

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 12 April 2013**

**BALCA Case No.: 2011-PER-00789**  
ETA Case No.: A-08212-74534

*In the Matter of:*

**MICROSOFT CORPORATION,**  
*Employer*

*on behalf of*

**HERNANDEZ, DIANA MARI,**  
*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearances: Mark S. Cross, Esquire  
Berry Appleman & Leiden LLP  
Houston, Texas  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Stephen R. Jones Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **Colwell, Johnson and Reilly**  
Administrative Law Judges

## **DECISION AND ORDER** **GRANTING CERTIFICATION**

**PER CURIAM.** 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 at 20 C.F.R. Part 656.

### **BACKGROUND**

On July 30, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s ETA Form 9089 for the position of “Support Engineer.” (AF 80-90).<sup>1</sup> The Employer stated that the job opportunity requires a Bachelor’s degree in Computer Science, Engineering, Physics, Math, Information Systems, Business or a related subject. (AF 81).

On March 20, 2009, the CO issued an Audit Notification, instructing the Employer to submit copies of its recruitment documentation. (AF 77-79). The Employer submitted its audit response materials on April 16, 2009. (AF 23-76). The Employer’s Notice of Filing (“NOF”) states the position “Requires a BA/BS or MA/MS degree or equivalent in Computer Science, Engineering, Physics, Math, Information Systems, Business or related field,” and that “Team Manager positions are available.” (AF 43-47). The Employer’s audit response materials also included a copy of the job order that the Employer placed with the Washington State Workforce Agency (“SWA”). (AF 67-69). The SWA job order stated in pertinent part, “Qualifications may include a MA/MS or equivalent or BA/BS deg or equivalent in Comp Science, Engineering, Math, Physics, Info Systems, Business or related field...Multiple positions available.” *Id.*

On August 9, 2010, the CO denied the Employer’s application. (AF 20-22). The CO found that the Employer’s NOF and SWA job order include a Master’s degree as a requirement for the position, which does not appear on the ETA Form 9089. (AF 20-22). The CO found that this additional language was a job requirement that exceeds the job requirements provided on the ETA Form 9089 in violation of 20 C.F.R. § 656.17(f)(6).

The Employer filed a motion for reconsideration in which it argued that neither the NOF nor the SWA job order stated a Master’s degree was a requirement for the job opportunity being sponsored on the ETA Form 9089. Rather, the phrases “Requires a BA/BS or MA/MS degree” and “Qualifications may include a MA/MS or equivalent or BA/BS deg” were meant to explain that, among the many job openings listed in the same advertisement, some positions may require a Master’s degree.

### **DISCUSSION**

The facts of this case are analogous to those of *Microsoft Corp.*, 2011-PER-324 (Feb. 29, 2012) (“lead decision”).<sup>2</sup> In the lead decision, this panel found that the Employer’s advertisement

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<sup>1</sup> Citations to the appeal file will be abbreviated “AF” followed by the page number.

<sup>2</sup> The decision in *Microsoft Corp.*, 2011-PER-324 was rendered following an oral argument that had the express purpose of assisting the Board’s resolution of pending appeals involving the same issue. The panel requested the parties to stipulate to the other pending appeals which could be disposed of consistent with this lead decision.

for multiple positions with varying job requirements did not violate the applicable regulations, and reversed the Certifying Officer's denial of permanent alien employment certification.

The lead decision involved an NOF, newspaper and web advertisements, and a job order advertising the position of "Marketing and Product Managers." The position listed the following responsibilities: "Responsible for computer software product or technology strategy, definition, promotion, pricing, and/or position, and/or for planning, implementing and managing marketing strategies and campaigns." The job required a BA/BS, MA/MS, or MBA degree or equivalent in Business, Marketing, Engineering, Computer Science, Design, or a related field, and contained a further list of extensive experience requirements. *Microsoft Corp.*, 2011-PER-324, slip op. at 3, 4.

From these facts, the panel concluded that, when the advertisements were viewed as a whole, the phrase "may require employer-reimbursed travel" is indistinguishable from the DOL-endorsed phrase "some positions may require travel." The panel reasoned that the numerous education and experience requirements described in the job description were listed both in the plural and in the alternative, which conveyed to a reader that not all requirements applied to every Marketing and Product Manager position available. Instead, the numerous requirements were written in the disjunctive to show the contrast between the various job openings and the differing duties of each job. Furthermore, since the advertisement was for multiple job opportunities, and the requirements were written in a passive voice, it was understood that the subject of each sentence is "some positions" as it relates to the content between each "or" in the requirements listed. *Id.* at 14, 15.

Although this panel concluded that the phrase "may require employer-reimbursed travel" was indistinguishable from the DOL-endorsed phrase "some positions may require travel" in the context of the Marketing and Product Manager positions, this panel also indicated that, "If an employer does not use the DOL-endorsed language, a fact-specific inquiry will be necessary to determine whether any potential applicants could have been confused or misled into believing that all positions advertised require travel." *Id.* at n. 11.

Accordingly, we must make a fact-specific inquiry to determine whether potential applicants could have been confused into believing that all positions required a master's degree.<sup>3</sup> The language at issue is "Qualifications may include a MA/MS or equivalent or BA/BS deg." and "Requires a BA/BS or MA/MS degree." Both the NOF and SWA job make clear that several Support Engineer positions are available. The degree requirements are phrased in the alternate. This suggests to a reader that there are multiple Support Engineer positions open that apply to

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Although the parties did not stipulate that the instant case's disposition could be stipulated to, it presents issues highly analogous to those decided in Case No. 2011-PER-324, and we will refer to it in the discussion below as the "lead decision" for purposes of convenience.

<sup>3</sup> An employer may use a single advertisement to recruit for multiple open positions, even if the positions have differing requirements. The Employer' Form 9089 allows a Certifying Officer to determine which requirements are a position's actual requirements. In the instant case, the Employer is recruiting for multiple support engineer positions, some of which require a BA/BS, and others of which require an MA/MS. Because the Employer's Form 9089 does not require an MA/MS, it is clear that the job before us is not one with that educational requirement.

various stages in the technical support process depending on the applicant's level of education. Additionally, the NOF indicates that Team Manager positions are also available.

In the lead decision, the Board identified plural phrasing as an important factor to weigh when determining the clarity of an advertisement. In the instant case, the Employer's job description is written in plural terms. Additionally, it is clear from the inclusion of team manager positions in the ad that the various positions had differing educational requirements.

Based on the foregoing, we find that the Employer's NOF and SWA job order do not contain a job requirement that exceeds that which is on the ETA Form 9089, because it is clear within the overall context of the advertisements that not all of the Support Engineer positions require a Master's degree. We find that the Employer's advertisements were not misleading, nor did they cause any confusion that could have prevented a potential U.S. applicant from applying for the job opportunity. As such, we reverse the CO's determination.

### **ORDER**

Accordingly, **IT IS HEREBY ORDERED** that this matter is **REMANDED** to the Certifying Officer for the purpose of **GRANTING** certification.

For the Board:

**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**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 review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board 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 full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.