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BALCA ON USING A RANGE OF EXPERIENCE IN RECRUITMENT

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As the Board of Alien Labor Certification Appeals (BALCA) continues to pump out decision after decision, it can be difficult to find time to review each case. But I am constantly being reminded that reviewing that one BALCA decision could truly mean the difference between approval and denial. I recently came across the BALCA decision in *CCG Metamedia, Inc*., 2010-PER-00236 (Mar. 2, 2011) and it raised some red flags with regard to previous recruitment practices that have not faced objection from the DOL. As a background, an employer has to conduct a good faith recruitment of the labor market in order to obtain labor certification for a foreign national employee. Obtaining labor certification is often the first step when an employer wishes to sponsor a foreign national employee for permanent residence.

In *CCG Metamedia,* the employer filed an Application for Permanent Employment Certification (ETA Form 9089) for the position of "Technical Design Director" indicating that the job opportunity required 2 years of experience. In response to an Audit Notification, the employer submitted evidence of recruitment, which indicated that the employer had placed advertisements in a newspaper of general circulation, a local newspaper and on the employer's website stating that the job opportunity requires "2-4 years of experience." The Certifying Officer (CO) denied certification on grounds, which included that these advertisements contained experience requirements in excess of those listed on the employer's PERM application.

The employer filed a Request for Reconsideration arguing that the "Technical Design Director" position indeed requires "2-4 years of experience" but that the

ETA Form 9089 requires the employer to list a whole number and does not provide space to list a range of experience, thus forcing the employer to indicate only 2 years of experience. The employer also relied on *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009). In *Federal Insurance*, the fact that certain mandatory language pertaining to an alternative requirement under *Matter of Francis Kellogg,* 1994-INA-465 (Feb. 2, 1998) (en banc), did not appear on the ETA Form 9089 was not fatal as there is no space on the Form for such language. BALCA held that a denial in that instance would offend fundamental fairness and due process. The employer in *CCG Metamedia* argued similarly that because the ETA Form 9089 does not accommodate its ability to express the requirement of 2-4 years minimum experience, it would "offend fundamental due process to deny the PERM application for failure to write the attestation on the ETA Form 9089."

In forwarding the case to BALCA, the CO asserted, in a letter of reconsideration included in the Appeal File, that the employer's advertisements did not represent the actual minimum requirements as required under 20 C.F.R. §656.17(i)(1). The CO argued that the employer's requirement of "2-4 years of experience" communicated to the job applicant "a preference" that he or she possess more than 2 years of experience in order to qualify for the position and thus may have discouraged applications from US workers who met the minimum requirements (i.e. 2 years of experience). The CO further argued, citing *The Frenchway Inc*., 2005-INA-451, slip op. at 4 (Dec. 8, 1997), that BALCA has held that "employer preferences are actually job requirements." The CO dismissed the employer's arguments with regard to the ETA Form 9089 simply stating that the case was not about the shortcomings in the ETA Form 9089.

BALCA affirmed the CO's denial of the case and held that *"stating a range of experience in the recruiting materials that goes above the minimum experience requirements stated in the application inflates the job requirements in the job advertisements and does not accurately reflect the employer's attestations on the ETA Form 9089."* BALCA cited the regulations at 20 C.F.R. §656.17(f)(6), which require that a newspaper advertisement "ot contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089" and held that the employer was in violation of the regulations. BALCA agreed with the CO that this case was not about the shortcomings in the ETA Form 9089 but instead, was about the fact that the employer did not conduct an adequate test of the labor market because minimally qualified US applicants

were discouraged from applying for the position. BALCA distinguished this case from *Federal Insurance* where the employer did not know *how* to comply with the requirement that *Kellogg* language be included on the ETA Form 9089 and stated that unlike *Federal Insurance*, in *CCG Metamedia,* the Form specifically requested the number of months of experience required for the job opportunity and this must be a discrete number, and not a range, because of the fact that the employer must state its actual minimum requirements.

After reading *CCG Metamedia,* one wonders whether this was correctly decided. The employer argued that its requirement for the job opportunity was indeed "2-4 years of experience" and that it was simply forced to indicate 2 years on the ETA Form 9089. But isn't it implicit in a requirement of "2-4 years of experience" that the employer's minimum requirement is 2 years of experience thus making the requirement listed on the recruitment and the ETA 9089 entirely consistent? The employer will clearly accept, *at a minimum*, 2 years of experience and a person with any level of experience upwards of 2 years (i.e. 2.5, 3 or 4 years) in the relevant area could potentially qualify for the position. The CO and BALCA claim that US workers could have been discouraged from applying for the position because the requirements indicated a "preference" that the job applicants have more than 2 years of experience. But how is this "preference" indicated? How can " 2 4" be interpreted to mean "more than 2" such that a US worker would be discouraged from applying for the position? The CO and BALCA cited *The Frenchway, Inc.*'s for its holding that employer "preferences" are indeed requirements. But I would argue that *the facts of CCG Metamedia* are entirely distinguishable from those of *The Frenchway, Inc.* where the employer listed its preferences for a foreign language and European contacts. Clearly, a US worker with no foreign language skills and no European contacts could have been discouraged from applying for the position. On the contrary, based on the facts in *CCG Metamedia*, a US worker with 2 years of experience ought to have considered himself qualified based on the requirement of "2-4 years of experience."

CCG Metamedia likely seems to imply that employers can no longer advertise seeking "2+" or "5+" years of experience as requiring applicants to have the minimum experience or more would also be perceived as a "preference, " which will discourage applicants possessing the minimum experience from applying for the position. This would be absurd, but in labor certification land, an employer should now advertise asking for the exact years of experience for

the position after *CCG Metamedia*. Two other recruitment scenarios immediately come to mind.

Take the case of a big corporation, recruiting for professional positions, which places an omnibus advertisement in a newspaper of general circulation indicating that it is *"seeking individuals with Bachelor's or Master's degrees and relevant experience for the following positions"* and lists all the positions, e.g. Software Engineer, Lead Technical Consultant, etc. including a brief description of the job duties for each position. All other requirements under 20 C.F.R. §656.17(f) are met. All additional professional recruitment contains the job requirements specific to each job opportunity, such as *"Bachelor's degree in Computer Science or a related field and 5 years of experience in the offered position or in a position performing similar duties."* In addition, the ETA Form 9089 filed for each particular position indicates the specific job requirements for that position. In light of the holding in *CCG Metamedia*, will the DOL now deny these PERMs on the basis that the newspaper advertisements violated 20 C.F.R. §656.17(f)(6) and indicated an impermissible range (Bachelors or Master's degree) which discouraged US workers from applying for the job opportunities?

I would argue that the 'either/or' requirement indicated in "a Bachelor's or a Master's degree and relevant experience" is not a "range." Thus, the potential applicant cannot reasonably be confused into thinking that a position requires a Master's degree when in actuality the employer requires only a Bachelor's degree. Furthermore, because the ad only states "and relevant experience" it cannot be argued that US workers were discouraged from applying for any of the positions due to a perceived lack of sufficient experience. A US worker with either a Bachelor's or a Master's degree and even less than one year of experience should feel encouraged to apply based on the requirements listed in the newspaper advertisement. Since the employer is essentially casting a wider net, it ought to be difficult for the DOL to assert that an adequate test of the labor market was not conducted.

In another scenario, an employer is conducting recruitment for a professional position that requires a Master's degree in Chemistry and no experience and wants to recruit using a university's campus placement office as one of the three additional recruitment steps for professional occupations required under 20 C.F.R. § 656.17(e)(1)(ii). The university's website allows the employer to place its advertisement but requires that certain fields be filled, e.g. job location, job status (full-time or part-time), writing sample required (yes or no), etc. One of

the fields asks "experience required?" and forces the employer to pick from a list of choices limited to "0-2 years", "3-5 years" or "over 5 years." Based on the holding in *CCG Metamedia*, if the employer chooses "0-2 years" for this advertisement and then indicates on the ETA Form 9089 that the position requires no experience, the employer will have listed job requirements in excess of the requirements listed on the ETA Form 9089 in violation of 20 C.F.R. §656.17(f)(6). (Recall that in *Credit Suisse Securities (USA) LLC*, 2010-PER-00103 (BALCA Oct. 19, 2010) BALCA held that the advertising requirements listed in 20 C.F.R. §656.17(f) for advertisements placed in newspapers of general circulation or in professional journals also apply to website advertisements.) But what if it is not feasible for the employer to conduct a different type of recruitment or to choose a different university's campus placement office? The employer may be able to protect itself against a *CCG Metamedia* type denial by indicating in the job description that the job opportunity requires a "Master's degree in Chemistry and **NO EXPERIENCE IS REQUIRED**." It would be difficult for the DOL to argue that US workers with no experience were discouraged from applying for this position.

I was recently confronted with a scenario similar to scenario No. 2 above and based on *CCG Metamedia* I suggested that new recruitment be conducted. I am reminded that regardless of previous success utilizing a particular method or type of recruitment, we cannot afford to become comfortable with the ever-changing PERM process and that these BALCA decisions provide invaluable insight into continuing to avoid the pitfalls of PERM. For a detailed overview of recent BALCA decisions that provide practice pointers, see Cyrus D. Mehta's article, *ANALYSIS OF SELECTED RECENT BALCA DECISIONS AS PRACTICE POINTERS TO AVOID PERM DENIALS*
