



Issue Date: 29 October 2020

BALCA Case No.: 2014-PER-00330
ETA Case No.: A-13065-45641

In the Matter of:

CLARKSDALE MUNICIPAL SCHOOL DISTRICT,
Employer,

on behalf of

BUDALA, SREELATHA,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Ray Rampersand, Esq.
Rampersand Immigration Group
Atlanta, Georgia
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
DIRECTING GRANT 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 April 20, 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. §§ 656.17(i)(1) and 656.17(i)(3), stating that the Alien did not meet the licensure requirement specified in Section H.14 of the Application. On October 2, 2020, the Board granted the Employer’s petition for en banc review. Counsel for the CO filed a brief; the Employer did not. For the following reasons, the CO’s denial of labor certification is vacated, and this matter is remanded for certification pursuant to 20 C.F.R. § 656.27(c)(2).

BACKGROUND

The Employer filed an *Application for Permanent Employment Certification*, sponsoring the Alien for permanent employment in the United States for the position of “Secondary School Teacher (Mathematics).” AF 31.² In Section H.11, the Employer indicated that the job opportunity involved teaching students in grades 9 through 12. *Id.* at 40. In Section H.14, the Employer indicated that applicants “[m]ust “[p]ossess [a] State of Mississippi[-]issued [v]alid Teaching Certificate/License to teach Mathematics.” *Id.* at 32. As detailed in Section K, the Alien possesses extensive teaching experience, and has been employed by the Employer since October 1, 2010.³ *See id.* at 35-37, 41-46. Aside from the Employer, the Alien’s prior employment did not otherwise involve work as a teacher in Mississippi.⁴ *Id.* at 35-36, 41-42. Section K, however, did not detail any state-issued teaching certificates or licenses. *Id.*

Without conducting an audit, the CO denied certification pursuant to 20 C.F.R. §§ 656.17(i)(1) and 656.17(i)(3), stating that the Employer did not provide proof that the Alien

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

³ The Alien’s job details while working for the Employer include the following:

Responsible to provide a rigorous high-quality education in challenging range of classroom conditions with students from diverse ethnic, financial and academic back[]grounds. Design, develop and teach Course requirement to meet State standards, appropriate to grade level and learning styles for students of grades 6-12 in the branches of Trigonometry, Pre-Calculus and Geometry. Teach courses pertaining to high School mathematical concepts, statistics, and actuarial science and to the application of original and standardized mathematical techniques in solving specific problems and situations. Compile, administer, and grade Middle and secondary school examinations. Prepare and deliver lectures to 6-12th grade students on topics such as linear algebra, differential equations, and discrete mathematics. Teach AP classes, challenging content to motivated students and administer AP Examinations. Evaluate 6-12th grade students’ class work, assignments, and papers. Use computer literacy skills, different software, interactive educational software programs. Integrates technology into the classroom as an instructional tool and for personal productivity. Brainstorm and strategize comprehensive behavioral management plan with teachers and parents. Enforce all administration policies and rules governing students.

AF 43.

⁴ The Alien’s employment history notes that he worked as a “Mathematics Teacher” in Louisiana and South Carolina, a “Mathematics and Science Teacher” in Virginia, and as a “Trained Graduate Teacher” in India. *See* AF 35-36, 41-42.

possessed the license required by Section H.14 at the time of hire and thus the job requirements listed in Section H could not represent the Employer’s actual minimum requirements of the job opportunity. *Id.* at 29. The CO stated that the Employer was “given room to state all the foreign worker’s qualifications” in Section K.9, which directs employers to provide “[j]ob details (duties performed, use of tools, machines, equipment, skills, qualifications, certifications, licenses, etc.).” *Id.*

The Employer requested reconsideration of the denial, stating that the Alien “possessed a valid Mississippi teaching license to teach Mathematics and General Sciences prior to filing this . . . [A]pplication.” *Id.* at 6. The Employer stated that it “inadvertent[ly] omi[tted] this information from the Application, and that “[i]n the absence of an audit notification we did not get an opportunity to show that the foreign worker possessed the requisite teaching certificate/license prior to the filing of the application and benefit from the relief afforded by 20 C.F.R. § 656.24(g)[.]” *Id.* at 6–7. The Employer provided a copy of the Alien’s valid Mississippi teaching license with its request for reconsideration. *Id.* at 13.

The CO accepted the teaching license submitted on reconsideration, but altered the legal theory in support of the denial on reconsideration, stating the following:

The licensure information provided with the appeal request indicates that while the foreign worker received a State of Mississippi license . . . to teach middle school mathematics for grades 7-8 on June 11, 2010, the foreign worker did not receive a license to teach secondary school mathematics, license . . . until May 24, 2011. Since the foreign worker was hired in on October 1, 2010, and since the job duties include teaching mathematics from grades 6-12, this means that the foreign worker taught mathematics for the employer at the secondary school level for more than seven months without possessing a valid license to teach mathematics at the grade 9-12 level.

Id. at 2. The CO further stated that while the Employer required a “Valid Teaching Certificate/License to teach Mathematics,” the job opportunity “is for a secondary school mathematics teacher, so that failing to specify the level appears to be designed to qualify the foreign worker who possessed a middle school mathematics teaching license prior to hire.” *Id.* The CO stated that “[t]his calls into question the employer’s actual minimum requirement for a valid high school mathematics license.” *Id.* The CO, therefore, forwarded this matter to the Board for administrative review.

Upon review, the denial was affirmed by a three-judge panel of the Board. *See Clarksdale Mun. Sch. Dist.*, 2014-PER-00330 (Apr. 20, 2018). The panel found that “the Alien did not possess a valid teaching license to teach Mathematics to upper grade levels.” *Id.*, slip op. at 4 (emphasis in original). The panel further found that the teaching license submitted with the Employer’s request for reconsideration demonstrated that the “Alien received a teaching license to teach Mathematics grades 7-12 on May 24, 2011, which was after October 1, 2010, when the Alien was hired [by the] . . . Employer to teach Mathematics grades 6-12. At the time of hire, the Alien only possessed licenses to teach grades 7-8 General Sciences, Middle School Science, and Middle School Mathematics.” *Id.* The panel thus found that the “Employer’s requirement

that U.S. workers possess a valid Mississippi Mathematics teaching license to teach Secondary School, which includes grades 9-12, was not one of [the] Employer’s actual minimum requirements because the Alien failed to possess a valid license prior to hire.” *Id.* We subsequently agreed to review this matter en banc.

In response to the Board’s October 2, 2020, *Order Granting En Banc Review*, counsel for the CO timely filed a *Brief in Support of the Certifying Officer’s Request to Affirm the Denial of Employer’s Labor Certification Application* (“CO’s Brief”) on October 23, 2020. Counsel for the CO states, *inter alia*, that because the Alien lacked a valid license to teach mathematics at secondary school, or to grades 9 to 12, prior to being hired, the Employer did not represent its actual minimum requirements on the Form 9089. CO’s Brief at 4. In distinguishing *Guess?, Inc.*, 2015-PER-00504 (June 28, 2017), counsel for the CO states that, here, “the Employer hired a foreign worker who did not meet the licensure requirement listed on the [A]pplication,” and that even if the CO audited the Application, the Employer “hired a foreign worker who did not possess the appropriate teaching license prior to hire, and therefore, did not possess the actual minimum requirements for the job opportunity.” *Id.* at 5. Counsel for the CO thus states that this matter “is analogous to cases in which the Board has affirmed denials of certification where an employer’s application does not demonstrate that the foreign worker met the minimum qualifications described in the application.” *Id.*

DISCUSSION

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 or wholly new arguments not made before the CO. *Id.* at 7-8.

The applicable regulation provides that “[t]he job requirements, as described [on the Form 9089], must represent the employer’s actual minimum requirements for the job opportunity.” 20 C.F.R. § 656.17(i)(1). The purpose of this regulation “is to address the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker.” *Your Emp’t Serv. Inc.*, 2009-PER-00151, slip op. at 6 (Oct. 30, 2009) (internal citations omitted). In determining whether an employer reported its actual minimum requirements for a position, the CO may consider the alien beneficiary’s training and experience at the time the alien was hired by the employer.⁵ 20 C.F.R. § 656.17(i)(3).

Here, the Employer attested in Section H.14 that applicants must possess a “[v]alid Teaching Certificate/License to teach Mathematics” issued by the state of Mississippi. AF 32.

⁵ Section K of the Form 9089 is the space designated for listing an alien’s “work experience” in order to establish his or her eligibility for the job listed on the application, and Subsection K.9 requires employers to list “job details” related to the alien’s prior work experience. *See* AF 35-36.

The Alien’s teaching licenses submitted on reconsideration demonstrated that prior to being hired by the Employer, the Alien possessed, *inter alia*, a license to teach middle school mathematics for grades 7 and 8 issued by the state of Mississippi. AF 14. The CO accepted the license documentation, but denied certification, stating that since the Alien obtained a license to teach secondary mathematics 7 months after being hired by the Employer, and since it was “clear that the job offered is for a secondary school mathematics teacher, . . . failing to specify the level appears to be designed to qualify the foreign worker who possessed a middle school mathematics teaching license prior to hire. This calls into question the employer’s actual minimum requirement for a valid high school mathematics license.” *Id.*, at 2. The panel affirmed for the reasons stated by the CO. *See Clarksdale Mun. Sch. Dist.*, slip op. at 4-5. We disagree with these findings.

At the outset, we note that the CO did not audit the Application. Although the regulations allow the license documentation submitted on reconsideration to be part of the record under such circumstances, the CO altered the legal theory in support of the denial on reconsideration by stating that the Alien did not possess a Mississippi state-issued license for teaching students in grades 9 through 12. *See* AF 2; 20 C.F.R. § 656.24(g)(2)(ii) (allowing requests for reconsideration to include documentation the employer did not have a prior opportunity to submit to the CO, but existed at the time of filing its Application and was maintained by the employer to support the Application). In doing so, the CO accepted the Alien’s license on reconsideration, but challenged its sufficiency.⁶ Thus, we must consider the

⁶ We note, however, that the CO was under no obligation to audit the Application or accept the teaching license and challenge its sufficiency relative to the requirements of the job opportunity. The Alien’s prior employment detailed on the Form 9089 included work as a mathematics teacher in Mississippi, which the Employer readily admitted required a state-issued mathematics teaching license. AF 8, 35. The Employer also acknowledged that “every . . . teacher must have a . . . state certification” to teach mathematics in Mississippi. AF 8. While the CO may not deny certification for an employer’s failure to include information on the Form 9089 when the Form 9089 does not provide a place to include that particular information, the plain and unambiguous language of Section K.9 of the Form 9089 requires the Employer to list all licenses or certifications possessed by the Alien: “*Job details* (duties performed, use of tools, machines, equipment, skills, qualifications, *certifications, licenses*, etc. Include the phone number of the employer and the name of the alien’s supervisor.). AF 36 (emphases added); *see also Guess?, Inc.*, slip op. at 6-8; *Solar Turbines, Inc.*, 2016-PER-00025, slip op. at 3-4 (June 2, 2017); *Smartzip Analytics*, 2016-PER-00695, slip op. at 6-7 (Nov. 9, 2016); *Apple, Inc.*, 2011-PER-01669, slip op. at 4-5 (Jan. 20, 2015); *Moreta & Assocs.*, 2009-PER-00008, slip op. at 4-5 (Aug. 6, 2009). The instructions for completing Section K.9 also emphasize this direction:

Enter the details of the job performed by the alien while employed. Include the phone number of the employer and the name of the alien’s supervisor. *Job descriptions should also include* specific details of the work performed, with emphasis on skills, qualifications, *certifications, and licenses required*, managerial or supervisory functions performed, materials or products handled, and machines, tools, and equipment used or operated.

<https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/9089inst.pdf> (emphases added); *see also* AF 30 (bolded instruction appearing at the very top of the first page of the Form 9089, which directs the Employer to “read and review the fling instructions” before completing the Form 9089, and providing the website address to access those instructions). It is incumbent on an employer to demonstrate that an alien has the skills required for the job opportunity. *Verian Techs., LLC*, 2015-PER-00297, slip op. at 4 (Feb. 7, 2018). In determining whether an employer’s application is complete and compliant with 20 C.F.R. § 656.17(i)(1), the CO is not “expected to infer or investigate the particular sorts of skills the alien may or may not have developed in particular prior positions The Employer must demonstrate that the Alien has the skills required for the job—not rest on its own knowledge or

license based on the CO's stated ground for denial since it is part of the record. *See* 20 C.F.R. § 656.27(c) (limiting the Board's review authority to the "record upon which the [CO's] decision was made").

The CO stated that the Employer appeared to tailor the Application to the Alien by failing to specify the grade level required for the license, but never challenged the business necessity of the licensure requirements. While BALCA has consistently affirmed denials of certification where the record contains evidence that the employer demanded more stringent requirements of U.S. workers than the Alien upon hire, which would violate the purpose of 20 C.F.R. § 656.17(i)(1) by treating the Alien more favorably than U.S. applicants, the CO does not cite any evidence in support of this assertion, nor does the record contain such evidence. *See Your Emp't Serv.*, slip op. at 6; *Infosys Int'l, Inc.*, 2013-PER-01087, slip op. at 4-5 (May 22, 2020); *Fla. Hosp. Zephyrhills, Inc.*, 2014-PER-01095, slip op. at 5-6 (Apr. 30, 2020); *Prime Tech. Grp.*, 2016-PER-00043, slip op. at 3 (June 26, 2018); *see also 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."). The evidence suggests the opposite—the Employer actually lowered the requirements for the job opportunity, which had the effect of expanding, rather than reducing, the pool of potential applicants by expressing its willingness to hire a math teacher who possessed a license that did not encompass secondary math. Thus, we find the record in this case does not support the CO's position on this point in support of the denial.

The only remaining issue in this matter is whether the CO was able to adequately evaluate the Employer's minimum job requirements against the Alien's qualifications at the time of hire pursuant to 20 C.F.R. § 656.17(i)(1). The Employer clearly stated its minimum job requirements for the job opportunity in Section H of the Form 9089. *See* AF 32. It was error for the CO to impute a minimum requirement for the job opportunity where no such requirement existed, then deny the Application pursuant to 20 C.F.R. § 656.17(i)(1) because the Alien did not possess that requirement. Likewise, the panel's rationale for affirming the denial—that the Employer "require[d] . . . U.S. workers possess a valid Mississippi Mathematics teaching license to teach Secondary School"—and the CO's position—that the Alien "did not possess the actual

demand that the CO engage in extended investigation or an interactive process to determine whether the Alien qualifies." *Id.*; *see also Fluke Corp.*, 2014-PER-00602, slip op. at 4 (Mar. 30, 2018) ("requiring the CO to 'extrapolate' the omitted portions of every application would result in a significant drain of time and resources and would directly conflict with the goals of the ETA") (internal quotation marks in original). The CO cannot be expected to engage in guess work, or an extended investigation of the particular sorts of skills the alien may or may not have developed in particular prior positions, and an employer cannot assume that the mere possession of certain skills without reference to those skills in the Application is sufficient, particularly where the Form 9089 explicitly accommodates such reference, as in this matter. *See Imagine Elementary at Desert West*, slip op. at 4-6 (Dec. 6, 2019); *Twin Peaks, Inc.*, 2016-PER-00195, slip op. at 3-5 (Aug. 21, 2019); *Theranos, Inc.*, 2015-PER-00240, slip op. at 4-5 (Aug. 23, 2018). Thus, the limitations of the Form 9089 and applicability of the July 28, 2014 FAQ identified in *Solar Turbines* and *Guess?* do not apply to cases involving an employer's failure to include a license and/or certification required by prior employment via Section K.9 of the Form 9089 that is also required by the job opportunity for which certification is sought. *Imagine Elementary at Desert West*, slip op. at 5-6 (affirming denial pursuant to 20 C.F.R. § 656.17(i)(1) where the employer failed to list the relevant license in Section K.9 and the CO refused to consider a license submitted on reconsideration); *Rehability Care*, 2015[PER-00511, slip op. at 3-4 (July 10, 2020) (same). It thus follows that the Employer was obligated to list all licenses required by the Alien's prior employers, particularly those bearing on the merits of its Application.

minimum requirements for the job opportunity . . . [because] the . . . foreign worker . . . did not meet the licensure requirement listed on the [A]pplication”—are both patently incorrect. *Clarksdale Mun. Sch. Dist.*, slip op. at 4; CO’s Brief at 5. The Employer did not require a teaching license or certificate for secondary mathematics, nor did it specify a grade level requirement for the mathematics license or certificate. *See* AF 32. All it required was a license or certificate to teach mathematics issued by the state of Mississippi, which the Alien possessed at the time of hire.⁷ *Id.* Thus, the Employer has sufficiently demonstrated that the Alien possessed the minimum requirements for the job opportunity.

Based on the foregoing, the CO erred in denying certification in this matter.

ORDER

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

⁷ While the CO states that the Employer “hired a foreign worker who did not possess the appropriate teaching license prior to hire,” we express no opinion on the Employer’s ability and/or willingness to hire a secondary school mathematics teacher that does not possess a state-issued secondary mathematics license, or whether it was appropriate to do so. CO’s Brief at 5.