U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 20 February 2009

BALCA Case No.: **2008-PER-00037**
ETA Case No.: C-06006-72025

In the Matter of:

[redacted]

Employer,

on behalf of

[redacted]

Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Ted J. Chiappari, Esquire
Satterlee Stephens Burke & Burke LLP
Iselin, New Jersey
For the Employer

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

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

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[1] The Employer's attorney reported in the appellate brief that the Alien recently married. The caption has been amended to reflect the Alien's current married name. When the application was filed, the Alien's name was [redacted]

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

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. The issue in this case is whether the Employer's application for permanent alien labor certification was properly denied because the Employer did not write on the Employer and Training Administration ("ETA") Form 9089 that "any suitable combination of education, training or experience would be acceptable" as required by 20 C.F.R. §656.17(h)(4)(ii). Section 656.17(h)(4) provides:

> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
>
> (ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

This section of the PERM regulations is based on the BALCA holding in the pre-PERM case of *Francis Kellogg*, 1994-INA-465 (Feb. 2, 1998) (en banc).[2] In *Kellogg*, the Board held that where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are considered to be unlawfully tailored to the alien's qualifications, unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.[3]

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[2] *See ETA, Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"],* 20 CFR Part 656, 69 Fed. Reg. 77326, 77352-77353 (Dec. 27, 2004); *Demos Consulting Group, Ltd.*, 2007-PER-20 (May 16, 2007) (finding that the pre-PERM holding in *Francis Kellogg*, 1994-INA-465 (Feb. 2, 1998) (en banc) was purposely written into the PERM regulation).

[3] In this decision, references to the "*Kellogg* language" are shorthand for the *Kellogg* decision's requirement that an employer indicate that applicants with any suitable combination of education, training or experience are acceptable. References to the "*Kellogg*" regulations are shorthand for § 656.17(h)(4)(ii).

This appeal does not concern whether the *Kellogg* regulation applies to the Employer's application – it clearly does – but rather whether the Employer's application should be denied because the Employer did not affirmatively write on the application that "any suitable combination of education, training or experience would be acceptable." Because the existing Form 9089 does not reasonably accommodate an employer's ability to express this attestation, we hold that it would offend fundamental due process to deny an application for failure to write the attestation on the Form 9089.

BACKGROUND

The Employer filed its application for alien employment certification on February 22, 2006 for the position of Property, Machinery and Marine Underwriter. (AF 39-52). The position's primary educational requirement was a Bachelor's Degree in Economics, (AF 40; Form 9089, H-4 and 4B) or in the alterative, study in statistics, business administration, finance or international trade. (AF 41; Form 9089, H-7 and 7A). The Employer indicated that it would accept, as an alternative to the level of education required, equivalent experience measured by one year for each academic year. (AF 41; Form 9089, H-8B).

The application provided for a primary experience requirement of 60 months of experience in the job offered. (AF 41; Form 9089, H-6). The Employer was also willing to accept 60 months of experience in underwriting, (AF 41; Form 9089, H-10) provided that 36 of those months included experience in marine underwriting. (AF 41; Form 9089, H-14).

The Alien, who was currently employed by the petitioning Employer, did not possess the primary educational requirement, but qualified for the position by virtue of the alternative experience requirement. (AF 44; Form 9089, J-18, 19 , 20 and 23).

The CO denied the application on March 27, 2006 on the ground that the Employer was in violation of Section 656.17(h)(4)(ii). (AF 36-38). Specifically, the CO found that the Alien currently worked for the Employer, that the Alien only qualified for the position by virtue of the alternative requirement, and that the application did not state that "any suitable combination of education, training or experience" would be acceptable.

The Employer filed a motion for reconsideration by cover letter dated April 11, 2006. (AF 5-35). The Employer argued that its answer to question H-8B – "equivalent experience in lieu of education" comported with the substantive requirements of 20 C.F.R. § 656.17(h)(4)(ii) and *Kellogg*. The Employer argued that it was a truism that an employer's advertisements and recruitment constitute an integral part of an application, even though the documentation is not submitted with the Form 9089, and that its CalJobs posting and newspaper advertisements had made no mention of an academic degree requirement, but only required the minimum number of years of relevant experience. The Employer further noted that its website posting and internal posting only stated in general terms a requirement of a bachelor's degree or equivalent experience, plus the relevant experience requirement of five years in underwriting, including at least three years in marine underwriting. Thus, according to the Employer there was nothing in the recruitment or application that would have discouraged a U.S. worker from applying; that misrepresented the actual minimum requirements; or that unlawfully tailored the minimum requirements to the beneficiary's qualifications. Further, the Employer argued that there were only two applicants, neither of whom had a bachelor's degree (which meant that they had not been discouraged from applying) and both of whom were rejected based on their lack of experience in underwriting and marine underwriting rather than their lack of a degree.[4] The Employer argued that *Kellogg* was focused on recruitment because that decision required the *Kellogg* language on both the pre-PERM Form 750 and on the employer's advertisements, whereas PERM permits deviations between the advertisements and the Form 9089. Thus, it would be unreasonable to deny

[4] The Employer's recruitment report clearly indicates that the applicants were rejected for lack of required experience in underwriting/marine underwriting. It appears that because of this, the Employer did not make a determination on whether the applicants had the type of experience that the Employer would accept in lieu of a bachelor's degree. (*See* chart at AF 35) (applicant "May or may not have equivalent experience").

the application on the ground that the Form 9089 did not include a verbatim formulation of the *Kellogg* principle when the Employer complied in substance with the regulations. Finally, the Employer argued that it would be arbitrary and capricious to do so "when the electronic form does not include any specific question regarding this issue, when the instructions are silent as to where to include language addressing alternative requirements, and when the Department of Labor at the time of the filing of the application had not provided any meaningful guidance as to how to complete the Form ETA-9089 in this regard."

The CO issued a letter of reconsideration on February 12, 2008, upholding the denial of certification because the regulations require employers to actually write on the Form 9089 that they will accept "any suitable combination of education, training or experience." According to the CO, employers typically place this language in Section H-14 of the Form 9089.

The CO then forwarded the case to BALCA. BALCA issued a Notice of Docketing on February 20, 2008. Both the Employer and the CO filed timely briefs.

The CO's Appellate Brief

The CO argued that the denial of certification was correct because the Employer failed to comply with the regulatory mandate of 20 C.F.R. § 656.17(h)(4)(ii). The CO argued that merely completing Section H-8 of the application does not satisfy this regulation because it does constitute a statement that the employer is willing to accept any suitable combination of education, training or experience. In regard to the Employer's argument that the *Kellogg* language need not be recited verbatim, and that its statement in Section H-8 that "equivalent experience in lieu of education" was sufficient, the CO argued that "[i]rrespective of whether the [*Kellogg*] language needs to be set forth verbatim, it is clear that the essence of the requirement must be set forth clearly and distinctly so that neither misunderstanding nor prejudice can occur." Thus, the Employer's statement in Section H-8 that "equivalent experience in lieu of education" would be acceptable was not a sufficient substitute for the *Kellogg* language because it does not note that sufficient training in the field, or a suitable combination of education,

training or experience could be sufficient. Thus, the Employer's language failed to convey the same meaning as the *Kellogg* language. The CO also observed that the Employer provided a further qualifier in Section H-8b, where it stated that one year of experience may be substituted for each year required of an academic year. The CO argued that this qualifier distorted the meaning of the regulatory requirement.

The CO argued that the Employer's contention that the recruitment report and advertisements, being an integral part of the application, support a finding that it met the PERM regulation's *Kellogg* requirement was incorrect. Moreover, the CO argued that the Employer's advertisements did not track the language, or even the spirit, of the *Kellogg* regulation. The CO noted that the fact that the Employer received two applicants merely reflected that only a limited number of domestic applicants applied for the position. Finally, the CO argued that the fact that the CO had not provided any explicit instruction on the issue [presumably the issue of where to write the *Kellogg* language on the Form 9089] does not mitigate the Employer's failure to follow the regulation.

The Employer's Appellate Brief

The Employer argued that the neither the Form 9089, the Form 9089 instructions, or the regulations, require that the *Kellogg* language be recited verbatim, and that the language it used -- "equivalent experience in lieu of education" – complies with the regulation at 20 C.F.R. § 656.17(h)(4)(ii). The Employer noted that the Board's decision in *Kellogg* stated only that an employer must "indicate" its willingness to accept a suitable combination of education, training and experience, and did not state that those precise words must be recited.

Moreover, the Employer argued that the CO had failed to address its contention that the substance of the language used to convey compliance with 20 C.F.R. § 656.17(h)(4)(ii) and the holding in *Kellogg* is more important than its form. The Employer reiterated that its recruitment documentation should be considered when determining whether it complied with the *Kellogg* regulation, and argued that the CO erred by focusing solely on the Form 9089. The Employer noted that the Board had recognized the need for principles of fundamental fairness in PERM adjudications in

HealthAmerica, and argued that an injustice would occur if the Employer were denied certification where ETA's Form and instructions were silent on how to comply with the *Kellogg* regulation.

DISCUSSION

1. What the regulation requires

Where the application involves the *Kellogg* situation, the regulation at issue, 20 C.F.R. §656.17(h)(4)(ii), states that "certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable." Thus, the regulations clearly contemplate that a petitioning employer attest in writing, on the application, that it will accept any suitable combination of education, training, or experience is acceptable if its application fits the *Kellogg* situation.

2. The design of the ETA Form 9089

Section H of the current Form 9089 requires a petitioning employer to provide information about the job opportunity. Questions H-4 through H-18A relate to the job requirements and duties. Section H-8 asks "Is there an alternative combination of education and experience that is acceptable?" The form permits the employer to select either a Yes or No box. There is no room for any additional information. Section H-14 is a box that permits an employer to describe skills required for the job. It states: "Specific skills or other requirements – If submitting by mail, add attachment if necessary. Skills description must begin in this space." Section H-14 does not mention anything about alternative education, training or experience.

Section J of the Form 9089 requires provision of information concerning the alien beneficiary. Sections J-18, 19, 20 and 23 ask for information relevant to a determination of whether the *Kellogg* situation applies to the application. Again, there is no place on this section of the form to insert the *Kellogg* language.

3. Whether what the Employer wrote in Section H-8 satisfied the Kellogg regulation

The panel does not reach the issue of how exactly the Employer's statement on the Form 9089 must mirror the words of the *Kellogg* regulation because we agree with the CO that what the Employer wrote in Section H-8 -- "equivalent experience in lieu of education" – was not the substantive equivalent of the *Kellogg* language, especially given that the Employer further qualified its requirements in Section H-8b, where it stated that one year of experience may be substituted for each year required of an academic year. This is simply not the same as agreeing that "any suitable combination of education, training or experience" would be acceptable. Thus, we reject the Employer's argument that what it wrote in Section H-8 satisfied the *Kellogg* regulation.

4. The Demos Consulting Group, Ltd. Ruling

In her appellate brief, the CO suggested that the panel decision in *Demos Consulting Group, Ltd.*, 2007-PER-20 (May 16, 2007), was on point. (CO's Brief at 7).[5] However, the issue presented in *Demos* was whether the *Kellogg* situation was applicable, the employer in that case arguing that the alien was in fact qualified for the job under the primary job requirements rather than the alternative requirements. The issues of what notations on the Form 9089 are sufficient to meet the regulatory requirement, and the fairness of denying an application where the Form 9089 does not provide a defined mechanism for meeting the regulatory requirement, were not before the panel in that case. In the case sub judice, the Employer has not argued that the Alien is qualified under its primary requirements and therefore *Kellogg* does not apply. Thus, the *Demos* panel did not rule on the issues presented in the instant appeal, and we agree with the Employer's appellate brief that the *Demos* decision is inapposite.

5. The PERM implementation of the Kellogg rule

Despite the regulatory history indicating that the CO was adopting the *Kellogg* rule to PERM applications, the CO's implementation of PERM does not exactly reflect

[5] The CO wrote: "The regulations provide for th[e *Kellogg*] language to be included in the application and the decision of the Board in Kellogg and Demos are clear."

the Board's pre-PERM ruling in *Kellogg*. The *Kellogg* ruling was premised in the notion that an employer who was willing to hire the alien despite not possessing the primary job requirements should recruit in a manner so as inform potential U.S. applicants that the employer's requirements are in fact flexible. This was an effort by the Board to limit the employer's motive and opportunity to manipulate the process by narrowly describing its job requirements while still qualifying the alien even though the alien did not meet the primary requirements. In other words, it was intended to make it difficult for employers to tailor the application to the alien's specific qualifications.

The PERM regulations expressly require that the employer state on its application its willingness to accept applicants who possess any suitable combination of education, training or experience. They do not expressly require that the *Kellogg* language appear in recruitment materials. In instructions to the public posted on its web site, ETA states that the *Kellogg* language does not need to appear in the employer's recruitment advertisements and postings. FAQs Round 10.[6] Thus, the CO's PERM implementation only seeks to follow part of the *Kellogg* ruling insofar as it requires only an attestation or pledge by the employer not to reject U.S. applicants who have a suitable combination of qualifications. It does not seem to require employers actually to inform U.S. applicants during recruitment of the employer's flexibility in assessing who is qualified for the job.

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[6] The "FAQs From Stakeholder Meeting of December 11, 2006" posted on ETA's web site state, in pertinent part:

> **Advertisement Content**
>
> **Does the advertisement have to contain the so-called "Kellogg" language where the application requires it to be used on the application?**
>
> Where the "Kellogg" language is required by regulation to appear on the application, it is not required to appear in the advertisements used to notify potential applications of the employment opportunity. However, the placement of the language on the application is simply a mechanism to reflect compliance with a substantive, underlying requirement of the program. Therefore, if during an audit or at another point in the review of the application it becomes apparent that one or more U.S. workers with a suitable combination of education, training or experience were rejected, the application will be denied, whether or not the Kellogg language appears in the application.

The CO's apparent limited implementation of *Kellogg*, and the question of whether it eviscerates the ruling, is not the focus of this decision. What it illustrates for present purposes is that the CO's argument in its brief that the *Kellogg* language needs to be on the ETA Form 9089 to avoid misunderstanding or prejudice needs further development to determine who is likely to misunderstand, or who would be prejudiced, if the language did not appear. It does not appear to be the CO. As noted in FAQ10, the CO can deny an application based on rejection of U.S. workers in violation of *Kellogg* regardless of whether the *Kellogg* language appeared in the application. Nor does it appear to be the Employer since it would typically fill out the PERM application after recruitment. And it does not appear to be U.S. workers because the advertisements do not inform them of the Employer's flexibility in regard to job requirements. It appears that the way the CO has implemented the *Kellogg* ruling under PERM would assist U.S. applicants only in the limited situation where an employer received applications from applicants persistent enough to apply even though they did not meet the requirements actually listed in the advertisements.

In short, the panel has not been presented with, nor found, an explanation as to why it is essential for the *Kellogg* language to appear on Form 9089, other than to act as a legally binding acknowledgement or attestation by a petitioning employer that it followed the *Kellogg* requirement.

6. Fundamental Due Process

The current Form 9089 very clearly does not include a Section that even suggests that it would be the correct place to write the *Kellogg* attestation. Moreover, we have made diligent attempts to find any kind of pertinent instruction on the Form 9089, the Form 9089 instructions, on the ETA web site, in Westlaw, or on Google, and we concur with the assertion of the Employer in its appellate brief, that instructions from ETA on where to place the *Kellogg* language on the Form 9089 at the time of the instant application did not appear to exist. Moreover, even as of the time that the panel is deciding this appeal, we have found nothing readily available to the public that provides

the CO's advice to place the language in Section H-14 of the form. If such instruction exists in a readily accessible forum, we have failed to find it.

As the Employer noted, the advice as to where to write the *Kellogg* language can be found in the Minutes of AILA-DOLETA Liaison Meeting Held on March 23, 2006, which is posted on the American Immigration Lawyers Association (www.aila.org) web site (or "AILA InfoNet").[7] But AILA is not a government organization, and much of its web site, including the liaison meeting minutes containing the H-14 advice, is only accessible to members.[8]

Moreover, ETA has obviously recognized this deficiency with the ETA Form 9089. On August 24, 2007, it published in the Federal Register a notice proposing changes to the ETA Form 9089 to provide more clarity to users of the form. 72 Fed. Reg. 48689 (Aug. 24, 2007). A review of the proposed new form and instructions indicates that the new form will directly address the question of how an employer may indicate on the form that any suitable combination of education, training, or experience is acceptable. (*See* AILA InfoNet Doc. No. 07082466 (posted Aug. 24, 2007), and forms linked thereon).

In *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), the Board found that fundamental fairness and procedural due process compelled vacating a denial of certification where the Employer conclusively established that the apparent violation was

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[7] The minutes state, in pertinent part:

> d. Other
>
> Another example goes to the magic language, "will accept any suitable combination of education, training or experience", and where it must appear. Since there was no guidance on this language from DOL, including where this language should appear on the application form, we submit that we should not be seeing denials on this issue.
>
> *DOL says the "magic language" should go in H-14. Kellogg language needs to be in this box. If denied incorrectly, send a Motion to Re-open and the case will be re-opened if the language was in the correct box.*

[8] Full access to the AILA web site is restricted to members. Partial access to certain non-public portions of the AILA web site is graciously made available to government officials who register. The general public does not have access to the liaison meeting minutes.

merely an unintentional typographical error on the Form 9089. In *Subhashini Software Solutions*, 2007-PER-43, 44 and 46 (Dec. 18, 2007), this panel applied *HealthAmerica* to vacate a denial of certification where the employer initially filed a Form 9089 that did not contain a DOL logo, but was able to prove that its recruitment would have been timely but for the missing logo.[9] Factors in that case were lack of notice of a non-regulatory requirement, proof that the recruitment was timely at the time the employer filed the deficient form, lack of evidence of bad faith or after-the-fact fabrications, and the injustice that would result if the denial stood. The panel found that "[t]he consequences to the Employer were out of proportion to the mistake. To deny labor certification for such an error would be to elevate form over substance, to lose perspective of the relative weight of the offense compared to the consequences to the petitioning Employer, and to offend the concept of fundamental fairness." Slip op. at 6.

In the instant case, the regulation explicitly requires that the PERM application include the *Kellogg* language where it applies, so there is notice of the requirement. But what is clearly lacking is effective notice to the public on just how to comply with the requirement. Although Section H-14 seems to be accepted by the COs as an acceptable place to write the *Kellogg* language, that policy is not easily found. The Form 9089 is unforgiving, and an employer can hardly be faulted for not realizing that the CO expected the Employer to write the *Kellogg* language on the Form, even though there was no place designed to accept it. There is no evidence that the Employer's failure to write the *Kellogg* language on the form was in bad faith. And, as we noted in the previous section of this opinion, it is not clear what is accomplished by writing the language only on the form other than memorializing an employer's attestation of compliance. Thus, as in *Subhashini*, a denial for failure to divine the CO's intent that the employer be creative in writing the *Kellogg* language on a form that is not designed to receive it elevates form over substance, and exhibits a loss of perspective of the relative weight of the offense compared to the consequences to the petitioning employer.

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[9] I dissented in *Subhashini* essentially on the ground that I did not think that COs should be required to accept non-official forms for filing. The instant case is clearly distinguishable in that it is format of the CO's form that is deficient rather than the form being presented by the applicant.

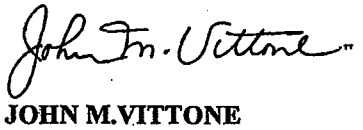
In both *HealthAmerica* and *Subhashini*, an important factor was that the Employer was able to establish actual compliance with the underlying substantive requirement. In both of those cases, it was only typographical error or a deficient format of the form that made it appear that the employer was not in compliance. Here, the absence of the *Kellogg* language (or possibly the substantive equivalent of the *Kellogg* language) on the form renders it difficult to know whether the Employer was in substantial compliance with the regulation, or whether it was unequivocally willing to attest that it was. ETA's deficient form and failure to post readily accessible clarifying instruction, however, is largely responsible for this difficulty.

Accordingly, we vacate the CO's denial based on the missing *Kellogg* language and order that the CO grant certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is hereby **VACATED** and that the Certifying Officer is directed to **GRANT CERTIFICATION**.

For the Panel:



JOHN M.VITTONE
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