

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 19 September 2012**

**BALCA Case No.: 2011-PER-01478**  
ETA Case No.: A-06278-67149

*In the Matter of:*

**SELECT INTERNATIONAL, INC.,**  
*Employer*

*on behalf of*

**MEI-CHUAN KUNG,**  
*Alien.*

Certifying Officer: William Carlson  
Atlanta National Processing Center

Appearances: Justin S. Coffey, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.  
Atlanta, GA  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Vincent C. Costantino, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **McGrath, Geraghty, Calianos**  
Administrative Law Judges

**TIMOTHY J. McGRATH**  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF 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 Title 20, Part 656 of the Code of

Federal Regulations (“C.F.R.”). For the reasons set forth below, we affirm the denial of the Employer’s Application for Permanent Employment Certification.

### **BACKGROUND**

On February 22, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Industrial/Organizational Psychologist.” (AF 351).<sup>1</sup> On June 22, 2007, the CO issued an Audit Notification, requesting that the Employer provide certain information in accordance with 20 C.F.R. § 656.20. (AF 347-49). On July 25, 2007, the Employer submitted its response to the Audit Notification. (AF 274-346).

On June 18, 2008, the CO issued a Notification of Supervised Recruitment pursuant to 20 C.F.R. § 656.21. (AF 270-73). On July 7, 2008, the Employer responded to the Notification of Supervised Recruitment, attaching a draft advertisement and a copy of the foreign worker’s Master’s degree and transcripts as requested. (AF 257-69). On September 30, 2008, the CO requested a signed affidavit and documentation explaining why it is not feasible to train a worker to qualify for the job opportunity, and on October 24, 2008, the Employer responded with the required information. (AF 226-56). In December 2008, the Employer, in response to the CO’s Recruitment Instructions, advised the CO of its recruitment steps taken and provided documentation of the same. (AF 118-96, 220-25). In December 2008, the CO sent the Employer a Notification of Resumes Received in response to its advertisements. (AF 197-219). On February 23, 2009, in response to the CO’s Recruitment Report Instructions, the Employer filed its recruitment report and other supporting documentation. (AF 68-116).

On February 4, 2010, the CO denied the Employer’s application because the Employer rejected three United States applicants for non-lawful job-related reasons in violation of section 656.10(c) of the regulations. (AF 65-67). Specifically, the CO stated that three potentially qualified applicants were rejected for not meeting the Employer’s minimum requirements, despite the Employer’s statement in its ETA Form 9089 that it “will accept any suitable combination of education, training or experience.” (AF 66).

On March 5, 2010, the Employer filed a request for reconsideration, arguing that the *Kellogg* language does not apply to its application and even if it did, “the three applicants at issue

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

were not potentially minimally qualified based on a combination of education, training or experience which could qualify them to perform the duties” required for the position. (AF 3-64). The Employer attached with its request a Statement by the Executive Vice President of the Employer detailing the reasons why the three applicants were not qualified for the position. (AF 14-23).

On May 23, 2011, the CO forwarded the case to BALCA. (AF 1-2). In the CO’s transmittal letter, he accepted the Employer’s information regarding two of the rejected applicants, Angel Rodriguez and Monica Rhoads. (AF 2). However, the CO upheld his denial because “the employer unlawfully rejected [Avi Avigdor,] a U.S. worker who was able and qualified for the job opportunity without further consideration beyond a review of his resume.” (AF 2).

On August 18, 2011, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on August 24, 2011, but did not file an appellate brief. The CO filed a Statement of Position on October 4, 2011, arguing that the applicant “appeared to be facially qualified for the job opportunity and the employer’s rejection of him, without even an interview to further assess his qualifications, demonstrates a lack of good faith recruitment on the part of the employer.” On May 23, 2012, the Employer certified via email that the job identified on the PERM application is still open and available and that the alien identified in the application remains ready, willing, and able to fill the position.

### **DISCUSSION**

An important goal of the Immigration and Nationality Act is to ensure that foreign workers do not obtain permanent employment in the United States where there are U.S. workers who are able, willing, qualified, and available to perform the work. *See* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.1(a)(1). Accordingly, when an employer files an application for permanent employment certification, it must certify that “[t]he job opportunity has been and is clearly open to any U.S. worker” and “the U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.” 20 C.F.R. § 656.10(c)(8),(9). Furthermore, the PERM regulations require an employer to conduct mandatory recruitment steps in a good faith effort to recruit U.S. workers prior to filing an application for permanent alien labor certification. *See* 20 C.F.R. § 656.17(e).

To conduct recruitment in good faith, an employer “must take steps to ensure that it has lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant’s qualifications.” *E. Tenn. State Univ.*, 2010-PER-00038, PDF at 12 n.11 (Apr.18, 2011) (citations omitted). The employer must prepare a recruitment report stating the number of U.S. applicants who applied for the job and explaining the lawful job-related reasons for their rejection. 20 C.F.R. § 656.21(e)(4). The regulations state that “[r]ejection of one or more U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training, is not a lawful job-related reason for rejecting the U.S. workers.” *Id.*

Pursuant to section 656.24(b), the CO “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). When determining whether to grant or deny certification on this basis:

The Certifying Officer must consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. For the purposes of this paragraph (b)(2)(i), 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. § 656.24(b)(2)(i).

The Employer indicated in its ETA Form 9089 that the minimum requirements for the job opportunity were a Master’s degree in Industrial/Organizational (“I/O”) Psychology and 36 months of experience in the job offered. (AF 351-52). The Employer also noted that it would accept a Master’s degree in a field directly related to I/O Psychology and 36 months in a position directly related I/O Psychology. (AF 352). In Section H.14, the Employer required the following specific skills:

Coursework must include personnel selection and employment law. Must know (through coursework or experience) legal issues related to personnel/candidate testing and selection, how to conduct job analyses, develop job candidate selection tools, and conduct advanced statistical analysis using SPSS and

LISREL. Will accept any suitable combination of education, training, or experience. (AF 352). The Employer described the following job duties for the position offered: “Develop new assessment tools and techniques. Conduct in-depth statistical analyses of existing and new assessment systems and tests, recommend enhancements, and write detailed project reports.” (AF 352).

The Employer’s Recruitment Report indicated that eight U.S. workers responded to its recruitment efforts. (AF 72). The Employer stated that it reviewed all the resumes it received, and considered “any suitable combination of education, training, or experience, as well as whether the applicant could perform the job duties with a reasonable period of on-the-job training.” (AF 72). Regarding the applicant Avi Avigdor, the Employer found that he did not have the required experience “having never worked in the field of Industrial/Organizational Psychology, or in the field of Psychology.” (AF 73-74). The Employer said that at best, he had “eight months of questionably relevant experience.” (AF 74). Therefore, the Employer did not offer him an interview.

On reconsideration, the Employer provided more in-depth reasoning for why Mr. Avigdor did not meet the minimum experience requirement. The Employer argued that Mr. Avigdor’s 47 months of experience cited by the CO is not related to the position offered. (AF 7). The Employer submitted a letter from the Executive Vice President of the Employer, Matthew O’Connell, which provided additional detail of the job offered and Mr. Avigdor’s qualifications. (AF 14-23). Mr. O’Connell explained that the Employer develops and implements testing and assessment solutions for employment testing, pre-employment hiring, promotions, and employee development. (AF 14). An I/O psychologist is expected to be an expert in statistical analysis, test design and development. (AF 15). Mr. O’Connell also addressed each position listed on Mr. Avigdor’s resume. Mr. O’Connell asserted that none of the positions held by Mr. Avigdor involved the skills listed in section H.14 or the job duties listed in section H-11 of the

application.<sup>2</sup> (AF 17-19). He concluded that Mr. Avigdor does not have the required three years of experience, is not qualified to perform the core duties of the position offered, and does not possess a suitable combination of education, training, or experience that would qualify him for the position. (AF 19).

We agree with the Employer that Mr. Avigdor does not appear to meet the minimum requirement of three years' experience in the job offered. However, even if the applicant did not have the exact experience required, the Employer was under a duty to investigate the applicant further. An employer is not required to interview every applicant, and where an applicant's resume reveals that he clearly lacked the minimum specified job requirements, the applicant may be rejected without an interview. *ENY Textiles, Inc.*, 87-INA-641 (Jan. 22, 1988); *Anonymous Management*, 870-INA-0672 (Sept. 8, 1988). However, if an applicant's resume demonstrates a broad range of experience, education, and training such that it is reasonably possible that he or she is qualified for the job, the employer has an obligation to further investigate the applicant's credentials beyond the face of the resume. *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (en banc); *Kennametal, Inc.*, 2010-PER-01512, PDF at 7, 12 (Mar. 27, 2012). The Employer has the burden of establishing that based on the resume alone there is no reasonable possibility that Mr. Avigdor met the job requirements. *Dearborn Public Schools*, 91-INA-222, HTML at 7 (Dec. 7, 1993).

The Employer specifically stated in its application that it would "accept any suitable combination of education, training, or experience." (AF 352). Mr. Avigdor's relevant education exceeds the minimum required education; in addition to his master's degree in I/O Psychology, his resume reveals that he was also in the process of obtaining his Doctorate in I/O Psychology.

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<sup>2</sup> Specifically, Mr. O'Connell opined that Mr. Avigdor's 24 months of experience as a Research Assistant was not related to the job offered because there is no sector of I/O Psychology that deals with lab animal functioning and because simple tests of mean differences cannot be considered advanced statistical analyses. (AF 17). Mr. O'Connell also found that Mr. Avigdor's 4 months experience as a Systems Management Intern was not related experience because developing a website for archiving and storing data is an Information Technology function. Next, Mr. O'Connell found that the 3 months experience as a Recruiter/Research Analyst "involved basic recruitment and data entry activities[;] essentially, he served in the role of a recruiter." (AF 18). Mr. O'Connell stated: "we routinely hire entry-level people to perform such jobs who have no training in I/O Psychology[;] it is essentially a call-center job and not related to the requirements of the position." (AF 18). Mr. Avigdor's 8 months experience as an Organizational Development Consultant, according to Mr. O'Connell, involved designing a process to track and manage client data, which has "nothing to do with . . . the key aspects of the target position." (AF 18). Lastly, in regards to the 8 months experience as an Organizational Development Specialist, Mr. O'Connell concluded that this is not related experience because "it simply involved developing surveys and developing and delivering a training program for an off-the-shelf personality test, the Myer-Briggs." (AF 18). He stated that this position has nothing to do with the core aspects of the job in question. (AF 18).

(AF 24). His experience includes 16 months experience in Organizational Development, 8 months of which was in a position similar to that offered by the Employer, in which he developed surveys and conducted statistical analyses to identify developmental opportunities. (AF 24). In addition to his experience in Organizational Development, Mr. Avigdor's resume reveals that he also has experience using SPSS and he is "highly proficient in statistical packages such as SPSS, SAS and LISTREL." (AF 25). Mr. Avigdor has experience using survey design software and has trained supervisors on how to use the Myers-Briggs Inventory, Strong Interest Inventory, and California Psychological Inventory. (AF 25). He has made recommendations to directors for future organizational change/development and selection procedures and has experience analyzing various test and survey results. (AF 25).

Mr. Avigdor's broad range of experience, training and education, especially in light of the Employer's willingness to "accept any suitable combination of education, training, or experience,"<sup>3</sup> is sufficient to trigger the Employer's duty to investigate his qualifications further. Therefore, because the Employer did not investigate the applicant's credentials further, we affirm the CO's denial of certification.

### **ORDER**

It is **ORDERED** that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

**TIMOTHY J. McGRATH**  
Administrative Law Judge

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<sup>3</sup> The Employer dedicated a significant portion of its request for reconsideration arguing that the *Kellogg* language, i.e. that the Employer "will accept any suitable combination of education, training, or experience," does not apply to its application. We agree with the Employer that it did not need to include such language in its application because the "alternate" education and experience listed in the application were substantially equivalent to that listed as the "primary" requirements. *See Agma Systems, LLC*, 2009-PER-00132 (Aug, 6, 2009). However, the Employer chose to include the language in its application anyways, and in its Recruitment Report and Request for Reconsideration, it stated that it considered "any suitable combination of education, training, or experience," when reviewing U.S. applicants. Thus, the *Kellogg* language must be considered in our analysis of whether the applicant was qualified for the position, and we reject the Employer apparent request that we ignore such language included in its ETA Form 9089.

**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.