U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

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

Issue Date: 16 October 2012

BALCA Case No.: 2011-PER-02563
ETA Case No.: A-09015-20963

In the Matter of:

MICROSOFT CORPORATION,
Employer

on behalf of

BOERLAGE, GERRIT DANIEL,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Camilia Chow, Esquire
Berry Appleman & Leiden
San Francisco, California
For the Employer

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

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

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 20 C.F.R. Part 656.

BACKGROUND

The Certifying Officer ("CO") accepted the Employer's labor certification application for processing on January 16, 2009. The Employer is sponsoring the Alien for the position of "Program Manager." (AF 48-62).[1] The Employer indicated in items H.4 through H.7 on ETA Form 9089, that the requirements for the position were a Bachelor's degree, or foreign educational equivalent, in Comp. Sci., Eng., Math, Physics, Business or related field and six months of experience in the job offered or in a computer-related occupation or student school project experience. (AF 49-50). The Employer indicated in item H.8 that there was an acceptable alternate combination of education and experience. (AF 50). The Employer specified in item H.8-B that it would accept three-years of work experience for every year missing from a four-year college degree. (AF 59).

On February 9, 2010, the CO issued a denial letter. (AF 46-47). The sole reason for denial was that the alternative requirements listed in item H.8 of the ETA Form 9089 were not substantially equivalent to the primary requirements listed in group H.4 and/or H.6. (AF 47). The CO stated:

> Specifically, the Employer's alternative combination of education and experience, three years of work experience for every year missing from a four-year college degree, is not substantially equivalent to the Employer's primary requirements of a Bachelor's degree in Comp. Sci., Eng., Math, Physics, Business or related field and six month of experience in the job offered, Program Manager. The alternate requirement has the potential of requiring up to twelve years and six months of experience and is not substantially equivalent to the primary requirement, therefore the application is denied.

Id. The CO denied the application pursuant to 20 C.F.R. § 656.17(h)(4)(i), which requires that the alternative experience requirement be substantially equivalent to the primary requirements of the job opportunity for which certification is sought. (AF 47).

The Employer submitted a request for reconsideration arguing that the CO erred in denying the application for several reasons. (AF 3-45). First, the Employer asserted that the CO erred in relying on and applying § 656.17(h)(4)(i) because the Employer did not state an alternate experience requirement, but instead set forth an alternate means by which an applicant who does not have the required education can qualify for the position. (AF 3-10). Second, the Employer argued that the interpretation of § 656.17(h)(4)(i) applied in *GlobalNet Management L.C.*, 2009-PER-110 (Aug. 6, 2009), is flawed and should not be followed as precedent because *GlobalNet* incorrectly confuses Field Memorandum (FM) No. 48-94 (May 16, 1994) with regulatory guidance. Additionally, the Employer asserts that the FM No. 48-94 does not purport to discuss how much work experience equates to a bachelor's degree, but simply provides a table equating the number of years of specific vocational preparation ("SVP") that are associated with various

[1] In this decision, AF is an abbreviation for Appeal File.

levels of post-secondary education. (AF 10-12). Third, the Employer argued that the Department of Labor's requirement that an alternate requirement have an identical SVP to the primary requirement is a substantial change of policy for which proper notice and reasonable rationale is required under the Administrative Procedure Act. (AF 12-14). Lastly, the Employer argued that the Department of Labor ("DOL") erred in issuing a denial outright as it should have issued an audit and provided the Employer the opportunity to address the requirements outlined on ETA Form 9089. (AF 14).

The CO reconsidered, but affirmed denial of the application. (AF 1-2). The CO stated that when validating the equivalency of the Employer's requirements, the SVP level is calculated utilizing the guidance provided in the FM No. 48-94. The CO indicated that DOL's intention to utilize the aforementioned guidance for calculation of SVP for PERM applications is stated in the preamble to the PERM regulations. The CO thus concluded that since the Employer's requirements may require a person not holding a bachelor's degree to possess up to twelve years of experience (SVP level 9) and a person qualifying under the primary requirements to possess the equivalent of two-and-a-half years of experience (SVP level 7), the Employer's alternative requirements were not substantially equivalent to the primary requirements. The CO, therefore, held that denial of the application was valid pursuant to § 656.17(h)(4)(i). (AF 1-2).

DISCUSSION

The Employer first argued that § 656.17(h)(4)(i) does not apply because the position does not require an alternate number of years of experience, but allows for alternate means of meeting the education requirement. (Employer's appellate brief at I). Section 656.17(h)(4)(i) provides that: "[a]lternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought . . . ." In discussing the purpose of this regulation, the Employment and Training Administration ("ETA") explained:

> Under § 656.17(h)(4) of this final rule, an employer may specify alternative requirements provided the alternative requirements meet the criteria set forth by BALCA in the *Kellogg* case. In *Kellogg*, BALCA indicated that alternative and primary requirements must be substantially equivalent to each other with respect to whether the applicant can perform the proposed job duties in a reasonable manner.

Final Rule, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77326, 77353 (Dec. 27, 2004). In § 656.3, the PERM regulations define specific vocational preparation ("SVP") as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job worker situation." Section 656.3 also outlines minimum and maximum amount of specific vocational preparation required for positions of different SVP levels. FM No. 48-94 expands on the SVP[2] requirements and offers guidance in determining the appropriate SVP level based on the required level of education. The

[2] Although the preamble to the PERM regulations and Field Memorandum No. 48-94 refer to Standard Vocational Preparation as SVP, the final PERM regulation uses SVP as an acronym for Specific Vocational Preparation.

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.

The Employer argued that § 656.17(h)(4)(i) does not apply because there is no alternate experience requirement. The Employer completed item H.8-C indicating it would accept an alternate combination of education and experience, but that there was no alternate experience requirement. The Employer, however, completed box H.14 indicating that it will accept three years of work experience for every year of missing education from a four-year college degree. Although not listed in item H.8C, box H.14 indicates that the position has, in effect, an alternate experience requirement which varies from zero to twelve depending on the level of education attained by the applicant. Therefore, the CO correctly applied § 656.17(h)(4)(i) in determining whether the alternate experience requirement is substantially equivalent to the primary requirements.

The Employer also essentially argued that its formula of crediting experience in lieu of school years is a reasonable means of establishing substantial equivalency to the primary education requirement under *Kellogg*. *Kellogg* requires that alternative and primary requirements be substantially equivalent to each other with respect to whether the applicant can perform in a reasonable manner the duties of the position being offered. To support its position, the Employer submitted an opinion letter from Professor Lawrence Wolk[3] in which he concluded that the three years of qualifying work experience for one year of academic study, to be an appropriate and accurate conversion tool for translating the knowledge and accomplishment gained via employment into an academic context.

Second, to further support its position, the Employer argued that BALCA recognized in *Syscorp International*, 1989-INA-212 (Apr. 1, 1991), that in the absence of contrary regulatory guidelines promulgated by the Secretary of Labor, BALCA would find the standard set forth by the United States Citizenship and Immigration Service in 8 C.F.R. § 214(h)(4)(iii)(c) as particularly persuasive. (Employer's appellate brief at II). 8 C.F.R. § 214(h)(4)(iii)(c) states:

> equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following: . . . A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.

[3] Professor Wolk is an Adjunct Instructor of Computer and Information Science at Fordham University who has made recommendations to the Computer and Information Science program at the University regarding granting of college level credit for prior learning and employment skills to individuals matriculated in the program.

The Employer argued that FM No. 48-94 is not a regulation and thus cannot be regulatory guidance. Therefore, the Department of Labor should recognize that FM No. 48-94 is not controlling regulatory guidance and should instead look to the way in which USCIS evaluates education and experience consistent with *Syscorp*.

While we agree with the Employer's statement of the test enunciated in *Syscorp*, it fails to recognize the distinction between a regulation and regulatory guidance. In *eBusiness Applications Solutions, Inc.*, 2005-INA-87 (Dec. 6, 2006), the panel recognized the FM No. 48-94 is clearly not a regulation with the force of law, but stated that nonetheless agency interpretations, such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines, may provide persuasive authority, depending on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.[4]

GlobalNet's point was that FM No. 48-94 is an existing regulatory guideline that has been applied in making equivalency determinations in the labor certification context, and that a contrary approach taken by USCIS in regard to H-1B equivalency determinations was not a convincing reason for departing from the existing ETA guidance.[5] Furthermore, the Employment and Training Administration clearly stated in the preamble to the PERM regulations its plans to utilize the guidance provided in FM No. 48-94. Thus, we are not persuaded by the Employer's argument that *GlobalNet* was incorrectly decided or that the USCIS H-1B regulation should be the standard applied under the PERM regulations.

In the case at bar, the analysis mandated by the regulations is whether the alternate experience requirement is substantially equivalent to the primary requirements of the position and not whether the primary education requirement is substantially equivalent to the alternate means of obtaining the required degree. The Employer's primary requirements were a Bachelor's degree and six months or experience (SVP level 7) and alternatively three years of experience for every year of education missing from a Bachelor's degree. As the CO found in his decision on reconsideration, the alternative requirement of up to twelve years is not substantially equivalent to the primary requirement of a Bachelor's degree and six months of experience. Applying the PERM regulations and the SVP guidelines set out in FM No. 48-94, the Program Manager position, as described by the Employer on its PERM application, has an SVP level of 7. Under the SVP guidelines, the employer may require over two years and up to and including 4 years of SVP. Therefore the employer may require a Bachelor's degree and six months of experience or two years and six months of relevant experience. These guidelines apply to both the primary and alternative requirements for the position and § 656.17(h)(4)(i) requires that both "must be substantially equivalent" to each other. As the CO pointed out requiring up to twelve years and six month of experience is not substantially equivalent to two years and six months of experience.

[4] In *eBusiness Applications Solutions*, the panel found that FM 48-94 was a reasonable interpretation of existing regulations, albeit in regard to a different issue.

[5] We also note that *Syscorp* was decided in 1991. FM No. 48-94 was issued in 1994.

Third, the Employer argued on appeal that the CO has, in the instant case, undertaken a major policy shift to "now appear[] to require an absolutely identical SVP in any situation where it decides that there are primary and alternative requirements." (Employer's appellate brief at III). The Employer contends that the CO could not make such a major policy change without notice and comment rulemaking. But the CO never stated that the SVP levels must be identical to be found substantially equivalent. Rather, the CO's decision on reconsideration merely relates that SVPs are used "[w]hen validating the equivalency of the employer's requirements," and finds that the Employer's formula would equate to an SVP of 9 as opposed to the SVP of 7. (AF 1). The CO then explicitly turned to the Employer's Expert Opinion Letter and considered whether it overcame the SVP inequality, and found that it did not. Thus, the CO's actions in this case show that he was willing to review documentation that might show why, despite the incongruent SVP levels, the alternative requirements should be considered substantially equivalent. The CO in no way formulated a new policy of requiring absolute equality in SVP levels when reviewing the equivalency question. (AF 1).[6]

Finally, the Employer argued that the CO should have issued an audit before denying certification to give the Employer a fair opportunity to explain its requirements and provide necessary supporting documentation. (Employer's appellate brief at IV). The Board, however, has held that the PERM regulations are structured in such a way that the CO is permitted to deny an application without first conducting an audit. *Albert Einstein Medical Center*, 2009-PER-379, slip op. at 20. (Nov. 21, 2011) (en banc). Where certification is denied without an audit, an employer is permitted to introduce additional evidence where he requests reconsideration by the CO of the application denial. *Michigan Technological University*, 2011-PER-790, slip op. at 6 (May 21, 2012).

ORDER

Based on the foregoing, **IT IS ORDERED** that the CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the panel by:

Digitally signed by TODD SMITH
DN: CN=TODD SMITH, OU=LEGAL COUNSEL, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

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

[6] *See also* Fragomen, Shannon and Montalvo, Labor Cert. Handbook § 2:46 (2011) ("The DOL has long applied a rule (reaffirmed by the agency in the supplementary information on the PERM rule) that a four-year college degree can be counted as two years of SVP, while each year of experience in the job is counted as one year of SVP.").

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.