



Issue Date: 28 September 2020

BALCA Case No.: 2013-PER-01380
ETA Case No.: A-12149-66589

In the Matter of:

SMALLS INSURANCE AGENCY, INC.,
Employer,

on behalf of

KHAN, MUKHTAR AHMAD,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Ryan Morgan Knight, Esq.
Palm Global Immigration
Lake Worth, Florida
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*, Paul R. Almanza, *Associate Chief Administrative Law Judge*, Carrie Bland, *Acting Associate Chief Administrative Law Judge*, Theodore W. Annos, and Francine L. Applewhite, *Administrative Law Judges*

Opinion for the Board filed by HENLEY, Chief Administrative Law Judge, with whom ALMANZA, Associate Chief Administrative Law Judge, BLAND, Acting Associate Chief Administrative Law Judge, ANNOS, and APPLEWHITE, Administrative Law Judges, join:

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

EN BANC. 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” labor certification regulations at 20 C.F.R. Part 656.¹

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

On March 28, 2018, a three-judge panel of the Board of Alien Labor Certification Appeals (“Board” or “BALCA”) affirmed the Certifying Officer’s (“CO”) denial of an Application for Permanent Employment Certification (“Form 9089” or “Application”) pursuant to 20 C.F.R. § 656.10(c) due to the Employer’s failure to interview two potentially qualified applicants for the job opportunity. On May 13, 2019, the Board granted the Employer’s petition for en banc review. The Employer timely filed an en banc brief. The CO did not. For the following reasons, the CO’s denial of labor certification is affirmed.

BACKGROUND

To summarize, the Employer filed an *Application for Permanent Employment Certification*, sponsoring the Alien for permanent employment in the United States for the position of “Accounting Associate.” AF 115.² The primary requirements are an Associate’s degree in “[a]ny field of study,” and 24 months of experience in the job opportunity. *Id.* at 115-16. The Employer indicated that it would accept 24 months of experience in the alternate occupations of “Bookkeeping or Accounting,” and that it would also accept “any suitable combination of training, education and experience equivalent to primary job requirements as specified in Section H.” *Id.* at 116.

The CO issued an audit notification letter, directing the Employer to provide, *inter alia*, resumes and applications for all U.S. workers who applied for the job opportunity, a report stating the reasons the Employer did not interview the applicant, and recruitment documentation. *Id.* at 110-13. The Employer timely responded to the audit, providing the documentation requested by the CO. *Id.* at 18-109.

The CO denied certification, stating that the Employer rejected several U.S. applicants without an interview despite the Employer’s willingness “to accept any combination of education, training or experience.” The CO cited 20 C.F.R. §§ 656.10(c), 656.21(e)(4), and 656.24(b) in support of the denial. *Id.* at 17.

The Employer requested reconsideration of the denial, stating that the candidates identified by the CO were “rejected purely for not meeting the minimum/primary requirements of the job for example, educational qualifications and/or working experience which was clearly outlined in the process of recruitment as well as mentioned on form 9089.” *Id.* at 5. The Employer further stated that “the Kellogg language [stated in Section H.14] is inapplicable and ineffective as far as acceptance of equivalent or alternative of education or experience is concerned” given its response to Section H.8, where it “emphasized sufficiently that acceptance of equivalent or alternative of education or experience is not acceptable at all.” *Id.* at 6.

The CO affirmed the denial for the reasons stated above, but did not cite 20 C.F.R. § 656.10(c) in support of the denial; rather, the CO “determined this denial as valid in accordance with the Departmental regulations at” 20 C.F.R. §§ 656.21(e)(4) and 656.24(b). *Id.* at 1-4. The CO, therefore, forwarded this matter to the Board for administrative review.

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

Upon review, the denial was affirmed by a three-judge panel of the Board. *See Smalls Ins. Agency, Inc.*, 2013-PER-01380 (Mar. 28, 2018). In doing so, the panel found that two applicants, R.M.C. and B.W., were rejected without an interview for other than lawful, job-related reasons in violation of 20 C.F.R. § 656.10(c) since there was a reasonable possibility they may have met the Employer’s requirements for the job opportunity. *Id.*, slip op. at 3. The panel thus found that the Employer was “obligated to interview the applicants in order to better ascertain their experience and qualifications.” *Id.* at 4. We subsequently agreed to review this matter en banc.

DISCUSSION

I. STANDARD OF REVIEW

The Board’s review of the CO’s legal and factual determinations when denying an application for permanent alien labor certification is de novo, limited in scope by 20 C.F.R. § 656.27(c). *Albert Einstein Med. Ctr.*, 2009-PER-00379, slip op. at 32 (Nov. 21, 2011) (en banc). The limitations imposed by 20 C.F.R. § 656.27(c) constrain the Board to a review of the record upon which the CO denied permanent alien labor certification, together with the request for review, and any statements of position or legal briefs. *Id.* at 25. The Board may not consider evidence first presented in an appellate brief. *Id.* at 7. The Board may not consider wholly new arguments not made before the CO. *Id.* at 8.

II. PROCEDURAL DUE PROCESS

The Board may not decide an appeal on grounds for denial not raised while the case was before the CO. *Loews Anatole Hotel*, 1989-INA-00230 (Apr. 26, 1991) (en banc) (pre-PERM); *Mandy Donuts Corp.*, 2009-PER-00481 (Jan. 7, 2011). Provided that an employer is not denied a full and fair opportunity to present its case, however, it is within BALCA’s de novo review authority to base our decision on a regulation not cited by the CO. Recently, in *Arbin Corp.*, 2013-PER-00052 (Aug. 7, 2020) (en banc), the Board found that the employer’s due process rights were not violated by its analysis under a regulation not cited by the CO because the employer was on notice of the apposite regulation and was afforded the opportunity to address that regulation. *Id.*, slip op. at 5. Similarly, here, we find that the Employer’s due process rights were not violated by the CO’s reliance on 20 C.F.R. § 656.21(e)(4), which only applies to cases where the CO conducts supervised recruitment, rather than the apposite regulation, 20 C.F.R.

§ 656.10(c)(9), as the Employer extensively argued its compliance with 20 C.F.R. § 656.10(c)(9) throughout its pleadings.³ Thus, it was proper for the three-judge panel to decide this matter pursuant to this regulation. Likewise, we will consider the validity of the CO's denial, and the Board's affirmation, based on the Employer's alleged noncompliance with 20 C.F.R. § 656.10(c)(9).

III. EMPLOYER'S COMPLIANCE WITH 20 C.F.R. § 656.10(C)(9)

Prior to filing a Form 9089, an employer must engage in a good-faith recruitment effort. 20 C.F.R. § 656.10(c)(8); *E. Tenn. State Univ.*, 2010-PER-00038, slip op. at 12 (Apr. 18, 2011) (en banc). The purpose of this effort is to test the labor market and solicit applications from U.S. workers. *Navistar, Inc.*, 2011-PER-01564, slip op. at 2 (Nov. 23, 2012). The outcome of this labor market test is of paramount importance, as “[t]he Certifying Officer makes a determination either to grant or deny the labor certification on the basis of whether or not . . . [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.” 20 C.F.R. § 656.24(b)(2).

An employer may only reject U.S. worker applicants for “lawful job related reasons.” *Id.* § 656.10(c)(9). One such reason arises when an applicant is not qualified for the position. *Fed. Home Loan Mortg. Corp.*, 2011-PER-02902, slip op. at 4 (Feb. 10, 2014). When assessing whether an applicant is qualified, an employer must measure the applicant's credentials against the requirements articulated on the Form 9089. *Jakob Mueller of Am., Inc.*, 2010-PER-01069, slip op. at 5-6 (Dec. 22, 2011). However, an applicant's failure to meet those requirements does not necessarily establish that the applicant is unqualified for the position. The regulations provide that “[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.” 20 C.F.R. § 656.17(g)(2). Thus, an employer must determine that the U.S. applicant does not meet the job requirements listed on the Form 9089 and that such deficiencies cannot be remedied through reasonable on-the-job training in order to comply with 20 C.F.R. § 656.10(c)(9). *Xerox Bus. Servs., LLC*, 2013-PER-00092, slip op. at 3 (Jan. 27, 2017).

³ In *The China Press*, 2011-PER-02924 (Aug. 20, 2015), vacated on other grounds (Nov. 30, 2015), the Board considered whether a CO's decision on reconsideration that did not include one of the grounds cited in the original denial indicated that the CO relied exclusively on the regulatory grounds cited in the denial on reconsideration:

We find that the plain language of the CO's decision on reconsideration relies only on Section 656.17(f)(7) to affirm the denial. . . . Moreover, the panel finds that under the facts of this case, the CO waived reliance on Section 656.10(c)(8). Specifically, we agree with the Employer that Section 656.10(c)(8) was not raised, even by implication, in the decision on reconsideration, and that the language of the decision on reconsideration indicated that the CO was relying exclusively on Section 656.17(f)(7).

Id., slip op. at 5 (Nov. 30, 2015 decision) (emphasis in original). We follow this reasoning in this matter. In doing so, we find that the CO relied exclusively on the grounds cited in the denial on reconsideration, which did not include 20 C.F.R. § 656.10(c)(9).

In some circumstances, it may be clear on the face of a resume that a U.S. applicant does not meet the job requirements listed on the Form 9089. For example, “[w]hen an applicant’s resume is silent on whether he or she meets a “major requirement such as a college degree, an employer might reasonably assume that the applicant does not and, therefore, rejection without follow up may be proper.” *Gorchev & Gorchev Graphic Design*, 1989-INA-00118, slip op. at 2 (Nov. 29, 1990) (pre-PERM). If, however, an applicant’s resume indicates that he or she meets the broad range of experience, education, and training required for the job, thus raising the reasonable prospect that he or she meets all of the employer’s stated actual requirements, the employer has a duty to make a further inquiry, by interview or other means, into whether the applicant meets all of the actual requirements. *Id.*

Here, the Form 9089 indicates that the primary requirements of the job opportunity are an Associate’s degree in any field, two years of experience in the job offered, *i.e.*, an “Accounting Associate,” and that 24 months of experience in “Bookkeeping or “Accounting” was acceptable in the alternative. AF 115-16. Although the Employer states that its response to H.8, that “an alternate combination of education and experience” was not acceptable, it also stated, in Section H.14, that it would “accept any suitable combination of training, education and experience equivalent to primary job requirements as specified in Section H.” *Id.* at 116. The Employer states that its response to Section H.8 nullified the *Kellogg* language stated in Section H.14. However, the Board declines to correct an ambiguity introduced into the Form 9089 by the Employer where no ambiguity otherwise exists on the Form 9089 itself, as “[t]he onus is on the Employer to make it perfectly clear to the CO, BALCA, and prospective applicants what the Employer seeks.” *JP Morgan Chase & Co.*, 2011-PER-01164, slip op. at 4 (July 25, 2012); *see also Exec Search, Inc.*, 2013-PER-02607, slip op. at 2–3 (Dec. 18, 2019) (recognizing that the Board will not affirm denials where ambiguities exist on the Form 9089 itself, and invalidating a FAQ addressing such ambiguities to the extent that the FAQ “alter[ed] the information that needed to be included on the Form 9089,” pursuant to *Solar Turbines, Inc.*, 2016-PER-00025 (June 2, 2017), *Guess?, Inc.*, 2015-PER-00504 (June 28, 2017)). Accordingly, we will consider the *Kellogg* language stated in Section H.14 in evaluating the Employer’s compliance with 20 C.F.R. § 656.10(c)(9).

The three-judge panel found that B.W. was unlawfully rejected. *Smalls Ins. Grp.*, slip op. at 3. B.W. possesses an Associate’s degree in Accounting and a Bachelor’s Degree in Accounting. AF 59. While the Employer lauded B.W.’s educational qualifications, the Employer indicated that B.W.’s Employment history “revealed . . . [no] accounting job title nor perform[ance] accounting related functions for at least 24 months tenure to qualify for the position.” *Id.* at 49. We agree. In a cover letter, B.W. was “excited about the possibility of putting [the skills gained through] education to work.” *Id.* at 58. B.W. also detailed relevant coursework, stating the following:

I have received my [A]ssociate’s degree in accounting at Goldey-Beacon College in 2009 and currently pursuing my bachelor’s degree in accounting with a graduation date on May 4, 2012. I have taking Accounting Principles I & II, Intermediate Accounting I & II, Advanced Accounting, Federal Taxes I & II and Auditing. I also took a refresher course for MS Access and MS Excel.

Id. B.W.’s prior work at “Citigroup” included “box[ing], verify[ing], [and] pack batches of work.” *Id.* B.W. noted strong typing skills, multi-tasking skills, and proficiency with Microsoft Word, Excel, and Access. *Id.* B.W.’s resume echoed the educational qualifications and lack of work experience in the job opportunity. For example, B.W. is an “[a]ccounting student with *practical experience* in operations, database usage, security, shipping and receiving.” *Id.* at 59 (emphasis added). B.W.’s work experience included work as an “Operations Representative[,] . . . Shipping/Receiving Clerk[, and] . . . Security Officer.” *Id.* B.W. provided sufficient detail in describing prior job duties, but none of these positions relate to any experience as an Accounting Associate, experience with Bookkeeping or Accounting, or a related field. Thus, B.W. necessarily does not meet the Employer’s statement that it will accept “any suitable *combination* of training, education and experience equivalent to primary job requirements as specified in Section H.” *Id.* at 116 (emphasis added); *see also The Bombay Club, Inc.*, 2016-PER-00293, slip op. at 10-11 (June 27, 2018) (finding that an applicant was unlawfully rejected pursuant to 20 C.F.R. § 656.10(c)(9) because the applicant has the “relevant experience when combining education and [work] experience”). Accordingly, the panel erred in finding that B.W. was unlawfully rejected pursuant to 20 C.F.R. § 656.10(c)(9).

The three-judge panel found that while R.M.C.’s “employment history did not indicate any . . . experience in the field of Accounting/Bookkeeping,” R.M.C.’s degree and experience merited further consideration by the Employer. *Smalls Ins. Grp.*, slip op. at 3. We agree. R.M.C. possesses an Associate’s degree in Accounting, experience with “Excel, QuickBooks, spreadsheets, and creating financial statements,” and “employment skills maintaining record keeping procedures without error.” AF 55. We disagree with the Employer’s statement that “[m]ost of the job experience held by the candidate is in the field of Sales (Account Manager, Account Analysis Rep), Office Management and Paralegal.” AF 48. The Employer merely assumes that these positions relate to sales without evidence supporting this assertion. *See Golden Ace Corp.*, 2016-PER-00765, slip op. at 4 (Dec. 9, 2019) (“It is a well-established principle that a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer’s burden under the Immigration and Nationalization Act.”). R.M.C.’s employment history includes, *inter alia*, employment as an “Account Analysis Rep[resentative]” with GC Services, LLP and a “Lead Associate” with Fibre Metal Products Co. for a combined work experience of more than 5 years. *Id.* at 55. One of R.M.C.’s professional references is a Certified Public Accountant. *Id.* at 56. We thus find that R.M.C.’s academic credentials—including the Associate’s degree in Accounting and “in-depth proficiency . . . us[ing] . . . financial software [gained] . . . [t]hrough coursework”—and the skills gained through prior employment—including proficiency using computer software to “[c]reate [f]inancial [s]tatements”—presents a suitable combination of education, training, and experience to meet the minimum qualifications of the job opportunity to merit further consideration by the Employer. *Id.* at 55. Putting aside the fact that the Employer’s Form 9089 belies its statement that it does “not have staff available to train an individual to perform the[job] duties as [its] primary business is insurance, not accounting,” the Employer has not demonstrated that R.M.C. would not “be able to immediately assume the duties of the position.” *Id.* at 48. Thus, the Employer has failed to establish that R.M.C. was rejected for lawful, job-related reasons. 20 C.F.R. § 656.10(c)(9).

Based on the foregoing, the CO did not err in denying certification in this matter.

ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **AFFIRMED**.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals