



Issue Date: 09 November 2017

**BALCA No.:** 2013-PER-01125  
**ETA No.:** A-12123-59402

*In the Matter of:*

**MARLABS, INC.,**  
*Employer,*

*on behalf of*

**ZALAKI, ARVIND,**  
*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearance: Cora-Ann V. Pestaina, Esquire  
Cyrus D. Mehta & Partners, PLLC  
New York, New York  
*For the Employer*

Before: Paul R. Almanza, *Associate Chief Administrative Law Judge*, Clement J. Kennington and Larry S. Merck, *Administrative Law Judges*

**DECISION AND ORDER**  
**DIRECTING GRANT OF CERTIFICATION**

**PER CURIAM.** This matter arises under § 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.<sup>1</sup>

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

## **BACKGROUND**

On May 17, 2012, Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States in Piscataway, New Jersey, for the position of “Software Developers, Applications,” Standard Occupational Code 15-1132. (AF 92, 241, 312).<sup>2</sup>

In Section H, Employer attested its primary minimum requirements for the job opportunity were a Master’s degree in Engineering, CIS, Computer Science, or a related field of study and 60 months of experience in the job offered. (AF 92-93, 241-242, 312-313). No training was required. (AF 92, 241, 312). Employer also attested that it would accept alternate fields of study, i.e., Math, Science, Business, or equivalent. (AF 93, 242, 313). Additionally, Employer noted that it would accept experience in alternate occupations, i.e., Software Engineer, Programmer, Programmer Analyst, Developer, Analyst, Consultant, and Engineer. (AF 93, 242, 313). In Section H-11, Employer included the job duties, which are as follows:

Design, development and testing of ASP/.NET Applications. Responsibilities include:

- Participate in Architecture and Design discussion. Analysis of client business processes and functional requirements;
- Interact with clients and develop design specifications for three tiered RDBMS applications.
- Monitoring project development, and ensuring conformity to project specifications at all stages as well as obtaining periodic client acceptance of the project deliverables.
- Work with VP, designers and developers to define new features
- Contributing ideas in the development environment, motivating the team and guiding them in designing and implement ASP/.NET applications for the client.
- Requirement Analysis, Domain modeling, Object Oriented design, Data mapping, and Data validation
- Develop XML/ASP/.NET applications and integrate to RDBMS Databases.
- EDI / XML Dataset creation/mapping. Transfer data using various communication protocols.
- Develop logic and code, and execute installation tasks for the software and supported software modules;
- Writing and implementing test plans. Track project milestones and deliverables
- Mentoring less experienced developers will be important.

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

(AF 101, 250, 321).

In Section H-14, *Specific Skills or Other Requirements*, Employer stated:

At least two years experience in developing ASP/.NET applications for windows using ASP, ASP.NET, C#. NET, ASP .NET Testing, VB 6.0, COM, COM+, MTS, SQL Server, Oracle, SSIS, Crystal Reports 11.0, WPF, nHibernate, SSRS, Sybase, COBOL, MySQL, SQL Server 2005/2008, XML/XSLT.

ALSO:

\*\* TRAVEL & RELOCATION POSSIBLE

\*\*EMPLOYER WILL ACCEPT A BACHELOR'S DEGREE (OR FOREIGN EQUIVALENT DEGREE) WITH FIVE YEAR'S EXPERIENCE.

\*\*\* EMPLOYER WILL ALSO ACCEPT ANY SUITABLE COMBINATION OF EDUCATION, TRAINING AND/OR EXPERIENCE.

(AF 102, 251, 322).

On July 27, 2012, the Certifying Officer (“CO”) issued an Audit Notification letter requesting, among other documentation, that Employer submit the following:

Recruitment Documentation

• § 656.17 Basic Process:

The recruitment report for this position as described in § 656.17(g)(1) signed by the employer or the employer's representative describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, summarized by the lawful job-related reasons for such rejections. Be advised, the Office of Foreign Labor Certification Certifying Officer, after reviewing the employer's recruitment report, may request U.S. workers' resumes or applications, sorted by the reasons the workers were rejected.

(AF 18-19, 167-168, 306-307).

On August 3, 2012, Employer submitted its audit response, which included, among other documentation, a recruitment report, the results of recruitment, and resumes. (AF 15-161, 164-305). Within the results of recruitment document, Employer noted Applicant B.B. did not complete at least a Bachelor’s degree as required for the position. (AF 136-137, 285-286). Employer also stated Applicant B.B. did not meet the minimum requirements for the position, and as a result, he was eliminated for lawful, job-related reasons. (AF 136-137, 285-286).

In Employer’s recruitment report, it specifically noted there were two workers that applied for the position, i.e., Applicant J.L. and Applicant B.B., and it reiterated the information stated within the results of recruitment. (AF 142, 291). Additionally, it stated each applicant

was not contacted because their resumes clearly indicated they were not qualified for the position. (AF 142, 291).

In regard to Applicant B.B.'s resume, it stated in pertinent part:

Polished professional manager with years of experience in work force supervision. Strong communication, organizational and interpersonal skills couples with the ability to manage multiple priorities, deadlines and fast paced work environments. Able to handle confidential information and interface with people from all different levels. A proven honest and discreet posture in all activities.

(AF 144, 158, 298). The applicant also listed his previous job titles, which were as follows: purchasing agent, warehouse manager, district manager/OSHA liaison, salesman, truck dispatcher/plant coordinator, and assistant dispatcher/truck driver. (AF 144, 158, 298). No education was included. (AF 144, 158, 298).

On February 5, 2013, the CO denied Employer's labor certification application pursuant to 20 C.F.R. § 656.17(g)(1). The CO concluded that Employer's recruitment report provided only a generalized statement that the U.S. applicants failed to meet Employer's minimum requirements. Specifically, the CO determined that Employer's rejection of Applicant B.B. for a lack of a Bachelor's degree was not a sufficient reason to reject the applicant without additional supporting documentation. Additionally, the CO explained that Employer's statement that Applicant B.B. did not meet the minimum requirements for the position was not specific enough; thus, the CO was not able to determine if the applicant was rejected for a lawful, job-related reason. In sum, the CO concluded the recruitment report did not contain the number of U.S. workers that were rejected, categorized by the lawful, job-related reason for rejection. (AF 12, 163).

On February 25, 2013, Employer submitted its request for reconsideration. (AF 3-161). In its request, Employer averred that it had "clearly stated in reference to each individual that the individual '[did] not meet the minimum requirements of the position.'" (AF 4). Employer noted it had provided the minimum requirements for the position in Section H of ETA Form 9089 as well as the alternate requirements and job duties. (AF 5).

Employer also asserted that the two resumes received clearly indicated that neither applicant met the minimum requirements based on the requirements listed under Section H of ETA Form 9089. (AF 6). Employer argued that "there is no requirement that the recruitment report restate each and every requirement for the position in assessing applicants when a review of an applicant's resume, from the face of the resume, makes clear that the person cannot, by any combination of education, training or experience possibly meet the minimum requirements for the position." *Id.* Employer further argued that Applicant B.B.'s resume clearly indicated that he "never worked as a programmer or a programmer analyst or a Senior .NET Developer (ASP/.NET) and has none of the experience required for the position offered." (AF 7). According to Employer, Applicant B.B.'s resume revealed he has experience in construction, warehouse management, and purchasing. Employer also stated that Applicant B.B. has no

combination of education, training, and/or experience for the position that would qualify him for the job based on his resume. *Id.* Employer contended that it complied with the requirements set forth in 20 C.F.R. § 656.17(g)(1). (AF 8).

On March 12, 2013, the CO reviewed Employer's request for reconsideration, but found Employer's request did not overcome the deficiency stated in the determination letter and that the reason for denial was valid. (AF 1-2). Specifically, with respect to Applicant B.B., the CO concluded "the mere assertion that a candidate does not have a Bachelor's degree is not sufficient to reject the candidate without additional information" because Employer stated it would accept any suitable combination of education, training, and/or experience. (AF 1). In addition, the CO determined Employer's statement that Applicant B.B. did not meet the minimum requirements was not specific enough to determine whether Employer rejected the applicant for a lawful, job-related reason. Consequently, the CO stated that since Employer did not submit a recruitment report with the number of U.S. workers that were rejected, categorized by the lawful, job-related reason, Employer's application was denied pursuant to 20 C.F.R. § 656.10(b)(2)(ii) and 656.17(g)(1). *Id.*

The case was later forwarded to the Board of Alien Labor Certification Appeals ("BALCA"), and BALCA issued a Notice of Docketing and Order Requiring Response to Notice of Docketing on November 18, 2013. On December 2, 2013, BALCA received Employer's response to the Notice of Docketing. Neither Employer nor the CO filed appellate briefs.

On April 13, 2017, BALCA sent an Order Requiring Certification on Mootness. On April 26, 2017, BALCA received Employer's response to the order, stating the job identified was still open and available on the terms set forth on Form 9089 and that Alien was ready, willing, and able to fill the position.

## DISCUSSION

The regulation at 20 C.F.R. § 656.17(g)(1) provides that "[t]he employer must prepare a recruitment report signed by the employer or the employer's representative noted in § 656.10(b)(2)(ii) ***describing the recruitment steps undertaken and the results achieved***, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections." (emphasis added).

One such reason arises when an applicant is not qualified for the position. *Federal Home Loan Mortgage Corporation*, 2011-PER-02902 (Feb. 10, 2014). When assessing whether an applicant is qualified, an employer must measure the applicant's credentials against the requirements articulated on ETA Form 9089. *See e.g., Jakob Mueller of America, Inc.*, 2010-PER-01069 (Dec. 22, 2011). BALCA has held "[t]he burden is on the Employer to establish that the resume alone shows there is *no reasonable possibility* that an applicant meets the job requirements." *Xerox Business Services, LLC*, 2013-PER-00092 (Jan. 27, 2017) (quoting *Gorchev & Gorchev Graphic Design*, 1989-INA-00118 (Nov. 29, 1990) (en banc) (pre-PERM) (emphasis added)).<sup>3</sup> In *Select International, Inc.*, 2011-PER-01478 (Sept. 19, 2012) BALCA

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<sup>3</sup> In one of its early en banc decisions, BALCA held in *Anonymous Management*, 1987-INA-00672 (Sept. 8, 1988) (en banc) (pre-PERM), that where the CO did not question the validity of the minimum requirements for the job, an

also held an employer was not required to interview every applicant that applied for the job, and if the applicant's resume indicated the applicant lacked the minimum requirements for the job, the employer could reject the applicant without an interview. The same standard also applies when an applicant lacks a major requirement such as a college degree. *Lemon Bay Drugs*, 2015-PER-00009 (Jan. 12, 2017) (citing *Gorchev*, at 2).

In the present matter, the CO denied labor certification because Employer rejected Applicant B.B. for lacking the appropriate education without additional supporting documentation. (AF 1). The CO also found that the statement "does not meet minimum requirements of the position" was not specific enough to determine if the rejection was for a lawful, job-related reason. *Id.* Employer, however, argues Applicant B.B. was not qualified for the job opportunity because he does not have any combination of education, training, and/or experience that would qualify him for the job. (AF 7).

Here, we conclude Employer's statement, indicating Applicant B.B. did not meet the minimum requirements, was a generalized statement. However, despite the generalized statement, Employer also included specific reasoning as to why Applicant B.B. was rejected, i.e., lack of a Bachelor's degree. (AF 136-137, 285-286). Yet, the CO concluded that regardless of Applicant B.B.'s lack of a Bachelor's degree, Employer required additional supporting documentation before rejecting the applicant because it indicated it was willing to accept any suitable combination of education, training, and/or experience. (AF 1). We disagree with the CO because there is no reasonable possibility that the applicant met Employer's job requirements based on his resume alone. Applicant B.B.'s resume is silent for a major requirement, i.e., a college degree. Additionally, the applicant has no relevant experience, and he does not have any training in the job opportunity. . As a result, we conclude Employer rejected Applicant B.B. for a lawful, job-related reason. Therefore, we reverse the CO's denial of certification.

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employer is entitled to rely on those minimum requirements as a yard stick to measure the qualifications of any applicant for the position, and is under no obligation to interview workers whose response to the advertisement fails to show that he or she meets those minimum requirements. This ruling, however, was later qualified in *Gorchev & Gorchev Graphic Design*. BALCA overruled *Anonymous Management*, to the extent that it would shift the burden from the employer to the U.S. applicant or the CO, and would be contrary to the application of the guideline set forth in *Gorchev & Gorchev*. Thus, *Anonymous Management* is limited to those instances in which it is clear that the applicant is not qualified.

## **ORDER**

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

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