



Date Issued: DEC 7 1993

Case No.: 91-INA-222

IN THE MATTER OF:

DEARBORN PUBLIC SCHOOLS,
Employer

on behalf of

ANTHONY BUMBACA,
Alien.

Before: Brenner, Clarke, Glennon, Groner,
Guill, Huddleston and Litt
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

This alien labor certification proceeding arises under the Immigration and Nationality Act of 1990 at 8 U.S.C. § 1182 (the "Act"), and the regulations promulgated thereunder at 20 C.F.R. Part 656. The case is before us by our grant of the Employer's petition for en banc review of a three-judge panel decision which denied the application for labor certification. For the reasons stated below, we reach the same result.

Statement of the Case

On March 8, 1990, the Employer, Dearborn Public Schools, filed an application for permanent labor certification on behalf of Anthony Bumbaca, the Alien, to fill the position of Choral Director, Grades 9-12. Appeal File (AF) 27. The Employer described the job duties in item # 13 of the ETA 750A form as follows:

Teaching piano classes (beginning to advanced levels), advanced music theory, vocal/music instruction/and direction of choral groups, private vocational instruction for students participating in state sponsored competitions, directing and arranging presentation of students vocal ensembles, including making any peripheral arrangements for performances.

The minimum stated requirements listed for the position were a Master's Degree for Teachers in Music Education, three years experience in the job offered and a Michigan State Teaching Certificate.

In response to the Employer's recruitment efforts, two U.S. applicants were referred to the Employer by the Michigan Employment Security Commission. The Employer rejected both U.S. applicants as not qualified for the position based on their resumes. Specifically, neither were found to have the required three years of experience as a Choral Director. AF 36.

On October 10, 1990, a U.S. Department of Labor Certifying Officer (CO) issued a Notice of Findings proposing to deny certification. AF 22-24. Upon review of the two U.S. applicants' resumes, the CO found that one of the U.S. applicants, Mary Jane Montague, appeared to meet the job requirements "inasmuch as she has performed the duties described in item # 13 of the ETA 750A form." AF 23. Therefore, despite the fact that Ms. Montague's previous job title was listed as "Teacher" rather than "Choral Director", the CO concluded that the Employer had failed to establish that U.S. applicants were rejected solely for lawful job-related reasons pursuant to 20 C.F.R. 656.21(b)(7) (now codified as subsection (b)(6)). The CO instructed the Employer to explain fully the particular reason why applicant Montague was rejected. Id.

By letter dated November 5, 1990, the Employer submitted its rebuttal as directed. The Employer reviewed applicant Montague's experience as listed and outlined why it still found her unqualified for the position. AF 20-21.

The CO issued a Final Determination on February 22, 1990, denying certification. The CO stated, in relevant part:

Ms. Montague has had experience based on her resume as Director of school musical programs from 1967 through 1977 which is a span of 10 years. Ms. Montague has been teaching music and directing choirs from Kindergarten up to and including adults for a span of 25 years or more. In addition, the applicant has been, since 1963, an instructor in organ, piano, voice, folk guitar, and accordion.

AF 14. On the basis of these stated qualifications, the CO determined that Ms. Montague was qualified to perform the job duties as listed and therefore was not rejected for lawful job-related reasons. AF 15.

The Employer requested review of the Final Determination by letter dated March 4, 1991. On April 24, 1991, the Employer submitted a brief in support of its appeal. Therein, the Employer maintained that the applicant's resume "at all times disclosed that she was merely a teacher of various subjects with emphasis in music". Brief of Employer, April 24, 1991, at p. 2. In addition, the Employer averred that the CO had arbitrarily and incorrectly characterized the applicant's experience gained between 1967 through 1977 as that of a director of school music.

In its April 24, 1991 brief the Employer also raised the issue whether the CO incorrectly failed to apply the "special handling" provisions at 20 C.F.R. 656.21a to this position. The Employer stated that pursuant to 8 U.S.C. § 1101(a)(14) a U.S. applicant for the job of secondary school Choral Director should be adjudged as qualified only if that applicant is equally as qualified for the position as the alien. The Employer acknowledged that the Department of Labor's implementing "special handling" provisions at 20 C.F.R. 656.21a do not mention elementary and secondary teachers, but "[t]he fact that the DOL has chosen to process some applications for teachers differently from others does not change the clear wording of the statute or its burden of proof." Brief of Employer, April 24, 1991, at pp. 3-4. Accordingly, the Employer argued on appeal that U.S. applicant Montague was lawfully rejected both for failing to meet the stated three year experience requirement and, alternatively, because she was not equally qualified for the Choral Director position as the alien.

On December 11, 1992, a three-judge panel of the Board issued a Decision and Order affirming the CO's denial of certification. The panel agreed that applicant Montague's resume does not explicitly set forth experience in all of the required job duties. Nevertheless, considering the extensive background that her resume does highlight, including a PhD. in Music Education, nearly twenty years of related experience, and that some of the detailed job duties may not have been included in her resume, the panel, citing Gorchev & Gorchev Graphic Design, 89-INA-118 (Nov. 29, 1990) (en banc), concluded that "the onus was upon the Employer to further investigate Ms. Montague's background." Decision and Order at p. 4. The panel dismissed the Employer's argument that U.S. workers must be shown to be equally qualified for this position as the alien under the "special handling" provisions at 20 C.F.R. 656.21a because the job opportunity at issue is neither a college or university professor position as required. Id., at p. 5.

The Employer requested en banc review of the panel decision. By Notice and Order dated June 3, 1993, the Board informed that it would review the panel decision and requested the parties to brief the following issues:

Whether the Board has jurisdiction to rule on the validity of a Department of Labor regulation.

Whether the Department of Labor's special handling regulations, with respect to teachers, at 20 C.F.R. 656.21a are: (1) limited in application to college or university teachers to implement the "at least as qualified" standard at §656.24; and (2) if so, whether this is in conflict with the provisions at 8 U.S.C. §1182(a)(14)(A) of the Immigration and Nationality Act, as recodified in 1990 at 8 U.S.C. §1182(a)(5)(A).

The Employer submitted its brief on July 6, 1993. It acknowledges that the "at least as qualified" standard found at 20 C.F.R. 656.24 is limited in application to college and university teachers. Nevertheless, it contends that the mere failure on the part of the Department of Labor's regulations to include other teaching professionals does not obviate the statutory requirement that

the "at least as qualified" standard apply to other teaching professionals as well. The Employer concludes:

Instead, by negative implication, those other teaching professionals would be processed under the normal labor certification regulations found at 20 C.F.R. 656.21 and the burden of proof would be the "at least as qualified" statutory standard. Any contrary position would read out of the statute that which is clearly stated and defined in the statute.

On August 4, 1993, the American Immigration Law Foundation and the American Immigration Lawyers Association, as amici curiae, submitted a joint brief in support of the Employer's position. Initially, amici state that the Board does not have jurisdiction to overrule a Department of Labor regulation. However, it is their position that because the regulations at 20 C.F.R. 656.21a and 656.24 are silent as to the application of the "equally qualified" standard to elementary and secondary teachers, the Board can, and indeed must, apply the clear statutory language found at 8 U.S.C. § 1182(a)(5)(A). Brief of the American Immigration Lawyers Association and the American Immigration Law Foundation, at p. 6. In the alternative, amici also maintain that U.S. applicant Montague was lawfully rejected for failure to meet the stated requirements. Id., at p. 9.

The Certifying Officer submitted a brief on September 3, 1993. Therein, the CO contends that the special handling and "equally qualified" regulations at 20 C.F.R. 656.21a and 656.24 are limited in application to college or university teachers. Moreover, it is the CO's position that the Secretary of Labor intentionally precluded application of these regulatory provisions to elementary and secondary teachers. Consequently, the CO concludes, this Board has no authority to overrule the regulations by applying the "equally qualified" standard to elementary and secondary schoolteachers. Brief of the Certifying Officer, at pp. 8-12. Finally, the CO urges that the Board affirm the panel's determination that the Employer failed to reject U.S. applicant Montague for lawful job-related reasons. Id., at pp. 17-21.

Discussion and Conclusions

I

This case presents two distinct issues for resolution by the full Board. The first issue is whether the "equally qualified" standard applies to all school teachers in the same manner as college and university teachers. If not, then the Board must decide whether the panel correctly found that the Employer unlawfully rejected U.S. applicant Montague.

II

The Employer and amici agree that the Department of Labor's special handling provisions only specifically apply to college and university teachers. Nevertheless, it is their contention that the regulation's failure to include other teaching professionals is tantamount to regulatory silence, and therefore, it is within the purview of the Board to apply the clear language of the

statute and extend the "equally qualified" standard to secondary teachers. In determining whether the Employer's contention is an accurate characterization of the regulations, it is helpful to review the legislative and regulatory history behind the special handling provisions.

Prior to the amendment of the Immigration and Nationality Act in 1976, immigration was conducted through a six class preference system. The third preference class, as indicated at 8 U.S.C. § 1153(a)(3), included members of the "professions", defined to include "teachers in elementary or secondary schools, colleges, academies, or seminaries." 8 U.S.C. § 1101(a)(32). Aliens seeking admittance into the United States pursuant to this third preference system were excludable unless the Secretary of Labor determined the following: 1) that there were not sufficient U.S. workers "able, willing, qualified, and available" for the same position, and 2) that employing alien workers would not "adversely affect the wage and working conditions" of similarly employed U.S. workers. 8 U.S.C. § 1182(a)(14).

In 1976, Congress amended section 1182(a)(14) of the Act to provide, inter alia, that, with respect to positions in the "teaching profession", a U.S. applicant must be equally qualified for the position as the alien in order for labor certification to be denied based on the availability of U.S. workers. The legislative history to the 1976 amendments provides the following rationale for this change:

The Committee continues to be disturbed by the administration of the labor certification requirement by the Department of Labor and plans to review this entire program during the next Congress. The Committee, however, is particularly troubled by the rigid interpretation of this section of law as it pertains to research scholars and exceptional members of the teaching profession. More specifically, the Committee believes that **the Department of Labor has impeded the efforts of colleges and universities to acquire outstanding educators or faculty members who possess specialized knowledge or a unique combination of administrative and teaching skills.** As a result, this legislation includes an amendment to section 212(a)(14) which requires the Secretary of Labor to determine that "equally qualified" American workers are available in order to deny a labor certification for members of the teaching profession or those who have exceptional ability in the arts and sciences.

H.R. Rep. No. 94-1553, 94th Cong., 1st Sess., U.S. Cong. and Adm. News (1976) 6083 (emphasis added).

These amendments were eventually implemented by regulations at 20 C.F.R. 656.21. Initially the Department proposed the following language at section 656.21(a)(4):

If the application involves a job offer **as a teacher**, the documentation (must establish) that the employer selected the alien pursuant to a competitive recruitment and selection process through which the alien was found to be more qualified than any of the U.S. workers who applied for the job[.]

41 Fed. Reg. 48,938 (1976) (to be codified at 20 C.F.R. 656) (proposed Nov. 5, 1976) (emphasis added).

The final version of the regulation, however, contained a significant change when it was published on January 18, 1977. The drafters of the regulation specifically narrowed the term "as a teacher" to read "as a **college or university teacher . . .**" (20 C.F.R. 656.21(a)(4) (1977) (emphasis added).¹ This regulation is presently codified at 20 C.F.R. 656.21a(a)(1)(iii).

The Secretary explained the rationale behind this change in the preamble to the regulation:

The House Subcommittee on Immigration, Citizenship, and International Law commented that the recent amendment, by Pub.L. 94-571, to sec. 212(a)(14) of the Immigration and Nationality Act with respect to members of the "teaching profession" was intended to apply only to educators at the college and university level, not to all members of the teaching profession. The final regulations have been revised in keeping with the Congressional intent.

42 Fed. Reg. 3440 (January 18, 1977).

The Immigration and Nationality Act was amended in 1990. In relevant part, section 1182(a)(14), as amended and recodified at section 1182(a)(5), further delineated the "equally qualified" standard, yet continued to apply the standard to "members of the teaching profession." 8 U.S.C. § 1182(a)(5)(A)(ii)(I). Moreover, the term "profession", as defined at 8 U.S.C. § 1001(a)(32), remained unchanged to include "teachers in elementary or secondary schools . . ."

Following the 1990 amendments, the Department made no substantive changes to the implementing regulations at either 20 C.F.R. 656.21a or 656.24. This despite the fact that just prior to the 1990 amendments, the United States District Court for Alaska ruled that the Department's regulations were in conflict with the plain language of the statute, and, in the case before the Court, ordered the Department to apply the "equally qualified" standard for labor certification processing of a secondary school teacher. Mastroyanis v. U.S. Department of Labor, No. A 88-089 (D. AK 1989) (unpublished).²

¹ See also 20 C.F.R. 656.24(b)(2)(ii) (1978) ("if the application involves a job opportunity as a college or university teacher . . . the U.S. worker must be at least as qualified as the alien.").

² The Court concluded that the regulations were clearly in conflict with the statutory language which does not limit application of the "equally qualified" standard to college and university teachers. In light of the clear statutory language, the Court found the Department's reliance on a comment by a House Subcommittee sometime after passage of the statute as an insufficient basis for limiting application of the "equally qualified" standard to college and university teachers. Mastroyanis, supra. Of course, as an unpublished decision, (continued...)

This review of both the legislative and regulatory history indicates that despite its amendment in 1976 and 1990, Congress never adopted statutory language to limit application of the "equally qualified" standard to college and university teachers. Nevertheless, the Secretary, relying on House Subcommittee comments, purposefully promulgated its own implementing regulations to exclude all teaching professionals except college and university teachers from the benefit of the "equally qualified" standard. The history shows that, contrary to the arguments of the Employer and *amici curiae*, there is not simply a vacuum in the regulations with respect to the correct standard to apply to teachers below the college and university level. As indicated by the only district court to have yet reviewed this issue, there is a clear conflict between the statutory language and the implementing regulations.

The question remains, however, whether this Board has jurisdiction to apply the "equally qualified" standard to secondary school teaching professionals in light of the Departmental regulations to the contrary. Initially, we reiterate that application of the "equally qualified" standard in this case would necessarily involve disregarding, in effect invalidating, the Department's own regulations which were purposefully enacted after express consideration of the issue presented in this case. The test for determining whether an administrative-judicial body such as BALCA has the authority to invalidate a regulation involves a two-fold inquiry: 1) whether the administrative-judicial body possesses the inherent authority to rule on the regulation; and 2) if not, whether such authority has been expressly delegated by statute or regulation. *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1117 (6th Cir.1984) (citing *Panitz v. District of Columbia*, 112 F.2d 39 (D.C. Cir.1940)). We hold BALCA, as a non-Article III court, lacks inherent authority to rule on the validity of a regulation. *Id.* Moreover, we hold that it also lacks express authority to invalidate the regulations as written. BALCA was established by regulation to carry out the Department's objectives under section 212(a)(5) of the Immigration and Nationality Act, 20 C.F.R. 656.26; 52 Fed. Reg. 11217 (1987). We are unaware of any concomitant, express statutory or regulatory authority, pursuant to either the Immigration Act and its implementing regulations, the Administrative Procedure Act at 5 U.S.C. § 550 *et seq.*, or Office of Administrative Law Judges general procedural regulations at 29 C.F.R. Part 18, extending the Board's jurisdiction to include invalidation of these regulations. *C.f. Gibas* (where the 6th Circuit concluded that the Benefits Review Board has express authority to rule on the validity of a regulation because, at 33 U.S.C. § 921(b)(3), Congress provided the BRB with express authority to decide substantive questions of law). Similarly, the Employer is unable to cite to anything supporting the proposition that the Board may rule on the validity of the regulation.³ Consequently, despite the conflict between the Department of Labor regulations and

²(...continued)

Mastroyanis is not precedent. Nonetheless, it is the only court decision involving the exact issue before us, the parties on both sides have cited it, and we agree with its conclusion that the regulation and the statute conflict in cases like the one before us.

³ *Amici* agree with the proposition that the Board cannot invalidate an applicable regulation. Brief of American Immigration Lawyers Association and the American Immigration Law Foundation, at p. 5.

the plain language of the statute, the panel properly concluded that the Alien cannot avail himself of the "special handling" provisions and "equally qualified" standard.

III

The second issue to be decided upon review is whether the panel correctly found that the Employer failed to carry its burden to show that the U.S. applicant did not qualify for the position. The panel's decision and order denying certification is clearly based on the premise that although her resume alone does not specifically list all of the minimum requirements and experience in all the listed job duties for the Choral Director position, U.S. applicant Montague's extensive music background mandated that the Employer further investigate her credentials in order to determine whether she in fact did meet the minimum requirements.

In its decision, the panel clearly specified in which ways applicant Montague's experience as listed on her resume made it imperative that the Employer further investigate her credentials. Decision and Order at p. 3. As the panel indicated, applicant Montague's resume highlighted a PhD. in Music Education and a wide variety of experience which spans nearly twenty years. Her specific experience, as analyzed by the panel, includes the following: 1) classroom music teacher for grades K-12, three years; 2) private music teacher, nearly twenty years; 3) Music Director and organist for various churches since 1974; 4) Teaching Assistant in elementary and secondary music education methods, and supervisor of music education students, at the University of Michigan, 1981-1983; 5) school choir director for various age groups up to grade 12, at least 11 years; 6) church choir director since 1977; 7) director of all-school music programs, elementary school, five years. Id. On the basis of this experience alone, as indicated on her resume, Employer has not met its burden of establishing that there is no reasonable possibility that applicant Montague meets the job requirements. Gorchev & Gorchev Graphic Design, 89-INA-118 (Nov. 29, 1990) (en banc). Accordingly, the panel correctly applied the well established principle that where an applicant's resume shows such a broad range of experience, education, and training, that it raises a reasonable possibility that the applicant meets all the employer's requirements, an employer must further investigate the applicant's credentials. Id.

A resume is just that: a summary; an introductory overview highlighting an applicant's background of qualifications. It is not a temple to be worshiped as the fount of all knowledge about an applicant's qualifications. Under the Gorchev & Gorchev standard, an employer truly seeking a qualified U.S. applicant would have contacted Ms. Montague and her references to inquire further about her qualifications. Indeed, her resume is so strong that it raises the reasonable possibility that had the employer done so, it might have discovered that Ms. Montague would satisfy even the higher standard, which we are not applying here, of being as qualified as the alien.

We note that the panel's alternative citation to section 656.24(b)(2)(ii) for the proposition that the CO shall consider the U.S. worker qualified for the position if, based on a combination of the applicant's education, experience, and training, she can perform the job duties, is not determinative. Such a finding violates our holding established in Matter of Bronx Medical &

Dental Clinic, 90-INA-479 (Oct. 30, 1992) (en banc). Nonetheless, as the panel correctly concluded that considering her background "the onus was upon the Employer to further investigate Ms. Montague's background," certification was correctly denied.

ORDER

The Decision and Order of the panel **DENYING** certification is hereby **AFFIRMED**.

For the Board:

Lawrence Brenner
Administrative Law Judge

LB/mn