the Board held that where the alien does not meet the primary job requirements, but only potentially qualifies for the job through the employer's alternative job requirements, the employer's alternative requirements are considered to be unlawfully

[12] As the panel in *Alexandria Granite & Marble* observed, the PERM regulations impose rigorous regulatory requirements designed to "limit the opportunities for applicants to misrepresent the job opportunity and increase the quality of information about the job opportunity received by job applicants and other interested persons. The requirements also were undoubtedly designed to assist the CO in processing a high volume of applications consistently and in a timely fashion in a central location. As such, applicants are sometimes required to conduct recruitment in ways that are different from the manner in which they normally recruit, and which may seem unnecessary or unimportant in the particular employer's circumstances." *Alexandria Granite & Marble*, 2009-PER-373, slip op. at 5-6 (May 26, 2010).

tailored to the alien's qualifications unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. This required language is known as the "*Kellogg*" language. The PERM regulations partially adopted this ruling by requiring that the statement be written on the PERM application. The panel in *Federal Insurance* refused to affirm a denial of certification for failure to include the "*Kellogg"* language on the Form 9089 as a matter of procedural due process because the form did not reasonably accommodate an employer's ability to express this required attestation.

Reliance on *Federal Insurance* is misplaced. *Federal Insurance* involved a requirement that the Employer write the "*Kellogg*" language on the Form 9089. Because there was no place on the form for the employer to write the required *Kellogg* language, the CO could not deny the employer's application based on its failure to do so. Here, on the other hand, because we treat "preferences" in advertisements as requirements, the Employer should have indicated these criteria as job requirements in Section H of the ETA Form 9089 if it wished to include them within its advertisements. In other words, the Employer's dilemma is a consequence of the Employer's inclusion of impermissible language in its advertisements, rather than a consequence of a deficient Form 9089. Thus, we find that *Federal Insurance* is inapposite.

III. Summary

In rendering this decision, we are mindful of the 1976 legislative history of the "equally qualified" exception for selecting members of the teaching profession when an application is made for permanent alien labor certification, in which Congress expressed the opinion that the Department of Labor had been impeding the efforts of colleges and universities to acquire outstanding educators or faculty members.[13] Accordingly, we

[13] In *Dearborn Public Schools*, the Board quoted the following legislative history to the 1976 amendments to the Immigration and Nationality Act:

have endeavored not to interpret the regulations in an overly restrictive fashion. But to adopt the Employer's position that preferences can be employed in recruitment for college and university teaching positions under the basic process at Section 656.17 in a manner different than recruitment for other occupations goes too far. It has the potential to shield the use of unjustified selection criteria from the CO's review of the application, to impose unstated requirements in the guise of preferences, to impose uncertainty about whether the recruitment chilled U.S. workers, and to open up the possibility of tailoring recruitment to the alien's particular qualifications.

While an employer recruiting under the basic process for a college or university professor is permitted to use its job-related 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.

Thus, in the case before us, the Employer failed to comply with the requirements at 20 C.F.R. § 656.17(f)(6) because the Employer's advertisements contained requirements not listed in its application, specifically an express requirement of "native

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> 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.

Dearborn Public Schools, supra, USDOL/OALJ Reporter at 5, quoting H.R. Rep. No. 94-1553, 94th Cong., 1st Sess., U.S. Cong. and Adm. News (1976) 6083 (emphasis as added by the Board in *Dearborn*) (In 1976, the labor certification provision was codified under section 212(a)(14) of the INA. The provision is now located at section 212(a)(5)). We also note that 35 year old 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's current view of the Department's regulatory procedures.

or near native fluency," and implicit requirements stated in form of preferences. Therefore, the CO properly denied certification.[14]

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

[14] Our holding is limited to applications filed under the basic labor certification process at 20 C.F.R. § 656.17.