

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 29 February 2012**

**BALCA Case No.: 2011-PER-00324**  
ETA Case No.: C-08109-43904

*In the Matter of:*

**MICROSOFT CORPORATION,**  
*Employer*

*on behalf of*

**DOV JONAH SALMON SCHIFF,**  
*Alien.*

Certifying Officer: William Carlson  
Atlanta National Processing Center

Appearances: Owen Bernard Cooper, 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*

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

**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER REVERSING**  
**CERTIFYING OFFICER'S 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.").

**BACKGROUND**

On April 21, 2008, the Certifying Officer ("CO") accepted for filing the Employer's ETA Form 9089 for the position of "Marketing Manager." (AF 142-152).<sup>1</sup> The Employer stated that the job opportunity requires a Master's degree in Business, Marketing, Engineering, Computer Science, or Education Technology. (AF 143-44). The Employer indicated that the minimum experience required for the position was six months of experience in the job offered, or, alternatively, six months in a marketing-related occupation. (AF 144). The Employer listed the following job duties for the position:

Responsible for analyzing, planning, implementing and managing marketing strategies and campaigns working under limited supervision. Applies principles and techniques of business and marketing. Utilizes graduate level research and analysis skills. May provide leadership to group. May be assigned to various marketing and product management projects that utilize the required skills.

*Id.* The Employer also listed the following specific skills or other requirements for the job opportunity:

Employer will accept six months of work experience or minimum of semester long or equivalent school project experience in planning, developing, and/or executing marketing or business plans and in planning

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<sup>1</sup> Citations to the appeal file will be abbreviated "AF" followed by the page number.

and executing public relations, advertising, events, and/or direct marketing activities. Experience may be gained concurrently. Any suitable combination of education, training, or experience is acceptable.

*Id.* The Employer's application does not mention any type of travel requirement for the position.

On July 31, 2008, the CO issued an Audit Notification, instructing the Employer to submit copies of its recruitment documentation. (AF 136-140). The Employer submitted its audit response materials on August 8, 2008. (AF 22-135). The Employer's Notice of Filing ("NOF") provides, in pertinent part:

### **Marketing and Product Managers**

#### **Job Description:**

Responsible for computer software product or technology strategy, definition, promotion, pricing, and/or positioning, and/or for planning, implementing and managing marketing strategies and campaigns.

#### **Job Requirements:**

Requires a BA/BS, MA/MS, or MBA degree or equivalent in Business, Marketing, Engineering, Computer Science, Design, or a related field and experience in planning, developing and/or executing marketing or business plans; planning and executing public relations, advertising, events and/or direct marketing activities; conducting market research; managing strategic business relationships; managing staff, budgets and/or projects; designing software architecture; and/or analyzing emerging marketing trends in a high tech industry, depending on assignment. May require experience in specific industry or technology. May require employer-reimbursed travel. Will accept any suitable combination of education, training, or experience. Must have proof of legal authority to work in the United States.

Job Location: Seattle Area; Salary: \$104,895 - \$129,895/year

(AF 66-68).

The Employer's audit response materials also included a copy of the job order that the Employer placed with the Washington State Workforce Agency ("SWA") and advertisements placed in the Seattle Times. (AF 77, 80-83). The Employer's advertisements in the Seattle Times ran on December 30, 2007 and January 6, 2008, and

were large advertisements that describe job opportunities in 20 different occupations, including the occupation of “Marketing and Product Managers.” (AF 80-83). The description for the job opportunities under the heading of Marketing and Product Managers states:

Responsible for computer software product or technology strategy, definition, promotion, pricing, and/or positioning, and/or for planning, implementing and managing marketing strategies and campaigns. Requires a BA/BS, MA/MS, or MBA degree or equivalent in Business, Marketing, Engineering, Computer Science, Design, or a related field and experience in planning, developing and/or executing marketing or business plans; planning and executing public relations, advertising, events and/or direct marketing activities; conducting market research; managing strategic business relationships; managing staff, budgets and/or projects; designing software architecture; and/or analyzing emerging marketing trends in a high tech industry, depending on assignment. May require experience in specific industry or technology. May require employer-reimbursed travel.

*Id.* The Employer’s Seattle Times advertisement also ran in the newspaper’s online classifieds, which included the identical description for the Marketing and Product Managers’ positions. (AF 111-122). The job description in the Employer’s SWA job order is identical to the advertisement in the Seattle Times. (AF 77).

The Employer included a copy of its recruitment report with its audit response materials. (AF 71-72). The Employer stated that on January 1, 2008, there were 501 open positions for Marketing and Product Managers at Microsoft in Redmond, Washington, and that on February 1, 2008, there were 531 open positions for Marketing and Product Managers at that location. (AF 72). The Employer also indicated that during the month of January 2008, it extended offers to 124 applicants for positions as Marketing and Product Managers. Of these, 100 accepted offers of employment. (AF 71).

On August 10, 2010, the CO denied the Employer’s application. (AF 18-20). The CO found that the Employer’s NOF, SWA job order, newspaper advertisements, and website advertisements all state, “May require employer-reimbursed travel,” which does

not appear on the ETA Form 9089.<sup>2</sup> (AF 19-20). The CO found that this additional language was a job requirement that exceeds the job requirements provided on the ETA Form 9089 in violation of 20 C.F.R. § 656.17(f)(6). *Id.*

*Request for Reconsideration*

The Employer requested reconsideration on September 8, 2010, arguing that its NOF, SWA job order, newspaper advertisements, and website advertisements were used to recruit for multiple positions within the occupation of Marketing and Product Managers. (AF 3-17). According to the Employer, some of these positions require travel, and some do not. (AF 10). The Employer argued that its recruitment complied with the regulations and guidance provided by the Department of Labor regarding an employer's ability to advertise multiple positions in a single advertisement. Additionally, the Employer contended that the NOF and advertisements were sufficient to apprise U.S. workers of the job opportunity and no U.S. workers would have been deterred from applying for the job opportunity because the advertisements were sufficiently broad.

In addition, the Employer argued that the NOF and advertisements clearly indicate that the Employer is recruiting for multiple open positions with varying requirements, and that the phrase "may require employer-reimbursed travel" does not create a mandatory travel requirement for all positions. According to the Employer, its NOF and advertisements were consistent with the guidance provided by DOL during a DOL Stakeholders Telephone Conference on June 22, 2010, because the language in the NOF and advertisements did not have a deterrent effect on applicants. The Employer also asserted that the CO improperly applied the advertisement content requirements at 20 C.F.R. § 656.17(f) to the Employer's website advertisement.

On January 5, 2011, the CO denied reconsideration, finding that use of "open-ended terms or conditions of employment," like "may require travel," could be interpreted as a mandatory requirement by interested individuals. (AF 1-2). The CO determined that use of the phrase "may require travel" could have a chilling effect on applicants and artificially exclude potentially qualified U.S. workers who would have

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<sup>2</sup> The CO also denied on one other ground, which is not at issue on appeal. (AF 1, 20).

been minimally qualified. (AF 1). Additionally, the CO found that because the purpose of SWA job orders and additional recruitment steps is to test the labor market, advertisements placed in connection with these steps may not contain any job requirements or duties that exceed those listed on the ETA Form 9089. *Id.*

The CO forwarded the matter to BALCA, and the Board issued a Notice of Docketing on March 8, 2011. The Employer submitted its Statement of Intent to Proceed on March 16, 2011, and filed its appellate brief on April 26, 2011.

### *Briefs Submitted to BALCA*

In its brief, the Employer contends that some positions covered in the NOF, SWA job order, and advertisements require travel, but the majority of the positions, including the job opportunity identified in this application, do not require travel.<sup>3</sup> The Employer asserts that its NOF, SWA job order, and advertisements are reflective of this, because the language “may require employer-reimbursed travel” does not create a universal travel requirement that applies to each individual job opportunity advertised. Additionally, the Employer argued that during the June 22, 2010 DOL Stakeholders Telephone Conference, DOL informed members of the immigration bar that advertisements containing the phrase “some positions may require travel” may be utilized for recruitment covering multiple positions when some of those positions have no travel requirement. The Employer argues that there is no logical or material distinction between the acceptable phrase “some positions may require travel” and the phrase “may require travel” when used in connection with the advertisement of multiple vacancies. The Employer asserts that that no U.S. workers would have been deterred from applying for the job opportunity that is the subject of this application based on the phrase “may require employer-reimbursed travel.”<sup>4</sup>

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<sup>3</sup> The Employer also notes that for the few applications that it filed where the job opportunity did have a travel requirement, the travel requirement was expressly stated in the ETA Form 9089. Employer’s brief (“ER’s br.”) at 7.

<sup>4</sup> The Employer also requested that BALCA revisit and clarify the holding in *Credit Suisse Securities (USA) LLC*, 2010-PER-103 (Oct. 19, 2010), where a panel held that advertisements placed in accordance with the additional recruitment steps at Section 656.17(e)(1)(ii) must comply with the Section 656.17(f) advertisement content requirements. Because we find that the Employer’s NOF, SWA job order, and

The CO filed its Statement of Position on April 27, 2011, arguing that the Employer's advertisements are deficient because they do not distinguish between the Marketing Managers that do and do not require travel. The CO contends that this ambiguity gives potential applicants the impression that each position is subject to the travel requirement, thereby chilling the applicant pool.

### *Oral Argument*

On August 17, 2011, the Board issued a *Notice of Oral Argument*, notifying the parties that it had determined that oral argument would provide assistance to the Board in resolving the above-captioned appeal and many other pending appeals involving the same or substantially similar issue. By subsequent order on October 5, 2011, the Board notified the parties that oral argument would be held on December 6, 2011, and enumerated several issues that it considered particularly relevant to the resolution of the appeal.

During the oral argument, the Employer argued that when used to advertise multiple positions, the phrase "may require travel" and the DOL-endorsed phrase "some positions may require travel" are substantively indistinguishable and that both convey to readers of the advertisement that both types of positions are available. Tr. 11.<sup>5</sup> The Employer argued that the language "may require employer-reimbursed travel" had to be read in the context of the advertisement as a whole. Tr. 12. The Employer contended that because the job opportunities included in the advertisement – "Marketing and Product Managers" – are written in the plural, and because the first seven lines of the advertisement lists different kinds of responsibilities, education levels, fields of study, and areas of experience, it is obvious that there are a multitude of Marketing and Product Manager vacancies that have varying requirements and job duties. *Id.* Additionally, the Employer pointed out that the advertisement also contains the language "may require

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advertisements comply with Section 656.17(f)(6), we decline to revisit the decision in *Credit Suisse Securities*.

<sup>5</sup> Citations to the December 6, 2011 oral argument transcript will be abbreviated as "Tr." followed by the page number.

experience in specific industry or technology,” which conveys that some of the jobs require experience in the specific industry, and some do not. *Id.* The Employer argued that when read in the context of the entire advertisement, the language “may require employer-reimbursed travel” conveys to any potential applicant that there are some positions that require travel and some that do not. Tr. at 13.

Additionally, the Employer argued that its advertisements were written to attract the greatest number of qualified U.S. workers and that its advertisements fulfill both the letter and the spirit of the PERM regulations. Tr. 18-19. As evidence of its efforts to cast the widest possible net to attract U.S. workers, the Employer noted that its newspaper advertisements are much larger in size than all surrounding advertisements and that they contain more information about the job openings than is required under the PERM regulations Tr. 18.

Counsel for the CO stated that it is permissible for an advertisement or NOF to state “some positions may require travel” if some of the positions, including the position that is covered by the labor certification does not have a travel requirement. Tr. 21. However, the CO argued that the phrase “may require employer-reimbursed travel” constitutes a job requirement, and is therefore not permitted under the regulations. *Id.* The CO contended that there is a subtle but significant distinction in these two phrases, and that “may require employer-reimbursed travel” could deter U.S. workers who are unable to travel from applying to the job. Tr. 22-23. The CO argued that the prospect of travel is effectively the same as a definitive requirement for travel, because it creates the expectation that the worker needs to be available for and must be willing to travel. Tr. 28-29. The CO also argued that under the panel decision in *Xaxis Solutions*, 2010-PER-909 (July 15, 2011), an employer advertising for multiple positions with different requirements within a single advertisement has the burden of making any distinctions clear. Tr. 24.

Additionally, the CO asserted that the impact of the language in this case was indistinguishable from other advertisement language that the Board has found constitutes a travel requirement. Tr. 29-30. According to the CO, the language in this case is

analogous to the language in the employer’s advertisement in *Technofina*, 2010-PER-711 (Mar. 30, 2011), where the advertisements stated that applicants “must be willing to travel to various client sites throughout the U.S.” *Id.* While the CO acknowledged that the language in *Technofina* was arguably more definitive given the use of the term “must” as opposed to “may,” the CO contended the impact on the reader was the same. *Id.*

The CO stated that the meeting minutes from the June 22, 2010 Stakeholders Telephone Conference are an accurate reflection of the DOL’s policy that a single advertisement of multiple positions may contain the language “some positions require travel.” Tr. 47-48. Counsel for the CO stated that it was her understanding that this was not a new policy. Tr. 48.

## **DISCUSSION**

### *PERM Regulations*

The PERM regulations require that a Notice of Filing and an advertisement may not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089. 20 C.F.R. §§ 656.10(d)(4); 656.17(f)(6). BALCA panels have repeatedly held that inclusion of a travel requirement in an advertisement for a single job opportunity, where none is listed on the application, violates 20 C.F.R. § 656.17(f)(6). *See JPP Eurosecurities*, 2010-PER-160 (Feb. 25, 2011); *Xpedite Technologies, Inc.*, 2010-PER-100 (Apr. 7, 2010). Nonetheless, while the PERM regulations clearly prohibit an employer from advertising a position with job requirements that are not included on the labor certification application, the regulations do not provide any guidance regarding the application of Section 656.17(f)(6) when an advertisement is for multiple job opportunities that have different job requirements.

### *OFLC Guidance*

The Office of Foreign Labor Certification (“OFLC”) has issued guidance permitting employers to advertise multiple job opportunities within a single

advertisement. OFLC has provided the following responses to Frequently Asked Questions (“FAQs”) regarding the use of a single advertisement for multiple job openings.

**Question: Can one advertisement be used for multiple positions?**

Answer: Yes, an advertisement for multiple positions may be used as long as all provisions in § 656.17(f), advertising requirements, have been met.

NOTE: While employers have the option to place broadly written advertisements with few details regarding job duties and requirements, employers must prepare a recruitment report that addresses all minimally qualified applicants for the job opportunity. If an employer places a generic advertisement, the employer may receive a large volume of applicants, all of whom must be addressed in the recruitment report. Employers placing general advertisements may wish to include a job identification code or other information to assist the employer in tracking applicants to the job opportunity.<sup>6</sup>

**Question: Is it possible to provide more specific guidelines for drafting PERM advertisements? For example, where there are multiple openings for the job offered, which of the following, if not all, would be acceptable: “5 Attorneys,” “Attorneys” or “Attorneys, multiple openings”?**

As stated in the advertising requirements provision, the advertisement must provide a description of the vacancy specific enough to apprise U.S. workers of the job opportunity for which certification is sought. At issue in evaluating whether the advertisement meets this criterion is whether the advertisement is written to attract the interest of the greatest number of qualified U.S. workers and encourage them to apply, not whether specific words or [phrases] have, or have not, been used. The advertisement will be reviewed to ensure that it reasonably describes the vacancy and reflects the job opportunity as described on the ETA Form 9089. With respect to the examples, any one of the three can be used as long as it is specific enough, under the circumstances, to apprise U.S. workers of the job opportunity. In any event, if employers feel it necessary, employers may always include more detail.<sup>7</sup>

Additionally, the FAQs inform employers that they are permitted to post one NOF for multiple positions:

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<sup>6</sup> [www.foreignlaborcert.doleta.gov/faqsanswers.cfm#multi1](http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#multi1) (last visited July 21, 2011).

<sup>7</sup> [www.foreignlaborcert.doleta.gov/faqsanswers.cfm#multi2](http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#multi2) (last visited July 21, 2011).

**Question: I have multiple positions available for the same occupation and job classifications and at the same rate of pay. May I post a Notice of Filing for the same occupation and job classifications with a single posting?**

Yes, an employer can satisfy Notice of Filing requirements with respect to several positions in each of these job classifications with a single Notice of Filing posting, as long as the single posting complies with the Department of Labor's regulation for each application (e.g. contains the appropriate prevailing wage information and the Notice of Filing must be posted for 10 consecutive business days during the 30 to 180 day time window prior to filing the application). For instance, separate notices would have to be posted for an attending nurse and a supervisory nurse (e.g. nurses containing different job duties).<sup>8</sup>

The only other agency guidance regarding the specific issue presented in this case is contained in Stakeholder Notes from a DOL Stakeholders Telephone Conference held on June 22, 2010. The Stakeholder Notes provided the following summary of the DOL's response regarding how an employer may advertise for multiple job openings where some positions require travel and some do not:

DOL affirmed that if a nexus between the job on the ETA 9089 and in the ad is shown, a general ad is acceptable. The primary concern is that the requirements in the ad should not have a deterrent effect on applicants. In the example provided, "some positions require travel," the lack of a travel requirement on the ETA 9089 would not be an issue, as the ad makes clear that some – but not all – positions may require travel. However, if the ad stated "travel may be required," and there was no travel requirement listed on the ETA 9089, DOL could find that the ad was not appropriate, as applicants would not know that travel was not required for all positions.<sup>9</sup>

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<sup>8</sup> [www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile11](http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile11) (last visited July 21, 2011).

<sup>9</sup> See AILA InfoNet Doc. No. 10062462. We consider this evidence because it was properly raised to the CO on reconsideration (AF 6, 10), and therefore, is within the Board's scope of review. See 20 C.F.R. §§ 656.24(g)(2)(ii); 656.27(c). Additionally, during oral argument, the CO confirmed that the information contained in the June 22, 2010 Stakeholder Notes, as related to the particular issue in this case, is an accurate reflection of the CO's position. Tr.47-48. As such, we find that this document is both within our scope of review and has probative value. We note that if the document had not been properly raised before the CO, we would have been unable to consider this information, as it is not appropriate to take official notice of unofficial agency guidance such as AILA documents. See *Karl Storz Endoscopy-America*, 2011-PER-40, slip op. at 10 (Dec. 1, 2011) (en banc); *Albert Einstein Medical Center*, 2009-PER-379, slip op. 16-17 (Nov. 21, 2011) (en banc).

*Relevant Caselaw*

While the CO contends that denial of certification is appropriate under several BALCA decisions, the cases on which the CO relies to support its position are inapposite. In *Xaxis Solutions*, 2010-PER-909 (July 15, 2011), the employer's advertisement contained required skills which were not included on the employer's ETA Form 9089. Slip op. at 4. The employer argued that its advertisement was for multiple positions and that it did not disqualify any applicants for not possessing all of the skills listed in the newspaper advertisement. A BALCA panel affirmed the CO's denial, finding that because the employer's advertisement listed the required skills for multiple positions together without differentiating between them, the advertisement could have discouraged qualified U.S. workers from applying. Unlike the advertisements in *Xaxis Solutions*, the advertisements in this case clearly demonstrate that the employer is hiring for multiple positions. As the job titles in the Employer's SWA job order, advertisements, and NOF are described in the plural ("Marketing and Product Managers"), and numerous education and experience requirements are provided in the alternative, potential U.S. applicants would clearly understand that the Employer has multiple job openings with different job requirements within this occupation. (AF 66-68, 77-78, 80-83, 111-12, 133-34).

Likewise, *American Express Travel Related Services*, 2010-PER-983 (Aug. 25, 2011) also does not govern the situation presented in the matter at bench. In that case, a panel affirmed the CO's denial where the advertisement for a single job opportunity contained a travel requirement, while the ETA Form 9089 did not. The panel found that the employer's advertisement, which specified that the position required travel between 25 and 40 percent of the time, was an unambiguous job requirement, and that the employer's statement on the ETA Form 9089 that the position required "international work experience" did not have the effect of notifying the CO that the position required travel. *American Express Travel Related Services* involved an employer's failure to indicate a travel requirement on its ETA Form 9089 where the job required travel and the advertisements included the travel requirement. Here, on the other hand, the position does not require travel, and the advertisements do not include a mandatory travel requirement.

The facts of *Technofina*, 2010-PER-711 (Mar. 30, 2011) are substantially similar to those in *American Express Travel Related Services*. In *Technofina*, the employer's advertisements stated that applicants "must be willing to travel to various client sites throughout the U.S.," while its ETA Form 9089 did not include this travel requirement. Unlike the job in *Technofina*, the job in this case does not involve travel. Additionally, unlike the advertisement language in *Technofina*, which included mandatory travel requirement for the single job opportunity being advertised, advertisements in this case do not include a mandatory travel requirement.

Accordingly, none of these cases cited are analogous to the facts presented in the case before us, as all of them involve definitive travel requirements.

#### *Appeal Under Judicial Consideration*

The CO denied certification in this case pursuant to Section 656.17(f)(6), finding that the Employer's NOF, SWA job order, and advertisements, which included the language "may require employer-reimbursed travel," exceeded the job requirements on the ETA Form 9089, which did not include travel. (AF 18-20). The Employer contends that it was proper that the ETA Form 9089 not include the travel requirement because this job opportunity does not in fact require travel. The Employer asserts that its advertisements, NOF, and SWA job order were advertisements for multiple job opportunities within the occupation of "Product and Marketing Managers," and that some of the positions require travel, while others, including the appeal at bench, do not.

The issue before this panel is whether, when used in connection with an advertisement or NOF that advertises multiple job openings in the same occupation, the phrase "may require employer-reimbursed travel" violates Section 656.17(f)(6) if the job opportunity in the application does not require travel.

During oral argument, counsel for the CO indicated that had the Employer's NOF, SWA job order, and advertisements contained the language "some positions may require travel," rather than "may require employer-reimbursed travel," its advertisements would

have complied with Section 656.17(f)(6). The Employer argues that when its advertisements are reviewed as a whole, the language that is acceptable to the CO and the language that the Employer used are indistinguishable. We agree.

Specific to the precise facts of this case, we find that the Employer's NOF, SWA job order, and advertisements do not contain any requirements that exceed those which are stated on the ETA Form 9089. The Employer's SWA job order, advertisements, and NOF clearly notify potential U.S. applicants that the Employer has multiple job openings within the occupation of "Marketing and Product Managers," as the occupation is described in the plural. (AF 66-68, 77-78, 80-83, 111-12, 133-34). The job description provides:

Responsible for computer software product or technology strategy, definition, promotion, pricing, and/or positioning, and/or for planning, implementing and managing marketing strategies and campaigns.

(AF 66-68). This description is written in the disjunctive to demonstrate the contrast between the different job openings and their differing duties. This same disjunctive language is used for the positions' requirements regarding education levels, areas of study, and experience. The educational requirements are described as "[r]equires a BA/BS, MA/MS, or MBA degree or equivalent in Business, Marketing, Engineering, Computer Science, Design, or a related field." From this language, it is clear that some of the positions require a bachelor's degree, while some of the positions require a master's degree. Additionally, the description of the experience requirements contains such a myriad of experience that no one viewing the advertisement could think that experience in each of the areas listed was required for the position. The advertisement states the experience requirements as:

[E]xperience in planning, developing and/or executing marketing or business plans; planning and executing public relations, advertising, events and/or direct marketing activities; conducting market research; managing strategic business relationships; managing staff, budgets and/or projects; designing software architecture; and/or analyzing emerging marketing trends in a high tech industry, depending on assignment.

(AF 66-68, 77-78, 80-83, 111-12, 133-34). As the advertisement is clearly for multiple positions, given the variety of job descriptions, education, and experience requirements, anyone reading the advertisement would understand that the education and experience requirements do not apply to each and every position within the Marketing and Product Manager occupation. Rather, the numerous requirements make clear that the occupation involves many different job opportunities corresponding to the many various education and experience requirements listed above.

The CO took no issue with the language in the advertisement providing “may require experience in specific industry or technology,” which does not appear in the Employer’s ETA Form 9089. (AF 66-68, 142-152). The CO’s only objection to the Employer’s advertisement is to the next sentence in the advertisement, “[m]ay require employer-reimbursed travel.”

We disagree with the CO’s determination that the Employer’s language has the effect of creating a travel requirement for each job opportunity that is being advertised. As the Employer’s advertisement is for multiple job opportunities with different requirements and all of the job requirements are written in the passive voice, it is understood that the subject of each sentence is “some positions,” *i.e.*, “[some positions] require a BA/BS, MA/MS, or MBA degree or equivalent.” In other words, “requires a BA/BS, MA/MS, or MBA degree” means that some positions require a BA/BS, some positions require an MA/MS, and some positions require an MBA. The requirements in this advertisement are all described as alternatives or as possibilities, which conveys that some of the requirements apply to some of the positions, while other requirements apply to other positions. There is nothing in this advertisement to indicate that some of the requirements apply to all of the positions.<sup>10</sup> Rather, it is clear that “some positions” is the subject of each sentence in this particular advertisement that covers more than 500 Marketing and Product Manager positions. Accordingly, in the context of this

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<sup>10</sup> While we note that any potential applicant who wanted to know whether a particular position within the Product and Marketing Managers occupation required travel would have to inquire further, so would a potential applicant who wanted to know whether a particular position required a bachelor’s or a master’s degree. As the CO took no issue with the manner in which the Employer stated its education or experience requirements, it appears that the CO does not consider language that would require an applicant to inquire further as having a deterrent effect on potential applicants.

advertisement, we find that the phrase “may require employer-reimbursed travel” is indistinguishable from the DOL-endorsed phrase “some positions may require travel.”<sup>11</sup>

Based on the foregoing, we find that the Employer’s NOF, SWA job order, and advertisements do not contain a job requirement that exceeds that which is on the ETA Form 9089, because it is clear within the overall context of the advertisements that not all of the Marketing and Product Manager positions require travel. We find that the Employer’s advertisements were not misleading, nor did they cause any confusion that could have prevented a potential U.S. applicant from applying for the job opportunity. As such, we find that the CO’s denial of certification was not proper, and reverse the CO’s determination.<sup>12</sup>

## **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **REVERSED** and **REMANDED** for certification.

For the Board:

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**WILLIAM S. COLWELL**

Associate Chief Administrative Law Judge

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<sup>11</sup> As DOL has provided its endorsement of the phrase “some positions may require travel” in a single advertisement of multiple jobs with and without a travel requirement, employers would be well-advised to follow such guidance. If an employer does not use the DOL-endorsed language, a fact-specific inquiry will be necessary to determine whether any potential applicants could have been confused or misled into believing that all positions advertised require travel.

<sup>12</sup> At the conclusion of the oral argument, we requested the parties to stipulate to the pending appeals which involve the same Employer and the same four issues on appeal as this appeal. We notified the parties that we will dispose of those cases in an order consistent with this decision. On January 31, 2012, we received the parties’ stipulation, and those stipulated appeals will also be reversed and remanded by subsequent order.

**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.