



Issue Date: 04 August 2016

BALCA Case No.: 2012-PER-01637
ETA Case No.: A-11174-88018

In the Matter of:

COSMOS FOUNDATION, INC.,
Employer,

on behalf of

ALBERT MERTIRI,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Garrett M. White, Esq.
Law Office of Garrett White
Houston, TX
For the Employer

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

TIMOTHY J. McGRATH
Administrative Law Judge

DECISION AND ORDER
REVERSING 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 reverse the denial of the Employer’s Application for Permanent Employment Certification.

BACKGROUND

On June 28, 2011, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Social Studies Department Chair.” (AF 57-67).¹ On September 6, 2011, the CO sent the Employer an audit notification letter requesting the Employer provide specific recruitment documentation. (AF 54-56). The Employer responded to the audit notification letter on October 11, 2011 and provided its recruitment information. (AF 16-53).

On January 30, 2012, the CO denied certification. (AF 12-15). The CO was concerned that the Employer’s ETA Form 9089 contained both primary and alternate requirements for the job opportunity. (AF 12-15). Section H.6 asks “[i]s experience in the job offered required for the job?” (AF 59). If yes, Section H.6-A requires the Employer to indicate the number of months of experience required. (AF 59). The Employer indicated that 24 months of experience in the job offered is required with a Bachelor’s degree in any field of social science. (AF 58-59). The Employer’s response to Section H.10-B further noted that 24 months experience as a “Teacher in Social Studies [or any subfield of social sciences] at the middle or high school levels” combined with a Bachelor’s degree in any field of social science, is acceptable. (AF 58-59).

The CO listed four reasons for denying the Employer’s application, citing 20 C.F.R. §§ 656.10(c)(8) and 656.10(c)(9) as authority for denial. (AF 12-15). Those sections provide that an employer must certify, under the penalty of perjury, to the following conditions on its application: “[t]he job opportunity has been and is clearly open to any U.S. worker” and “[t]he U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.” 20 C.F.R. §§ 656.10(c)(8), 656.10(c)(9). Although the CO also cited 20 C.F.R. § 656.24(b)(2)(ii), he quoted language from 20 C.F.R. § 656.24(b)(2)(i). (AF 12-15).

The CO denied certification because the Employer’s newspaper advertisements in the *Waco Tribune-Herald* and *Waco Citizen*, the advertisement on radio station KWTX-AM, and the Texas Workforce Agency job order only listed the “primary requirement of a Bachelor’s degree along with two (2) years of experience in the job offered as Social Studies Department Chair.”

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

(AF 12-15). The CO explained that the Employer's advertisements and job order failed to indicate it would also "accept two (2) years of experience in the alternate occupation of Social Studies Teacher or as a teacher in any subfield of social sciences at the middle or high school levels." (AF 12-15).

The CO reasoned "[b]y not including the alternate job requirement(s) in its newspaper print advertisements, [job order and radio advertisement], the employer has not provided U.S. workers/applicants a sufficient understanding of the job opportunity to make an informed decision as to whether they would qualify for the position and/or apply." (AF 12-15). The CO noted "[b]y placing only one set of requirements in its newspaper advertisements, [job order and radio advertisement] and not specifically indicating the requirement(s) it will accept in lieu of the primary requirements, the employer failed to apprise potential applicants of the job opportunity." (AF 12-15). The CO indicated "[b]ecause the employer's advertisements are intended to ensure the greatest number of able, willing, qualified, and available U.S. workers is apprised of the job opportunity and the employer failed to do so, the application is denied." (AF 12-15).

On February 29, 2012, the Employer requested review pursuant to 20 C.F.R. § 656.26(a). (AF 1). On March 9, 2012, the CO forwarded the official case file to BALCA. (AF 1-11).

On August 6, 2012, BALCA issued a Notice of Docketing. On August 28, 2012, the Employer submitted a Statement of Intent to Proceed and then filed its legal brief on October 1, 2012. The CO did not file a brief or position statement. On March 21, 2016, BALCA issued an Order Requiring Certification on Mootness. On April 11, 2016, the Employer certified that the Social Studies Department Chair job is still open and available, and Mertiri is still ready, willing, and able to fill the position.

DISCUSSION

PERM is an attestation based program. *HealthAmerica*, 2006-PER-1, slip op. at 19 (July 18, 2006) (*en banc*). Under 20 C.F.R. § 656.10(c)(8), an employer must certify on its application that the job opportunity "has been and is clearly open to any U.S. worker." Failure to attest to this condition "results in the denial of the application." 20 C.F.R. § 656.10(c). Furthermore, the regulations provide that an employer's advertisements placed in newspapers of general

circulation or in professional journals must “provide a description of the vacancy specific enough to apprise U.S. workers of the job opportunity for which certification is sought.” 20 C.F.R. § 656.17(f)(3).

In this case, the Employer’s print advertisements, radio advertisement, and job order stated that a Bachelor’s degree and 24 months of experience is required. (AF 36, 38, 39, 42, 43, 46). However, the CO denied certification of the Employer’s application because the advertisements and job order did not include the Employer’s acceptable alternate job requirement of 24 months experience as a “Teacher in Social Studies [or any subfield of social sciences] at the middle or high school levels.” (AF 12-15, 59). The Employer’s newspaper advertisements stated:

SOCIAL STUDIES DEPARTMENT CHAIR. Chair meetings of social studies teachers to discuss mgmt, curriculum, textbooks and class materials to improve educational outcomes; teach social studies to middle school students. Job in Waco. Bachelor’s degree plus 24 mos. exp. req. Mail res. to Cosmos Foundation 9321 W. Sam Houston Pkwy. S., Houston, TX 77099. Attn. HR Depart. Ref. to Ad#AM.

(AF 38, 39, 42, 43). The Employer’s radio advertisement included similar language to the newspaper advertisements:

Hello Educators! Cosmos Foundation, a charter school system, has an opening for a Social Studies Department Chair in Waco to chair meetings of social studies teachers to discuss management, curriculum, textbooks and class materials to improve educational outcomes and to teach social studies to middle school students. A Bachelor’s degree plus 24 months of experience is required.

(AF 46). The Employer’s job order contained a detailed job description, and listed a Bachelor’s degree and two years of experience as the minimum experience and education requirements.²

² The full job description featured in the job order stated:

About 65% of the time: Chair meetings of Social Studies teachers to discuss classroom management issues, curriculum implementation and effectiveness, recommend books for next year, adequacy of classroom materials and supplies, and the use of technology in the classroom to improve educational outcomes. Organize and encourage student participation in intramural and interschool competitions and fairs related to social sciences; prepare and administer practice test for State standardized and A.P testing in Social Studies topics; analyze results and evaluate student progress. Organize with Dean of Academics tutorial groups for students who need improvement. Design the content of the tutorial sessions and provide teachers with learning materials for the tutorials. Make recommendations to Principal which could improve students’ learning of social studies. As part of a team, observe social studies teachers in the classroom and suggest ways in which they may be more effective. As part of a hiring committee, interview candidates for the position of Social Studies Teacher and make recommendations.

(AF 36).

The CO presented two issues in his denial letter: (1) whether the description contained in the Employer's advertisements sufficiently apprised U.S. workers of the job opportunity, and (2) whether the omission of the alternate occupation experience requirement in the advertisements and job order undermined the attestation that the job is clearly open to U.S. workers. (AF 12-15).

The Employer's alternative requirement of 24 months experience as a "Teacher in Social Studies [or any subfield of social sciences] at the middle or high school levels" listed on the ETA Form 9089 constitutes the actual minimum experience requirement for the position. (AF 58-59). The CO determined the advertisements did not "sufficiently apprise U.S. workers of the job opportunity" because the advertisements failed to state that the Employer would accept experience in an alternate occupation.³ (AF 13-15). An Employment and Training Administration FAQ addresses the amount of detail required in an employer's advertisement:

Employers need to apprise applicants of the job opportunity. The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity. An advertisement that includes a description of the vacancy, the name of the employer, the geographic area of employment, and the means to contact the employer to apply may be sufficient to apprise potentially qualified applicants of the job opportunity.

<https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (last visited May 31, 2016). Thus, not every "job requirement" must be listed in an employer's advertisement in order to apprise U.S.

About 35% of the time: instruct students in middle school in social studies; administer and grade exams; assign and review homework; and meet with parents and students to resolve academic or behavioral issues.

(AF 36).

³ In the denial letter, the CO stated the Employer's advertisements "failed to apprise potential U.S. applicants of the job opportunity" by not indicating the alternate occupation requirements acceptable to the Employer. (AF 12-15). This statement is similar to the language of 20 C.F.R. § 656.17(f)(3). However, we note the CO did not cite Section 656.17(f)(3) as a ground for denial.

We further note that Section 656.17(f)(3) is not applicable to the Employer's job order or radio advertisement in this case. See *Symantec Corp.*, 2011-PER-1856 (July 30, 2014) (*en banc*) (finding that Section 656.17(f) applies only to newspaper advertisements, professional journal advertisements, and the Notice of Filing). Therefore, Section 656.17(f)(3) is only applicable to the Employer's newspaper advertisements placed in the *Waco Tribune-Herald* and *Waco Citizen*. Thus, the CO was incorrect to use Section 656.17(f)(3)'s language as a ground for denial as to the Employer's job order and the KWTX-AM radio advertisement.

workers of a job opportunity.

Recently, another BALCA panel decided that “where a statement of the educational requirement on the newspaper advertisement *overstates* the actual minimum educational requirement for the job opportunity, applicants are not sufficiently apprised of the job opportunity.” *Waterside Construction, LLC*, 2012-PER-1603, slip op. at 6 (Jan. 8, 2016) (emphasis added).

The present case is distinguishable because the Employer’s newspaper advertisements did not overstate the actual minimum job requirements. The work experience requested in the Employer’s advertisements did not say that 24 months of experience as a Social Studies Department Chair is required, but merely stated 24 months of experience is necessary. (Emphasis added). In its legal brief, the Employer argued the work experience requirement “would not be interpreted by U.S. workers as meaning that the experience must be only in that exact job.”⁴ (Er. Br. at 2).⁵

In denying certification, the CO overstates the job experience requirement listed in the advertisements. The CO’s denial letter indicates that the advertisements list “the primary requirement of a Bachelor’s degree along with two (2) years of experience in the job offered as Social Studies Department Chair.” (AF 12-15). However, we specifically note those advertisements do not state that two years of experience as Social Studies Department Chair is required. The advertisements only require 24 months of experience. (AF 36, 38, 39, 42, 43, 46). We reasonably interpret the Employer’s listed job experience requirement to be that applicants must have two years of experience in the specific field of work [teaching social studies or any subfield of social sciences], rather than in the particular job identified [Social Studies Department Chair]. Thus, we find the Employer’s print advertisements “sufficiently apprised” U.S. workers/applicants of the job opportunity. *See* § 656.17(f)(3).

Additionally, the CO determined the job was not clearly open to U.S. workers as required under Section 656.10(c)(8) because the Employer’s advertisements and job order failed to

⁴ The Employer argued: “[r]ather, it would be understood that the experience need be in the field generally. It is a commonsense observation that U.S. workers know that the experience needed for many jobs can be gained through various occupations.” (Er. Br. at 2). The Employer noted “the limiting words ‘in job’ are not a part of any of these advertisements and consequently the U.S. worker (knowing full well that many jobs are filled by candidates with various occupational backgrounds) would not be discouraged from applying as long as he/she had at least two years experience in the field or in a related job.” (Er. Br. at 3).

⁵ Hereinafter, references to the Employer’s brief are cited as “(Er. Br. at [#]).”

mention the acceptable alternate experience requirement indicated in the ETA Form 9089. (AF 12-15). In an *en banc* decision, the Board interpreted Section 656.10(c)(8) to involve an analysis of the Employer's recruitment efforts. *East Tennessee State University*, 2010-PER-38 (Apr. 18, 2011) (*en banc*) (finding Section 656.10(c)(8) requires employers to conduct a good faith recruitment effort, such that the recruitment does not "chill a potentially qualified applicant's interest in the position or otherwise restrict the pool of potential applicants."); *see also The China Press*, 2011-PER-2924 (Aug. 20, 2015), *vacated on other grounds*, by order of Nov. 30 2015 (finding Section 656.10(c)(8) requires analysis of whether the employer's recruitment "so misinformed potential job applicants about the [position] that this aspect of recruitment did not support the attestation that the job opportunity is clearly open to any U.S. worker.")

A CO may reasonably determine that a job is not clearly open to U.S. workers if an employer's advertisement overstates the minimum job requirements for the job opportunity under 20 C.F.R. § 656.10(c)(8). *Waterside*, 2012-PER-1603, slip op. at 6. Here, the Employer did not mischaracterize the minimum experience qualifications in its job advertisements and job order. The advertisements and job order sought applicants with 24 months of experience, not 24 months of experience as a Social Studies Department Chair. The Employer's advertisements described the job duties which included "discuss[ing] management, curriculum, textbooks, and class materials to improve educational outcomes" and "teach[ing] social studies to middle school students." (AF 38, 39, 42, 43, 46); *see also* (AF 36).

We find the advertisements did not misinform U.S. workers/applicants about the job opportunity or deter qualified candidates from applying. We believe that a U.S. worker with relevant teaching experience would still apply for the position, whether or not that worker had experience as a Social Studies Department Chair. Thus, qualified U.S. workers with 24 months job experience as a "Teacher in Social Studies [or any subfield of social sciences] at the middle or high school levels" would not be dissuaded or discouraged from applying to the job opportunity based on the text of the advertisements.

Recent BALCA panels have been unwilling to hold that a job opportunity is not clearly open to U.S. workers when an employer's advertisements merely omit information. *DGN Technologies Inc.*, 2012-PER-1647 (Feb. 25, 2016) (although the geographic area of employment is useful information for job seekers, omission of employment location does not undermine the § 656.10(c)(8) attestation); *Global TPA LLC*, 2012-PER-847 (Feb. 18, 2016) (finding employer's job opportunity advertised on the website of its sister company was clearly

open to U.S. workers because “the [e]mployer provided a reasonable explanation for why it chose to advertise on its sister company’s website” and the employer’s address “was a mere mouse click away”). Accordingly, we find that the Employer’s omission of the acceptable alternate job experience in its advertisements and SWA job order did not “chill” potentially qualified candidates’ interest in the job opportunity.⁶ See *East Tennessee State University*, 2010-PER-38.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **REVERSED** and the CO is directed to **GRANT** certification.

For the panel:

TIMOTHY J. McGRATH
Administrative Law Judge

⁶ The CO cited to 20 C.F.R. § 656.10(c)(9) which requires an employer to attest that the “U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.” However, we find this section is not applicable to the present case. The CO did not provide any reasoning in the denial letter explaining its position that the Employer failed to attest that the U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.

The CO cited to Section 656.24(b)(2)(ii) in its denial letter, however used the language from Sections 656.24(b)(2) and 656.24(b)(2)(i). Section 656.24(b)(2) provides “[t]he Certifying Officer makes a determination either to grant or deny the labor certification on the basis whether or not: (2) [t]here is in the United States a worker who is able, willing, qualified, and available for and at the place of the job opportunity.” Section 656.24(b)(2)(i) states “[t]he Certifying Officer must consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, and experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similar employed. For the purposes of this paragraph, (b)(2)(i), a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.” However, we find this section inapplicable to the issues presented by the CO in his denial letter. Specifically, the denial letter only discusses the deficiencies with the Employer’s advertisements and job order, not the Employer’s rejection of specific U.S. applicants. (AF 12-15).

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.