

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 January 2014

BALCA No.: 2011-PER-02857
ETA No.: A-09075-33886

In the Matter of:

THE CLARIDEN SCHOOL,
Complainant,

on behalf of

NATHANI, SHAGUFTA,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Naim Haroon Sakhia, Esquire
Sakhia Law Group
Plano, Texas
For the Employer

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

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
GRANTING CERTIFICATION

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 found at 20 C.F.R. Part 656.

BACKGROUND

The Employer is sponsoring the Alien for permanent employment in the United States for the position of "AMI Montessori Elementary Teacher." Accordingly, the Employer filed a Form

9089 application with the U.S. Department of Labor for a labor certification. (AF 53-62).¹ The primary job requirements were listed on the Form 9089 as a Bachelor's degree "in any discipline and AMI (Montessori) Certification"; nine months of training in "Montessori Teacher Training Course leading to AMI Certification"; and 18 months of experience in the job offered. (AF 54-55). The Employer indicated in Section H-7 of the Form 9089 that an alternative field of study was acceptable; specifically "Bachelor's in Education [sic] plus AMI Certification, which is essential for this [sic]". (AF 55). In Section H-8 the Employer indicated that it would also accept the alternative combination of a Master's degree, and one year of experience. (AF 55). In Section H-10, the Employer indicated that it would accept as an alternative to experience in the job offered, 18 months of experience as an "Instructor," which it defined as providing structured instructions to a group in a classroom. In Section H-14, the Employer noted that "Association of Motessori [sic] Internationale Certification (AMI Certification) is required." (AF 55). The Employer indicated that it would accept a foreign educational equivalent. (AF 55).

In Section J-11 of the Form 9089, the portion of the Form in which the Employer is to report the highest level of education achieved relevant to the occupation, the Employer checked "Other" from a list of options that included "None," "High School," "Associate's," "Bachelor's," "Master's," "Doctorate," and "Other." (AF 57). The Employer specified in Section J-11-A that the "Other" classification was AMI Certification. The Employer reported that the Alien obtained the AMI Certification in 2006 at the Montessori Institute of Milwaukee. (AF 58).

The Certifying Officer (CO) denied certification under 20 C.F.R. § 656.17(i)(1) on the ground that the application did not indicate that the Alien met either the primary or the alternative educational requirements of a Bachelor's degree in any discipline or a Master's degree in any discipline. (AF 51-52).

The Employer requested reconsideration/review of the denial. (AF 3-50). The Employer argued that it answered Section J-11 accurately because AMI Certification was the highest education level achieved by the Alien. The Employer contended that such a certification is a level of education higher than Bachelor's but lower than a Master's or Doctorate. (AF 4). The Employer noted that the motion for reconsideration was its first opportunity to explain and clarify its answer on the Form 9089, Section J, and that it was supplying supporting documentation. (AF 5). Part of the Employer's documentation was a document from the Montessori Training Center of Minnesota stating that one of the admission requirements for its AMI Montessori Diploma program is that the applicant holds a Bachelor's degree. (AF 3). The Employer also presented an Educational Assessment letter concluding that, based on work experience and postsecondary education, the Alien has the equivalent of a U.S. Baccalaureate degree in Early Childhood Education. (AF 26-28).

The CO reconsidered but affirmed the denial. (AF 1-2). The CO noted the Employer's contention that its answers to J-11 and J-11A were accurate because AMI Certification was the highest level education achieved by the Alien, and that AMI Certification cannot be granted to individuals who do not possess a Bachelor's degree. The CO, however, stated that "the employer's representation on the ETA Form 9089 that Other – AMI Certification is the highest

¹ In this decision, AF is an abbreviation for Appeal File.

education level achieved by the foreign worker does not enable the DOL to verify from the face of the application that the foreign worker earned a Bachelor's degree which is the minimum education level required. There is sufficient free form space on the ETA Form 9089 for the employer to disclose, for example, that the foreign worker possessed a Bachelor's degree (or its equivalent) in addition to AMI Certification. Since the ETA Form 9089 did not state the foreign worker possessed a Bachelor's degree listed as the minimum education level acceptable to qualify for the position, the Office of Foreign Certification Certifying Officer has determined this reason for denial as valid."

On appeal, the Employer filed an appellate brief reiterating and expanding on the arguments made in the request for reconsideration/review.

DISCUSSION

An employer must disclose its actual minimum requirements for a job opportunity on the Form 9089. Where the alien is already working for the employer and does not meet the stated requirements for the position, it appears that the employer has failed to disclose its actual minimum requirements. *See generally* 20 C.F.R. § 656.17(i).

Thus, we understand why the CO denied the application initially. On the face of the Form 9089, it appeared that the Alien did not possess a Bachelor's or Master's degree, or its equivalent, and only possessed a nebulous AMI certification. That the AMI certification might be considered to be a higher level of education than a Bachelor's degree is hardly intuitive.

However, the CO's insistence that the Alien's holding of a Bachelor's or Master's degree had to be disclosed on the Form 9089, even in the face of documentation on a motion for reconsideration showing that a Bachelor's degree is a prerequisite for the Alien's admission to the Minnesota Montessori Training Facility for its AMI certification program, was unreasonable and unsupported by the regulations. *See generally Moreta & Associates, Int.*, 2009-PER-8 (Aug. 6, 2009) (CO found not have to be justified in denying certification solely on the failure of the Form 9089 to show the alien's qualifications for a special skill requirements, without first providing the employer an opportunity to clarify the alien's qualifications); *CVS Rx Services, Inc.*, 2010-PER-1108 (Nov. 16, 2010) (regulations do not bar consideration of documentation which does not purport to amend the content of any answer to the Form 9089).²

The CO's claim that the Form 9089 has adequate free form text fields, and therefore the Employer was mandated to provide a clarification is not persuasive. We have reviewed the Form 9089, and find that it does not have any obvious free form space for clarifying why a person would necessarily have at least a Bachelor's degree to have obtained an AMI certification.³ But more importantly, we have found nothing on the face of the Form 9089 or its associated

² In *CVS Rx Services*, certification was denied without an audit, and the employer was attempting to explain to the CO on reconsideration why it was proper to use a professional journal as a second mandatory print advertisement because of accreditation standards transition, despite it not being apparent based on the information reported on the Form 9089 why that was allowed under the regulations.

³ Arguably, Section J-11-A has some space for an explanation; but such space would have been minimal and it is not obvious that this space was designed for this purpose.

instructions that would have alerted the Employer that it was required to make such a clarification. *Moreta & Associates, Int., supra*, citing *Federal Insurance Co.*, 2008-PER-37 (Feb. 20, 2009) (where Form 9089 does not reasonably accommodate reporting of information CO found to be required, it is a violation of due process to deny certification based solely on the absence of such information on the face of the Form).

It may have been predictable that reporting of “Other” on the portion of the Form 9089 as the Alien’s highest educational level was going to be misunderstood and a red flag. Thus, the Employer may have saved itself the trouble of a reconsideration and appeal if it had found a way to clarify on the Form 9089 its position that AMI certification is a higher educational level than a Bachelor’s degree. But that is hindsight. We find that the Employer’s explanation with its motion for reconsideration, supported by documentation from a Montessori school, adequately explained its answer to Section J-11 of the Form 9089, and that the failure to show on the face of the Form 9089 that the Alien had the equivalent of a U.S. Bachelor’s or Master’s degree was not, in itself grounds for denial of certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the application is **REMANDED** for the purpose of **GRANTING** certification.

For the panel:

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.