U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 November 2016

BALCA Case No.: 2016-PER-00695
ETA Case No.: A-15111-69196

In the Matter of:

SMARTZIP ANALYTICS,
Employer,

on behalf of

LELE, NIKHIL,
Alien.

Certifying Officer: Atlanta National Processing Center
National Certifying Officer

Appearance: Malcolm K. Goeschl, Esquire
Goeschl Law Corporation
San Francisco, California
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; William T. Barto and Morris D. Davis, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

PER CURIAM. This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the "PERM" labor certification regulations at 20 C.F.R. Part 656.[1]

BACKGROUND

The Employer filed an *Application for Permanent Employment Certification* ("Form 9089") sponsoring the Alien for permanent employment in the United States in Pleasanton,

[1] "PERM" is an acronym for the "Program Electronic Review Management" system established by the regulations that went into effect on March 28, 2005.

California. The occupational title listed on the Form 9089, Section F.3, was "Software Developers, Applications," Standard Occupational Classification Code 11-3021.00. (AF 43-55).[2]

The Employer attested on the Form 9089 that the minimum requirements for the job opportunity were a Bachelor's degree in computer science, engineering, or a related field and 60 months of experience in the job offered. (AF 44-45). The Employer also attested that 60 months of experience in any related occupation was acceptable. (AF 45). The Employer attested in Section H.11 that the job duties were:

> Design and develop mobile applications and the mobile first application strategy. Specific duties include: performing iOS application design, development and deployment to AppStore; integrating iOS applications with the existing SaaS/Data platform; executing iOS testing automation and performance tuning; and performing benchmarking and feature/functionality matching with the Android platform.

Id. The Employer also attested in Section H.14 that specific skills were required for the job opportunity:

> Experience must include experience with: delivering native mobile products at scale; publishing iOS application; Objective-C, iOS SDK, Cocoa Touch, Xcode, Interface Builder, and Auto-Layout; knowledge of Apple Human Interface Guidelines; Java.

Id.

On November 24, 2015, the CO denied certification on the face of the application because the Alien's experience and qualifications listed on the Form 9089 did not demonstrate that the Alien had 60 months of experience in the specific skills listed in Section H.14. (AF 39-42). The CO referenced and relied on a Frequently Asked Question ("FAQ") posted on the Office of Foreign Labor Certification's ("OFLC") website:

> ETA ***must assess*** whether the foreign worker possesses all the qualifications for the employer's job opportunity. When the employer lists specific skills and other requirements for the job opportunity in Section H, Question 14, the employer must also demonstrate on the ETA Form 9089 that the foreign worker possesses those skills and requirements. In order to do so, the employer should list separately in Section K all the foreign worker's qualifications, such as certificates, licenses, professional coursework, or other credentials that meet the requirements to perform the job opportunity listed in Section H, if those qualifications have not already been explicitly identified under information about the jobs held in the past three years. If not listed elsewhere, the list of certificates, licenses, professional coursework, or other credentials held by the foreign worker ***and required in order to perform the job opportunity***, should be entered after all jobs held in the past

[2] Citations to the Appeal File are abbreviated as "AF" followed by the page number.

> three years are listed, under Question 9, "Job Details (duties performed, use of tools, machines, equipment, etc.)…."

(Emphasis as in original) (AF 41).

The CO concluded that because Section K did not specify that the Alien had 60 months of experience, knowledge, or skill in several of the specific skills required for the job opportunity, the Employer was willing to hire an employee who did not meet the actual minimum requirements of the job opportunity in violation of 20 C.F.R. § 656.17(i)(1). (AF 42).

On December 17, 2015, the Employer requested reconsideration, arguing that "the CO incorrectly assumed that the skills listed in H.14 was a part, or a continuation of the 60 months of experience required in the job offered or a related occupation." (AF 26-30). Further, the Employer argued that the Alien's experience with each of the skills in H.14 was included in Section K, as required by the FAQ, and because it "did not require any specific amount of experience for the skills listed in H.14, the [] Form 9089 accurately reflects the actual minimum requirements for the position." *Id.*

The CO reconsidered, but determined that the denial ground was valid:

> [T]he employer did not quantify the amount of experience it requires in the Cited H14 Skills, but used the unquantified term "experience must include experience with." By not quantifying its skills requirements in Section H14, the employer becomes the sole judge of the amount of experience that is acceptable for each Cited H14 Skill. This introduces the possibility that the employer might require more experience or proficiency of U.S. worker applicants than it required of the foreign worker prior to hire. It also provides the Certifying Officer with no way to evaluate this substantive issue.
>
> [T]he fact that the employer did not quantify the amount of required experience in the Cited H14 Skills also prevented the Certifying Officer from reasonably determining whether the foreign worker met the employer's skill requirements prior to hire, and thus whether the employer had stated its actual minimum requirements on the Application, as required by 20 CFR § 656.17(i)(1). To resolve this issue, the Certifying Officer used the specific amount of experience already attested to by the employer in Sections H6 and/or H10 of the Application to evaluate the foreign worker's qualifying experience in the Cited H14 Skills.
>
> Section K of Form 9089 does not indicate that the foreign worker had 60 months of experience in the Cited H14 Skills prior to hire, and therefore the employer has not stated its actual minimum requirements on the Application, in violation of 20 CFR § 656.17(i)(1).

(AF 15-17).

On appeal, the Employer submitted an appellate brief,[3] expanding upon its arguments in its request for reconsideration. In its summary, the Employer argued:

> [T]his denial is in error for the following reasons: (1) the CO has misinterpreted Form ETA 9089 to read Subsection H-6-A as governing wholly separate subsection, Subsection H.14, and accordingly requiring that any skills enumerated in Subsection H.14 be shown to have been maintained over the full term of employment described in Subsection H.6-A; and (2) OFLC Section K of Form ETA 9089 indicates clearly that the beneficiary of this application possessed the knowledge, and experience enumerated in Subsection H.14. Contrary to the CO's assertions, the employer did not require for the position to be certified that all knowledge and experience enumerated in Subsection H.14 have been maintained over 60 months, and required only that such skills, knowledge and experience be possessed by applicants for this position. (3) The CO's new argument, raised in the denial to the employer's motion, which bases the denial on an inability to 'reasonably determine whether the foreign worker met the employer's skill requirements…' is inconsistent with longstanding BALCA case law and Department of Labor practice.

(Emp. Brf. at 2).

The CO did not file a statement of position or an appellate brief.

DISCUSSION

Section 656.17(i)(1) provides that "the job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity." The minimum requirements listed on the Form 9089 for the available job opportunity were listed as follows:

- **Sec. H.4, Education:** Bachelor's
- **Sec. H.4-B, Major field of study:** Computer Science, Engineering, or a related field
- **Sec. H.6, Is experience in the job offered required for the job?:** Yes
- **Sec. H.6-A, [N]umber of months experience required:** 60
- **Sec. H.10, Is experience in an alternate occupation acceptable?:** Yes
- **Sec. H.10-A, [N]umber of months experience in alternate occupation required:** 60
- **Sec. H.11, Job Duties:**

  Design and develop mobile applications and the mobile first application strategy. Specific duties include: performing iOS application design, development and deployment to AppStore; integrating iOS applications with the existing SaaS/Data platform; executing iOS testing automation and performance tuning; and performing benchmarking and feature/functionality matching with the Android platform.

[3] On July 28, 2016, prior to BALCA issuing a Notice of Docketing, the Employer submitted its brief with a request for expedited review "due to a program-wide issue." BALCA issued a Notice of Docketing on September 2, 2016, and the Employer submitted its legal brief dated July 28, 2016 under a cover letter dated September 15, 2016.

- **Sec. H.14, Specific skills or other requirements:**
  Experience must include experience with: delivering native mobile products at scale; publishing iOS application; Objective-C, iOS SDK, Cocoa Touch, Xcode, Interface Builder, and Auto-Layout; knowledge of Apple Human Interface Guidelines; Java.

The CO denied certification because the Alien did not have 60 months of experience in each of the specific skills listed in Section H.14 of the Form 9089. In the initial denial letter, the CO stated that the FAQ issued by OFLC on July 28, 2014 requires the CO to assess the Alien's credentials to ensure he possesses the skills required to perform the job opportunity. The Employer argues that the FAQ "does not indicate that listing a skill at Section H.14 means that the skill must have been practiced or acquired over the same period of time being required for requisite experience on the job or in an alternate occupation." (Emp. Brf. at 5). We agree with the Employer. Based on a plain reading of the FAQ, it does not provide any guidance on a durational requirement for skills included in Section H.14 of the Form 9089. Therefore, it is not determinative as to the issue presented.[4]

In his decision on reconsideration, the CO determined that the Employer failed to quantify the amount of experience required for each skill listed in Section H.14, so he was prevented from "reasonably determining whether the foreign worker met the employer's skill requirements prior to hire." Therefore, the CO "used the specific amount of experience already attested to by the employer in Sections H6 and/or H10…." The Employer argues that the CO erroneously imputed the 60 month experience requirement from Sections H.6 and H.10 to the special skills listed in Section H.14. (Emp. Brf. at 4). The Employer also argues that the format of the Form 9089 "clearly [shows] that the requirements in Section H.6 and H.10 should be considered separate from…Section H.14" because while Sections H.6 and H.10 have subparts for months of experience requirements, Section H.14 does not. *Id.* The Employer contends that "there is nothing in the Instructions for ETA Form 9089 to lead the CO to conclude that the amount of experience identified at H.6-A and/or H.10-A extends to the skills listed in H.14."[5] (Emp. Brf. at 5).

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[4] We find only that the FAQ in question does not control the issue in this case. We do not make any findings as to the validity of the FAQ. *But see HealthAmerica*, 2006-PER-00001(July 18, 2006) (*en banc*) (finding that the FAQs may not impose substantive rules); *Bank of America*, 2012-PER-02227 (Sept. 13, 2016) (same).

[5] The Instructions to the Form 9089, Section H, in relevant part, state:

> H.6. Select *Yes* or *No* to identify whether experience in the job offered is a requirement.
>
> H.6-A. If the answer to question 6 is *Yes*, enter the number of months of experience that are required for the job.
>
> H.10. Select *Yes* or *No* to indicate if experience in an alternate occupation is acceptable.
>
> H.10-A. If the answer to question 10 is *Yes*, enter the number of months of experience in the alternate occupation that is acceptable for the job offered.
>
> H.14. Enter the job related requirements. Examples are shorthand and typing speeds, specific foreign language proficiency, and test results.

In *Apple, Inc.*, 2011-PER-01669 (Jan. 20, 2015), the panel considered whether information contained in Section K established that the alien met the special skills requirements in Section H.14. *Id.* The panel determined that at the time of filing, the application only solicited information about the alien beneficiary's work experience, but it did not solicit information about skills gained outside of employment. *Id.* The panel wrote:

> Faced with this deficiency, the CO should have asked the Employer to submit supplementary information and/or documentation demonstrating that the Alien possessed the special skills in section H-14. But the CO declined to do so. Instead, the CO assumed that the Alien did not possess any special skills that the Employer did not affirmatively list in Section J of the Form 9089.
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> As discussed above, however, neither Section J nor Section K solicited enough information to determine whether the Alien did, or did not, possess the special skills that the Employer listed in section H-14. It was therefore unreasonable for the CO to assume that an alien beneficiary did not possess a special skill unless the Employer affirmatively stated so on the Form 9089. Accordingly, we agree with the panel in *Moreta & Associates*, that "the CO was not justified in basing the denial solely on the failure of the Form 9089 to show the Alien's qualifications for special skill requirements, without first providing the Employer an opportunity to clarify the Alien's qualifications."
>
> Because the sole ground on which the CO relied to deny certification was based on an unreasonable and unfounded assumption, we vacate the denial and direct the CO to grant certification.

Id. at 4-5 (internal citations omitted).

We recognize that the issue in this case differs from the issue in *Apple*; however, much of the panel's reasoning applies to the facts in this case. Here, the CO found that because the Employer did not indicate a duration requirement for the special skills listed in Section H.14, it was necessary to gauge the required duration by looking to the Employer's responses in Sections H.6 and H.10, which required applicants to have 60 months of experience in the job offered or in a related occupation. The CO was faced with this dilemma because the Form 9089 does not solicit a duration requirement for the special skills listed in Section H.14. Neither the Form 9089, nor the Form 9089 instructions, solicits a statement of a duration requirement for the special skills listed in Section H.14. Unlike Sections H.6 and H.10, Section H.14 does not have a Subpart A question requesting how many months of experience are required in each special skill. Although the CO's concern about needing to know the duration required of special skills when assessing the PERM application was reasonable, we find that the application cannot be denied on its face based on a failure to provide a duration requirement for special skills listed in Section H.14, short of legally sufficient notice of a requirement to do so.

ETA Form 9089—Instructions, U.S. Department of Labor, *available at* http://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf (last visited Sept. 28, 2016).

Like the panel determined in *Apple*, the CO was permitted, under the regulations at 20 C.F.R. § 656.20(d)(1), to request supplemental information rather than assuming that 60 months of experience in each cited special skill was required. It was unreasonable for the CO to make this assumption when the Employer did not make an affirmative statement that 60 months of experience in each special skill was required.[6]

ORDER

IT IS ORDERED that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2).

Entered at the direction of the panel by:

Digitally signed by TODD R. SMYTH
DN: CN=TODD R. SMYTH, OU=LEGAL COUNSEL, O=US DOL 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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.

[6] Because we find that the Employer was not required to include a duration requirement for special skills listed in Section H.14, we do not reach the Employer's arguments addressing the definition of its phrase "Experience must include experience with."