



**Issue Date: 28 October 2016**

**BALCA Case No.: 2012-PER-01692**  
ETA Case No.: A-09062-313000

*In the Matter of:*

**INTENT DESIGN, LTD,**  
*Employer,*

*on behalf of*

**VAKDE SHANKAR RAO, ANAND KUMAR,**  
*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearance: John C. Clement, Esquire  
Troy, Michigan  
*For the Employer*

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza 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.<sup>1</sup>

---

<sup>1</sup> “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

## **BACKGROUND**

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States for the position of “Design Engineer.” (AF 50-63).<sup>2</sup> On January 15, 2010, the Certifying Officer (“CO”) denied the application because the Alien did not possess the bachelor’s degree in mechanical engineering that the Form 9089 identified as the minimum education requirement and therefore the job was not being offered based on the employer’s actual minimum requirements as mandated by 20 C.F.R. § 656.17(i)(1). (AF 46-48).

On May 11, 2010, the Employer responded to the denial. The Employer stated that the application provided in Section H.8.A & B as well as in H.14 that the Employer would accept any suitable combination of education training and experience. The Employer also included a credentials evaluation that purported to show that the Alien possessed the equivalent of a bachelor’s degree through a “Diploma” in Tool and Die Making, along with work experience. (AF 44-45). The Employer also noted that he had only recently received a copy of the January 15, 2010 denial and attached email correspondence describing how the Employer had become aware of the denial. (AF 80-83).

The CO treated the letter as a request for reconsideration but indicated that he would not process it since it was filed more than 30 days after the denial was issued. (AF 24-25). The Employer appealed that determination. The Board of Alien Labor Certification Appeals (“BALCA”) reversed and remanded after concluding that the Employer’s contentions it did not timely receive the January 15, 2010, denial were credible. *Intent Design, LTD*, 2011-PER-00091 (Mar. 7, 2012).

On March 16, 2012, the CO issued his decision denying the request for reconsideration and forwarding the matter to the Board. The CO concluded that the Employer had violated 20 C.F.R. § 656.17(i) (1) by failing to disclose its actual minimum requirements on the Form 9089. The CO noted that the Employer listed its primary requirements as a bachelor’s degree in mechanical engineering plus 24 months of experience but then “obfuscated its alternative requirements by stating simply, ‘Will accept any equally suitable combination of education training and experience.’ The employer provided no reasonable measure by which it, or the Department, could evaluate U.S. worker applicants against the employer’s alternative requirements.” Neither the Employer nor the Certifying Officer filed a brief in this matter.

## **DISCUSSION**

The Board has previously held that applications cannot be denied simply because the employer characterizes its alternate experience requirement as encompassing a “suitable combination of education, training, and experience.” *Patni Americas*, 2013-PER-03224 (May 10, 2016); *General Electric Co.*, 2011-PER-02696 (Jan. 23, 2013). We follow the reasoning in *Patni* and *General Electric* and reverse the denial in this case.

---

<sup>2</sup> Citations to the Appeal File are abbreviated as “AF” followed by the page number.

As noted above, the Employer listed a bachelor's degree in mechanical engineering plus 24 months experience as the minimum requirements for the advertised position but indicated it would accept any suitable combination of education, training, and experience. The CO denied the application, concluding that "the employer provided no reasonable measure by which it or the Department could evaluate U.S. worker applicants against the employer's alternative requirements. No standard is provided to clearly qualify or disqualify any applicant." (AF 1). However, the CO's objection to the Employer's use of the suitable combination language is perplexing as the regulations impose precisely that burden on the CO:

(i) The Certifying Officer must consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation . . . .

20 C.F.R. § 656.24(b) (2) (i).<sup>3</sup>

This provision has a long history in the program, appearing in the permanent labor certification regulations published over 35 years ago. 45 FR 83933 (Dec. 19, 1980). It was carried forward into the PERM regulation and there is nothing in the preamble suggesting that the agency found its implementation problematic. In fact, the PERM regulation enhanced the importance of the concept, and extended it from the CO to the employer, with respect to the employer's use of alternate experience:

(ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

20 C.F.R. § 656.17(h) (4) (ii).

While the Board in *Federal Insurance*, 2008-PER-00037 (Feb. 20, 2009), concluded that fundamental due process precluded a literal application of this provision, since there was no place on the Form 9089 where that language could be placed, nothing in that decision, and nothing in the Board's description of the CO's arguments, suggests that the CO was anything other than committed to allowing employers to evaluate domestic applicants based on "any suitable combination of education and experience."<sup>4</sup>

---

<sup>3</sup> The CO's transmittal letter acknowledges this provision but dismisses its significance. After quoting the regulation, the CO observes that "under these circumstances, the employer must specify the actual minimum alternate requirements." (AF 1). Unfortunately, we are left to speculate what "these circumstances" may be. Likewise, the CO's assertion that the Employer "obfuscated" its alternate requirement by using language directly from the regulation is equally uninformative. Missing from the CO's discussion is the fact that the suitable combination language actually widens the pool of potentially qualified domestic applicants.

<sup>4</sup> The CO appears willing to use the provision to support a denial where domestic applicants have been improperly rejected. *CEO Ally*, 2012-PER-01274 (May 12, 2016).

The CO in the instant matter appears to be attempting to create regulatory obligations where none exist. The CO asserts that “Departmental regulations at 20 CFR § 656.17(i)(1) require the employer to divulge its actual minimum requirements on the Application for Permanent Employment Certification, ETA Form 9089.” (AF 1). To the contrary, § 656.17(i) does not mandate that the employer explicitly identify and disclose its actual minimum requirements. Rather, it contemplates that the Department of Labor will determine if the job is being offered at the employer’s actual minimal requirements. The CO accomplishes this by looking at the qualifications of the alien as reflected in the application and juxtaposing them against the job requirements listed in Section H of the Form 9089. If the alien did not possess, at the time of hire, the qualification(s) specified in Section H, the application can be denied. *Boodell & Domanskis*, 2012-PER-01275 (May 11, 2016).

In this case, the Employer demonstrated, through a credentials evaluation (AF 44-45), that the alien met its alternative requirement of training and experience equivalent to a bachelor’s degree in mechanical engineering and 24 months experience. The CO does not take issue with the evaluator’s conclusion and therefore a denial based on § 656.17(i) cannot be sustained.<sup>5</sup>

---

<sup>5</sup> Since the CO’s real concern appears to be with the alternative experience requirement, the matter should have been addressed under 20 C.F.R. § 656.17(h) (4). As the CO did not cite that provision, arguments arising out of it are waived. In any case, no violation of that regulation is present. The use of alternative experience requirements as a subterfuge by employers to tailor a job to the alien’s unique credentials was discussed by the Board, prior to PERM, in *Francis Kellogg*, 1994-INA-465 (Feb. 2, 1998) (*en banc*). The PERM regulation governing the use of alternative experience was adopted to address the issues identified in *Kellogg*. See ETA, *Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States*, 20 CFR Part 656, 69 Fed. Reg. 77326, 77352-77353 (Dec. 27, 2004). This regulation has two elements; the alternative experience must be “substantially equivalent” to the principal experience and, if the alien qualifies on solely based on the alternative experience, the employer must indicate on the application its willingness to accept applicants who qualify based on “any suitable combination of education, training or experience.” The employer has satisfied the first element since it defines the alternative requirement in term of equivalency. As to the second element, *Federal Insurance*, 2008-PER-00037 (Feb 20, 2009), teaches that an application cannot be denied for not including this language; we decline to find the application should be denied because the employer has found a way to include it.

## **ORDER**

Based on the foregoing, **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:

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.