U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 February 2013

BALCA Case No.: 2011-PER-02631

ETA Case No.: A-09007-18531

In the Matter of:

TELCORDIA TECHNOLOGIES, INC.,
Employer,

on behalf of

FERDINANDO MOLINO,

Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Timothy M. Nelson, Esq.
Fragomen, Del Rey, Bernsen & Loewry, LLP
Matawan, NJ
For the Employer

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

Before: **McGrath, Geraghty, Calianos**
Administrative Law Judges

TIMOTHY J. McGRATH
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 Title 20, Part 656 of the Code of

Federal Regulations ("C.F.R."). For the reasons set forth below, we affirm the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On January 20, 2009, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Senior Software Engineer." (AF 207).[1] The CO did not conduct an audit, but instead denied the application on February 19, 2010, because the alternative requirements for the job opportunity listed in the Employer's ETA Form 9089 are not substantially equivalent to the primary requirements of the job in violation of 20 C.F.R. § 656.17(h)(4)(i). (AF 204). Specifically, the CO stated:

> [T]he employer's alternative combination of education and experience, "12 years of progressive responsible related experience as equivalent to Bachelors [sic] degree" and 5 years of experience is not substantially equivalent to the employer's primary requirements of a Bachelors [sic] degree in "Electronic Engineering, Engineering, or closely related field" and 60 months of experience in the job offered, Senior Software Engineer.

(AF 205).

On March 18, 2010, the Employer filed a request for reconsideration. (AF 3-203). The Employer advanced four arguments: 1) Employer listed only one education and experience requirement, and therefore, there was no alternative combination of education and experience allowed; 2) The CO failed to properly assess the application's job requirements under the standard required by *Matter of Francis Kellogg*, 94-INA-465 (BALCA Feb. 2, 1998); 3) Employer's acceptance of twelve years of experience as the equivalent to a bachelor's degree is a widely accepted formulation within the IT industry and has long been accepted by the DOL; and 4) The DOL erred in basing the assessment of whether requirements are substantially equivalent based solely on SVP values. The Employer submitted numerous exhibits in support of its reconsideration request.

On August 29, 2011, the CO upheld the denial pursuant to 20 C.F.R. § 656.17(h)(4)(i) and forwarded the case to BALCA. In the transmittal letter, the CO refuted the Employer's assertion that "the 3-to-1 equivalency formula (three years of work experience equals one year of

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

college education) [is] widely accepted within the Information Technology industry and U.S. educational institutions, has been codified by the United States Customs and Immigration Service (USCIS), and has been accepted by the DOL" and found "the USCIS regulations do not govern DOL's determination of whether a PERM application should be granted. Rather the USCIS regulations cited by the employer govern the determination of equivalency for H-1B visas issued by the Department of Homeland Security." (AF 1). The CO further explained:

> [T]he regulations under Part 656 set forth the procedures through which Applications for Permanent Labor Certification are assessed by DOL. Accordingly, 20 C.F.R. § 656.3 outlines minimum and maximum experience requirements for positions of different levels under the specific vocational preparation (SVP) definition. When validating the equivalency of the employer's alternative requirements against the primary requirements, SVP level is calculated utilizing the detailed SVP guidance provided in the administrative directive, Field Memorandum (FM) No. 48-94, issued May 16, 1994, Subject: Policy Guidance on Labor Certification Issues for each set of requirements. Per the FM, a Bachelor's degree is the equivalent of two years of work experience.

(AF 1).

The CO then applied the equivalency standard set forth in the Field Memorandum and found "[b]ased on these guidelines, seventeen years work experience is not substantially equivalent to a Bachelor's degree plus five years of work experience. Rather, seven years of work experience is the substantial equivalent of a Bachelor's degree plus five years of work experience." (AF 1).

On December 13, 2011, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on December 28, 2011, and submitted an additional copy of its brief supporting reconsideration. The CO did not file a Statement of Position. On September 12, 2012, the Employer certified via email that the job identified on the PERM application is still open and available and the alien identified in the application remains ready, willing, and able to fill the position.

DISCUSSION

The Employer may include in their ETA Form 9089 alternative job requirements in addition to primary job requirements, so long as the alternative requirements are "substantially

equivalent to the primary requirements of the job opportunity for which certification is sought." 20 C.F.R. § 656.17(h)(4)(i). According to 20 C.F.R. § 656.17(h), the requirements for a job opportunity "cannot exceed the Specific Vocational Preparation ("SVP")[2] level assigned to the occupation as shown in the O*NET job zones." In O*NET, the range of SVP levels associated with the position "Senior Software Engineer" in the Employer's application is "7.0 to < 8.0."[3] A position with an SVP Level of 7 has a specific vocational preparation time of "over 2 years up to and including 4 years." 20 C.F.R. § 656.3.

The Preamble to the Final Rule implementing the PERM regulations specifically addresses how to translate an education level into its experiential equivalent. The Preamble states that utilizing Field Memorandum No. 48-94 (May 16, 1994) as guidance, "a bachelor's degree is equivalent to 2 years [SVP]." ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77332 (December 27, 2004). The purpose of the SVP levels is to ensure the job requirements are not tailored to the alien identified in the application, but rather are tailored to the position itself. *St. Mobile Aerospace Engineering, Inc.*, PDF at 4, 2009-PER-00429 (July 9, 2010).

In sections H.4 and H.6 of its ETA Form 9089, the Employer indicated that the primary job requirements for the position of "Senior Software Engineer" were a Bachelor's degree in "Engineering, Electronic Engineering or [a] closely related [field]", and 60 months of experience in the job offered. (AF 207-208). In section H.8, Employer checked "yes," there was "an alternate combination of education and experience that is acceptable." (AF 208). Employer noted in 8.B, "Emplyr will deem 12yrs of prog resp rel exp as equiv. to Bach."[4] (AF 208).

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[2] SVP is defined 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." 20 C.F.R. § 656.3.

[3] Employer's application identifies the offered position's SOC/O*NET (OES) code as 15-1031.00 – Computer Software Engineer, Applications. This code is no longer in use and is now cross-referenced with 15-1031.00 – Software Developers, Applications. This change does not alter our analysis. *See* O*Net Online, Summary Report for: 15-1132.00 - Software Developers, Applications, http://www.onetonline.org/link/summary/15-1132.00 (last visited January 30, 2013).

[4] We interpret this short-hand abbreviation to mean "Employer will deem twelve years of progressively responsible related experience as equivalent to a U.S. Bachelor's degree."

The Employer advanced four lines of argument in support of its petition for reconsideration. First, Employer alleges it "listed only one education and experience requirement." (AF 5). Employer argues the information provided in Sections 8.A and 8.B was merely a "refinement" of its primary requirement. We find this argument unpersuasive. Employer clearly checked "yes" when asked whether it would accept an "alternate combination of education and experience," and then it provided further information on the alternate combination.

Second, the Employer argues the CO failed to use the standards set forth in *Matter of Francis Kellogg*, 94-INA-465 (BALCA, Feb. 2, 1998) to analyze whether Employer's alternative requirements are substantially equivalent to its primary requirements. (AF 5). In *Kellogg*, the Board held:

> [w]here the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training, or experience are acceptable.

Kellogg, 94-INA-465, PDF at 6.

Although the sponsored Alien does not meet the primary requirements of the offered position, *Kellogg* does not create a specific standard of review for the CO to apply in determining whether alternative requirements are substantially equivalent to primary requirements. As such, the Employer's argument that the CO failed to properly apply *Kellogg* is unavailing.

Third, the Employer argues that the acceptance of twelve years of experience as the equivalent to a bachelor's degree is widely practiced within the Information Technology industry, Universities, and the DOL. (AF 7). In support thereof, Employer offers an expert opinion letter and directs this Panel to the USCIS regulations to support its position. (AF 161-177). In his transmittal letter, the CO concisely refutes Employer's claims. The CO is correct that the USCIS regulations do not govern the PERM process and that "20 C.F.R. § 656.3 outlines minimum and maximum experience requirements for positions of different levels under the specific vocational preparation (SVP) definition." (AF 1). SVP levels are "calculated using the detailed SVP guidance provided in the administrative directive, Field Memorandum (FM) No.

48-94, issued May 16, 1994." (AF 1). Under those guidelines, a Bachelor's degree is the equivalent of two years of work experience. Field Memorandum No. 48-94 (May 16, 1994). Because the regulations, field memorandum, and preamble to the PERM regulations are clear on the equivalency calculation, Employer's arguments concerning industry practice are unpersuasive.

Lastly, Employer argues that rigid adherence to the SVP values to determine equivalency is contrary to the PERM regulations, resulting in the artificial alteration of job requirements, and undermines the spirit of the PERM program. (AF 10). This argument also without merit. The PERM regulations specifically provide for the use of SVP values to determine the fairness and adequacy of alternative education and experience requirements. *See* 20 C.F.R. § 656.3; *see also* ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77332 (December 27, 2004); Field Memorandum No. 48-94 (Feb. 2, 1994).

Based on a straightforward application of 20 C.F.R. § 656.3 and the Field Memorandum, we find that one year of experience (with or without a degree) equals one year for SVP purposes, and a Bachelor's degree equals two years for SVP purposes. There is nothing in the PERM regulations, regulatory history, or the Field Memorandum to support a finding that three years of experience without a degree is the equivalent of one year of college/university level credit. Furthermore, the relevant authority provides no distinction between experience gained with a degree and experience gained without a degree.

Accordingly because an applicant may be required to have up to seventeen years of experience[5] under the Employer's alternative requirements, in comparison to five years under the primary requirements, the two sets of requirements are not substantially equivalent, and we therefore affirm the CO's denials of certification pursuant to 20 C.F.R. § 656.17(h)(4)(i). *See St. Mobile Aerospace Engineering, Inc.*, 2009-PER-00429 (July 9, 2010); *Globalnet Management L.C.*, 2009-PER-00110 (August 6, 2009).

[5] We note that this also exceeds the maximum of four years of experience for a SVP Level 7 position under 20 C.F.R. § 656.3.

ORDER

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

For the Panel:

TIMOTHY J. McGRATH
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.