

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 March 2012

BALCA Case No.: 2011-PER-00162
ETA Case No.: A-09180-52614

In the Matter of:

MERCER UNIVERSITY,
Employer

on behalf of

STANISLAV TREMBACH,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: David C. Whitlock, Esquire
Elarbee Thompson
Atlanta, Georgia
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: Krantz, Sarno, Bergstrom
Administrative Law Judges

DECISION AND ORDER
VACATING 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) (“Act”), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).

BACKGROUND

On June 30, 2009, the Certifying Officer (“CO”) accepted for filing Employer’s Application for Permanent Employment Certification for the position of “Instructional Coordinator.” (AF 27-36)¹ On March 24, 2010, the CO denied the application on the ground that the job opportunity did not qualify for filing under 20 C.F.R. § 656.18 as a college or university teacher. The CO considered the job opportunity as a professional occupation for which Employer was required to conduct mandatory additional recruitment steps. (AF 24-26)

Employer requested reconsideration on April 23, 2010, asserting that the position is indeed that of a university teacher, and submitted additional documentation in support of this argument. Employer asserts that the denial was precipitous given the job title and duties and that a request for further information confirming the duties would have been a more appropriate agency action. (AF 2-12)

The CO forwarded the case to BALCA on November 19, 2010, stating that the request did not overcome the deficiency. (AF 1) BALCA issued a Notice of Docketing on February 9, 2011. Employer filed a Statement of Intent to Proceed on February 18, 2011, and a Statement of Position on March 25, 2011, elaborating on its argument in the request for reconsideration and asserting that the CO relies on an inaccurate definition of “teaching.” The CO did not file a Statement of Position brief.

DISCUSSION

The regulations at 20 C.F.R. § 656.18 provide optional special recruitment and documentation procedures for college and university teachers. That Section outlines the special procedures but at no point does it define “college and university teachers,” nor does it refer to

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

any required principal duties or job description. Section 656.3, which provides definitions for the Act, is similarly silent on the matter.

Employer is a university. Its application lists an occupational title and job title of “Instructional Coordinator” and requires a major field of study of “Library Science.” (AF 28) The job duties listed in the application in Section H-11 are:

Participate in all aspects of library reference services, including *instruction activities*, liaison to academic departments, and collection development. Participate in planning, implementation, and evaluation of library services. University and community service.

(AF 29)(emphasis added) Employer indicated in Section I-a-2 that this is an application for a college or university teacher and that the candidate was selected using the corresponding competitive recruitment and selection process. Its advertisement was placed in the Chronicle of Higher Education. (AF 30)

The CO denied the application solely on the ground that the job opportunity did not qualify for filing under § 656.18 for a college or university teacher. The CO stated that the description in H-11 “does not include teaching job duties, and therefore, the job opportunity does not appear to be that of a college or university teacher.” (AF 25) The only authority cited to is § 656.18, which, again, provides no definition whatsoever of “college and university teacher.”

Employer argues that the job duty of “instruction activities” is synonymous with teaching under any common-sense interpretation of the English language. Employer goes on to point out that

there has never been any requirement that an individual perform only teaching duties in order to qualify as a college or university teacher. . . . Indeed, such a requirement would disqualify nearly all faculty members at U.S. colleges and universities, as research and community service are almost universally required for contemporary faculty positions.

(AF 13-14) We find these arguments persuasive, especially in light of the fact that the regulations do not require any specific definitions or terminology to describe the duties of a college or university teacher.

With its request for reconsideration Employer submitted two additional documents: a job description of the position, and a memorandum from the Dean of University Libraries summarizing Alien's position, teaching responsibilities, and teaching experience. An employer is permitted to request reconsideration of a denial of labor certification, and the applicable regulations at § 656.24(g)(2)(i)-(ii) provide that the request may include only:

- (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
- (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of § 656.10(f).

The new materials were not received in response to a request from the CO, so they cannot be considered under § 656.24(g)(2)(i). However, these materials did exist at the time of filing (June 30, 2009), as the job description was last revised on February 28, 2008, and the memorandum is dated March 16, 2009. (AF 20-21) They were maintained to support the application, and because the CO denied the application without an audit or request for additional information, Employer has had no opportunity to present them previously. Therefore, the materials were properly before the CO for consideration under § 656.24(g)(2)(ii), and the CO did in fact consider them, as reflected in his second denial. (AF 1)

The job description includes the job duty of providing “effective *teaching* in the library *instruction program* as part of the public services team.” (AF 19)(emphasis added) It also requires the qualifications of demonstrating enthusiasm for teaching and fluency with technologies “especially as they relate to instruction.” Finally, it listed the preferred qualification of experience “leading instructional activities.” (AF 20)

The memorandum states that Alien holds the academic rank of Assistant Professor and is a faculty member in the Division of Library Services. In the seven months Alien had been with Employer at the time of the memo, he had taught 24 instruction class sessions to 400 students, which the Dean notes was the most of any of the subject librarians at the university. He also designed and ran faculty workshops, created a great deal of teaching material and infrastructure,

and conducted individual research sessions for students. The Dean referred to Alien as “an excellent classroom teacher providing effective, creative, and critical learning experiences for our students.” (AF 21-22)

The CO asserts that “the principal duties described are not those involved in teaching, evaluating and advising students within an assigned instructor workload in a classroom setting.” (AF 1) The CO gives no authority for this specific definition of a college or university teacher and cites to no support whatsoever for his assertion that this is required by the regulations. We find this to be unsupported, arbitrary, and unpersuasive, especially in light of all the evidence describing Alien’s teaching duties that was before the CO when he made his decision.

Employer has provided sufficient information to show that the desired position is a university teacher for purposes of the regulations and it was proper to file the application under §656.18.² The CO erred in finding the job opportunity was a professional occupation for which Employer was required to conduct mandatory additional recruitment steps. The CO preserved no other grounds for denial; therefore we vacate the denial and return this application to the CO for further processing consistent with this decision.

IT IS ORDERED that the denial of labor certification in this matter is hereby **VACATED** and **REMANDED** for further processing consistent with this decision.

For the Panel:

A

KENNETH A. KRANTZ
Administrative Law Judge

KAK/LEC/jcb
Newport News, Virginia

² Even without the supplemental documents, the multiple references to instruction in the application alone should have been sufficient to either allow processing under §656.18, or at the very least warrant a request for more information to make this determination.

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.