**U.S. Department of Labor**

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

**Issue Date: 27 March 2012**

**BALCA Case No.: 2010-PER-01512**
ETA Case No.: C-07003-96588

*In the Matter of:*

**KENNAMETAL, INC.,**
*Employer*

*on behalf of*

**PAVEL LEDYAN,**
*Alien.*

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Lawrence M. Lebowitz, Esquire
Alexander R. Castrodale, Esquire
Cohen & Grigsby, P.C.
Pittsburg, Pennsylvania
*For the Employer*

Gary M. Buff, Associate Solicitor
Stephen R. Jones, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
*For the Certifying Officer*

Before: **Colwell, Johnson and Vittone**
Administrative Law Judge

**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" regulations found at 20 C.F.R. Part 656.

## STATEMENT OF THE CASE

On January 4, 2007, the Certifying Officer ("CO") accepted for processing an Application for Permanent Employment Certification from Kennametal, Inc. (the "Employer") for the position of "Design Engineer-Mechanical" on behalf of Pavel Ledyan (the "Alien"). (AF 583-591).[1] On June 21, 2007, the Department of Labor (the "DOL") audited the application and issued a notification letter to the Employer. (AF 579-582). The Employer responded to the audit notification on July 23, 2007. (AF 512-578). In its response, the Employer included its recruitment report, as well as the resumes from the various U.S. workers who applied for the position. (AF 553, 555-567). The Employer sorted these resumes by their reasons for rejection.

On October 31, 2008, the CO sent a letter notifying the Employer that it would be required to conduct supervised recruitment. (AF 508-511). The CO noted that the process demands that the Employer follow certain advertising requirements, and that it place its advertisement only in approved sources or publications. The CO also noted that the supervised recruitment process imposes duties on the Employer once it has received applications from U.S. workers. On November 26, 2008, the Employer responded to the DOL's notification of supervised recruitment and included the following proposed language for its advertisement:

> Kennametal, Inc. seeks Design Engineer (Mechanical) in Rogers, AR to design underwater palletizing dies. Master's in Mechanical Engineering or Bachelor's in Mechanical Engineering plus 5 years of experience as Design Engineering (Mechanical) required. Background must include fully parametric 3-D modeling using Unigraphics; machine & tool design; computer simulations of 3-D modeling; precisions measuring equipment, knowledge of heat transfer and fluid dynamics; computational fluid dynamics; steel heat treatment; steel chemistry; furnaces & materials science. Any suitable combination of education, training or experience is acceptable. Training will be provided. $56,355/yr. 40 hrs/wk, 8am-5pm. OT not available. Flex benefits, med/dental/vision ins., LTD/life/accident

[1] In this decision, AF refers to the Appeal File.

> ins., vacation, Cobra. Apply for this job by submitting resume: Recruitment and Employment Office, Attn: Recruitment Manager, Job Ref # AA00002, P.O. Box 77698, Washington, DC 20013.

(AF 501-507). On December 16, 2008, the CO approved the Employer's proposed advertisement and included a letter with further instructions for how to proceed with the supervised recruitment process. (AF 497-500).

The Employer informed the CO via email of a change of contact on December 23, 2008. (AF 496). The Employer then responded by e-mail on December 24, 2008 informing the CO that it had commenced the formal recruitment process. (AF 495). On January 8, 2009, the Employer also responded to the recruitment report instruction letter, in which it included evidence of the job order it placed with the Arkansas State Workforce Agency, a letter from the print newspaper in which its advertisement appeared, and copies of the Employer's job postings from the print newspaper, the online job-search website, and from the Employer's own website. (AF 428-494).

The CO notified the Employer of received resumes on January 23, 2009. (AF 423-427). As of this date, the CO had only received one resume in relation to the advertised position. On March 18, 2009, the CO sent a letter informing the Employer that the recruitment period for the application ended and that the Employer should now submit a detailed written report of the recruitment steps undertaken and the results achieved. (AF 420-422). The CO gave the Employer 30 days to submit the recruitment report. The CO emailed the Employer on March 19, 2009 to clarify the date on which the recruitment report was due. (AF 419).

On April 14, 2009, the Employer submitted its supervised recruitment results. (AF 92-418). The Employer noted that the recruitment campaign produced 45 applicants for the position, two of whom applied through the Department of Labor's post office box. (AF 92). The remaining 43 applicants applied directly to the Employer. *Id.* The Employer noted that upon receipt of the resumes, it considered applicants based on a combination of their education, training and experience, as well as whether the applicant could perform the job duties after a

reasonable period of on-the-job training. *Id.* According to the Employer, none of these applicants satisfied the minimum requirements and were thus not eligible for employment.

The Employer again forwarded its response to the CO's recruitment report instructions on April 17, 2009. (AF 82-91). Included in this communication was the report written by the Employer's Human Resources Manager as well as the job order placed with the Arkansas State Workforce Agency, the Notice of Filing, and a copy of the newspaper advertisement.

On August 4, 2009, the CO issued a denial of certification. (AF 78-81). The CO reasoned that the Employer's recruitment report shows that the Employer rejected qualified U.S. workers for other than lawful, job-related reasons. (AF 79). The CO found that there were at least ten qualified applicants. The Employer rejected three applicants, named in Exhibits B, C, and I, for not meeting the minimum education requirements.[2] It rejected four applicants, named in Exhibits JJ, KK, MM, and NN, for not having experience with the Unigraphics system. The Employer also rejected three applicants, named in Exhibits LL, OO, and PP, for not having a background in or knowledge of heat transfer and fluid dynamics. *Id.* Because the Employer failed to take years of experience into consideration and refused to provide reasonable training to qualified applicants in the required specific skills areas, the CO concluded that the Employer improperly rejected these qualified U.S. workers and denied the application for certification for this reason.

On September 14, 2009, the Employer filed a request for review and the CO forwarded the case to BALCA. (AF 1-77). In its request to the Board, the Employer asserted that the ten applicants named in the CO's denial were not in fact qualified. The Employer stated that, while to the untrained eye these applicants may have appeared "almost qualified," an expert supervisor could easily discern that none of the applicants had a sufficient background. (AF 4). According to the Employer, the advertised position required a minimum level of education of at least a Bachelor's degree, and specific knowledge of heat transfer, fluid dynamics, and the Unigraphics system. (AF 26-30). The Employer contends that providing training to make these applicants

[2] For referential purposes, the letters designated to each applicant are used here as in the CO's denial letter. These identification letters refer to the Employer's Exhibit where that applicant's resume and information is located in the record.

productive employees would be time-consuming and very costly. *Id.* For this reason, the Employer argues that it would not have been reasonable to train or educate these rejected applicants to perform the required duties of the position. (AF 4). The Employer also maintains that its failure to interview all of the applicants is within an employer's prerogative if it deems that the applicants lack the minimum requirements for the job. (AF 5).

On October 19, 2010, the Board issued a Notice of Docketing and requested that the Employer notify the Board of its intent to proceed with its appeal. The Employer responded to the notice on November 2, 2010 and expressed its intent to continue with the appeal. The Employer re-submitted its first brief along with this response, where it affirms its earlier arguments in favor of certification and requests that BALCA reverse the CO's refusal to certify the PERM application.

On November 18, 2010, the Employer submitted a supplemental note to BALCA informing the Board that it would not be filing an additional brief in the matter and referring the Board to the documents it submitted on September 14, 2009.

The CO filed a brief on December 9, 2010. In its brief, the CO argued that the Employer's rejection of the applicants noted in the denial letter was unlawful for several reasons. The Employer's advertisement indicated that it would accept a combination of education, training and experience. However, the CO's brief notes that the Employer did not in fact consider the combination of these factors when it rejected the qualified applicants "in conclusory terms." Furthermore, the CO argues that the Employer's advertisement stated that training would be provided, but that the Employer rejected qualified applicants without giving them the opportunity to undergo this training. The CO contends that it is the Employer's burden to establish that it is not feasible to train the applicant because doing so would be too costly or time-consuming, and concludes that the Employer did not satisfy its burden in this regard.

## DISCUSSION

*Scope of BALCA review*

The PERM regulations restrict BALCA's review of a denial of labor certification to evidence that was part of the record upon which the CO's decision was made. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c); *Eleftheria Restaurant Corp.*, 2008-PER-143 (Jan. 9, 2009); *5th Avenue Landscaping, Inc*., 2008-PER-27 (Feb. 11, 2009); *Tekkote*, 2008-PER-218 (Jan. 5, 2008). Under 20 C.F.R. § 656.24(g)(4), "[t]the Certifying Officer may, in his or her discretion, reconsider the determination or treat it as a request for review under § 656.26(a)." Note, however, that when an employer unambiguously requests BALCA review, it makes a tactical decision to have the Board rather than the CO review the denial of certification, and the employer is deemed to understand the consequence. *See Denzil Gunnels*, 2010-PER-628, slip op. at 14 (Nov. 16, 2010). The consequence of that choice is that the Employer cannot supplement the record with argument or evidence that was not in the record before the CO when the CO denied the application. *Albert Einstein Medical Center*, 2009-PER-379, slip. op. at 8 (Nov. 21, 2011) (en banc) (citing *Gunnels*).

In this instant case, the Employer unambiguously requested BALCA review following the denial of the application. (AF 2). The regulations, therefore, restrict BALCA from considering any new evidence that the Employer submitted along with its request for review because this evidence was not a part of the record upon which the CO's decision was made.

*Rejection of U.S. workers for other than lawful, job-related reasons*

The PERM certification process requires that employers follow strict procedures if they wish to hire foreign workers to be employed in the United States. The purpose of these regulations is to ensure that there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work for which the alien would be hired. *See* 20 C.F.R. § 656.1(a)(1). The regulations also seek to prevent the employment of aliens which adversely

affects the wages and working conditions of U.S. workers similarly employed. *See* 20 C.F.R. § 656.1(a)(2).

In order to safeguard the effectiveness of these requirements, the regulations at 20 C.F.R. § 656.21(a) state that when the CO determines it appropriate, it may require an employer filing for labor certification to conduct supervised recruitment for the pending application. Section 656.21(b) establishes the requirements of the supervised recruitment process, and Section 656.21(e)(4) requires that employers conducting such recruitment explain, with specificity, the lawful, job-related reasons for not hiring each U.S. worker who applied for the position. *See also* 20 C.F.R. § 656.10(c)(9). The regulations do not require that an employer interview all U.S. workers who apply for the position, but an employer should inquire further into an applicant's background if it appears that the applicant could be qualified for the position. *See Dearborn Public Schools*, 19-INA-222 (Dec. 7, 1993) (en banc). The regulations specify that if a U.S. worker lacks the skills necessary to perform the duties involved in the occupation, but he can acquire these skills during a reasonable period of on-the-job training, the employer may not use the applicant's lack of skills as a lawful, job-related reason for rejection. 20 C.F.R. § 656.21(e)(4).

In this case, the Board is asked to decide whether the Employer had lawful, job-related reasons for rejecting ten of the U.S. workers who applied for the position. We find that the Employer improperly rejected these applicants without first conducting an interview or determining whether they would be qualified after a reasonable period of on-the-job training.

Under the regulations, an Employer whose PERM application is subject to the supervised recruitment process has a burden to conduct the recruitment in good faith. *See* 20 C.F.R. § 656.10(c)(8). Employers conducting supervised recruitment can satisfy this burden by detailing the lawful, job-related reasons for not hiring a certain applicant. Bare assertions by an employer that applicants are not qualified, however, are not sufficient to carry the burden of demonstrating good faith recruitment. *See, e.g., Brilliant Ideas, Inc.,* 2000-INA-46 (May 22, 2000).

In *Wisconsin Career Academy*, 2008-INA-100 (Aug. 27, 2008), we noted that a U.S. worker will be considered able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in a normally acceptable manner the duties involved in the occupation as customarily performed by other workers similarly employed. If a U.S. applicant's resume does not expressly state qualifications for all of an employer's job requirements, but lists such a broad range of experience that there is a reasonable possibility the applicant may meet the job requirements, it is incumbent on the Employer to further investigate the U.S. applicant's qualifications, either through an interview or by other means. *See Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*).

Where the U.S. applicant clearly does not meet a stated job requirement, the burden shifts to the CO to explain adequately why the U.S. applicant is qualified through a combination of education, training or experience, despite his or her failure to meet the stated requirement. *Houston Music Institute, Inc.*, 19-INA-450 (Feb. 21, 1991); *See Mindcraft Software, Inc.*, 19-INA-328 (Oct. 2, 1991) (applicant lacked experience in job offered, but had M.S. degree in Electrical Engineering, which CO found to be equivalent to two years of experience); *Hina Textiles, Inc.*, 19-INA-82 (July 15, 1991); *External Resources International, Inc.*, 19-INA-32 (Apr. 19, 1991); *Shakti Engineering & Design Group*, 19-INA-347 (Nov. 2, 1990).

In the instant case, we agree with the CO that the Employer failed to meet its burden to properly investigate the qualifications of some U.S. applicants. The CO identified ten applicants who were rejected based on the Employer's determination that they were not qualified for the job and separated these applicants into three categories: (1) applicants rejected for not meeting the education requirements; (2) applicants rejected for not knowing Unigraphics; and (3) applicants rejected for not having a background in/knowledge of heat transfer and fluid dynamics. We have reviewed the rejected applicants' submitted documentation and agree with the CO that the Employer should have inquired further into the applicants' qualifications or available training options to determine whether they would be eligible for the job. We therefore find that this rejection, without additional investigation about the applicants' backgrounds or available training and educational programs, was improper.

We find that the Employer did not have a lawful, job-related reason when it rejected applicants B, C, and I because they did not meet the minimum education requirements. Applicant B has a high school diploma, and over 20 years of experience, including 14 years with the Employer in Arkansas. He has experience with 3-D modeling using Unigraphics, tool design, and computer simulations in 3-D models using CAD. Applicant C has an Associate's degree in Mechanical Engineering with ten years of experience in 3-D modeling using Unigraphics, tool design, and computer simulations of 3-D models using CAD. Applicant I has 24 years of manufacturing experience, an Associate's degree in Mechanical Engineering and Kennametal University (Machine Tool Technology) training. He has experience in Unigraphics, AutoCad, and Solidworks. The Employer did not contact these three applicants for interviews.

The Employer indicated on its advertisements that it would accept a combination of education, training and experience. While none of these applicants had a Bachelor's degree, they had experience ranging between ten and 24 years. We agree with the CO that the Employer should have considered this experience as well as their extensive knowledge of Unigraphics and physics concepts, and should have interviewed all three applicants to further evaluate their skills.

The Employer similarly did not have a lawful, job-related reason for rejecting applicants JJ, KK, MM, and NN. Applicant JJ has a Bachelor's degree in Mechanical Engineering, an Associate's degree in Mechanical Tool and Design Technology, and three years of experience in the "design [of] fire truck parts and assemblies." Even though the job required a Bachelor's plus five years of experience, Applicant JJ was contacted by the employer and interviewed by telephone.[3] He was disqualified for not knowing Unigraphics. The Employer stated in its recruitment report that "[Applicant JJ] has no background in Unigraphics (a skill which would take an unreasonable/substantial amount of training to learn). Further, [Applicant JJ] stated that, in addition to not being qualified, he is **no longer interested in this position**." (Bold added by the Employer). Applicant KK has a Master's Degree in Mechanical Engineering and is a PhD candidate in Mechanical Engineering. He has experience in fluid mechanics and computational

[3] The Employer noted that Applicant JJ was interviewed "because (based on a review of his resume) he may have met the minimum requirements (based on a combination of his academic background, experience and training)." (AF 100).

fluid dynamics. Because Applicant KK met the minimum requirements he was contacted by the Employer and interviewed by telephone. The Employer states in its recruitment report that "[Applicant KK] has no background in either Unigraphics or design (which skills would take an unreasonable/substantial amount of training to learn. [Applicant KK] is not qualified for this position."

Applicant MM has a Bachelor's degree in Industrial Engineering with ten years of experience as a Mechanical Engineer. Because he may have met the minimum job requirements, he was contacted by the Employer and interviewed by telephone. The Employer states in its recruitment report that "[Applicant MM] has no background in 3-D modeling using Unigraphics (which skills would take an unreasonable/substantial amount of training to learn). [Applicant MM] is not qualified for this position." Applicant NN has a Bachelor's degree in Mechanical Engineering. The applicant has less than the five years minimum requirement, but was interviewed by the Employer by telephone.[4] The Employer states in its recruitment report that "[Applicant NN] does not have any background in Unigraphics. Further, [Applicant NN] stated that, in addition to not being qualified, he is **no longer interested in the position**." (Bold added by the Employer).

Thus, the Employer rejected these four applicants because they did not have background using the Unigraphics system. While the Employer notes that it did contact these four applicants by telephone, we agree with the CO that the Employer did not attempt to determine whether these applicants could be qualified for the advertised position after undergoing training courses or online tutorials on Unigraphics. According to the CO's research, there are many vendors who offer training courses, books, and online tutorials in Unigraphics NX. Additionally, we share the suspicion of the CO that applicants JJ and NN would determine after the phone interview that they were not qualified and no longer interested in the position.

We find also that the Employer's rejection of applicants LL, OO, and PP was also not for lawful, job-related reasons. Applicant LL has a Bachelor's degree in Mechanical Engineering

[4] The Employer noted that Applicant NN was interviewed "because (based on a review of his resume) he may have met the minimum requirements (based on a combination of his academic background, experience and training)." (AF 101).

and ten years experience in mechanical design. He was contacted by the Employer and interviewed by telephone.[5] The Employer states in its recruitment report that "[Applicant LL] had no background in/knowledge of heat transfer or fluid dynamics (which skills would have an unreasonable/substantial amount of training to learn). [Applicant LL] is not qualified for this position."

Applicant OO has a Bachelor's degree in Mechanical Engineering and 15 years of relevant experience. He was interviewed by the Employer by telephone. While the Employer does acknowledge that "[Applicant OO] does have over 10 years of relevant experience;" it notes that "his background does not include Unigraphics and, further, he has no background in/knowledge of heat transfer and fluid dynamics, nor computational fluid dynamics (which to learn, would involve a substantial and unreasonable amount of training). [Applicant OO] is not qualified." Applicant PP has a Bachelor's degree in Mechanical Engineering and ten years of experience as a Mechanical Engineer, including five years as a Mechanical/Design Engineer. He was interviewed by the Employer by telephone. The Employer states in its recruitment report that "[Applicant PP] has architectural background, rather than a machine and tool design background, as required for this position. Further he has no background in heat transfer (which skills would take an unreasonable/substantial amount of training to learn)."

The Employer rejected these three applicants because they did not have knowledge of the physics concepts of heat transfer and fluid dynamics. While the Employer also notes that it determined the ineligibility of these three applicants after a phone interview with each, we agree with the CO that the Employer failed to consider whether any of these applicants would be qualified for the position after an online tutorial or training course. The CO found that these courses are available online or as books and there is educational software designed specifically for engineers working with these subjects.

The Employer's argument that training unqualified employees in using Unigraphics and learning heat transfer and fluid dynamics would involve a substantial and unreasonable amount

[5] The Employer noted that Applicant LL was interviewed "because (based on a review of his resume) he may have met the minimum requirements (based on a combination of his academic background, experience and training)." (AF 101).

of training is not acceptable. An employer bears a the burden to establish that it is not feasible to train a U.S. worker. *See 58th Street Restaurant Corp.*, 919-INA-58 (Feb. 21, 1991). An employer claiming that applicants will only be qualified if they already possess these skills must substantiate its claims by giving the specific period of time that training would take. The Employer's failure to do this also proves fatal to its application.

In this case, the CO correctly applied the well-established principle that the applicants' resumes raised a reasonable possibility that they met all of the Employer's requirements and, therefore, the Employer should have further investigated the applicant's credentials. *Gorchev & Gorchev, supra*. There is no evidence in the Appeal File that at the time of the recruitment the Employer actually attempted to contact applicants B, C, or I. Additionally, there is no evidence that when the Employer contacted applicants JJ, KK, MM, NN, LL, OO, and PP, it considered the possibility that these applicants could become qualified after a reasonable period of on-the-job training, such as taking online tutorials or training courses. Therefore, we agree with the CO that the Employer should have inquired further into the qualifications of these applicants and available training opportunities to determine whether they were qualified for the job as described in the application. Because the Employer failed to do this, we affirm the CO's findings that the Employer rejected these applicants for other than lawful, job-related reasons.

## ORDER

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

For the panel:

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**WILLIAM S. COLWELL**
Associate 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.