



FLORIDA DETOX CENTERS PROVIDES FURTHER GUIDANCE ON RESUME REVIEW IN LABOR CERTIFICATION RECRUITMENT

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Under the Immigration and Nationality Act (“INA”), U.S. employers wishing to sponsor a foreign worker for employment and permanent residence must first prove to the Department of Labor (“DOL”) that there are no sufficient workers who are able, willing, qualified and available for the prospective job and that hiring the foreign worker will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. INA § 212(a)(5)(A)(i).

Before employers can file an Application for Permanent Employment Certification, or Form 9089, sponsoring a foreign worker, they must conduct a good faith recruitment effort and ascertain whether there are U.S. workers available for the job. Employers may only reject applicants for lawful, job related reasons in accordance with 20 C.F.R. § 656.10(c)(9), such as when an applicant is not qualified for the job opportunity. However, the regulations also provide that 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. § 656.21(e)(4). Therefore, an employer may lawfully reject a U.S. worker for being unqualified, only if the employer determines that a U.S. applicant does not meet the requirements listed on Form 9089 and the U.S. applicant could not acquire the skills during a reasonable period of on-the-job training.

Previous decisions by the Board of Alien Labor Certification Appeals (“BALCA”) have indicated that where an applicant’s resume shows a broad range of experience, education, and training that raises a reasonable possibility that the

applicant is qualified, even if the resume does not expressly state that the applicant meets all the requirements, the employer bears the burden of further investigating the applicant's credentials. See *Blessed Sacrament School*, 96-INA-52, slip op. at 3 (Oct. 29, 1997); *Matter of Goldman Sachs & Co.*, 2011-PER-01064 (June 8, 2012). These decisions discussed in a [previous blog](#) put pressure on employers to interview U.S. applicants, no matter how convinced they may have been that the applicants were unqualified for the position based on their resumes, or else risk a denial of the foreign worker's labor certification. However, a recent BALCA decision, [Florida Detox Centers](#), 2017-PER-00236 (Aug. 24, 2021), may offer some leeway to employers by allowing them to reject applicants on the basis of their resumes.

In *Florida Detox Centers*, the employer sought to employ an "Operations Analyst" with "two years of experience in the job offered," and having found no such U.S. worker, filed Form 9089 sponsoring a foreign worker for the position. The employer was subjected to supervised recruitment by the DOL. In its recruitment report, the employer stated that it received 240 applications for the job opportunity, interviewed 20 applicants it found to be potentially qualified and rejected 220 applicants because they did not possess the minimum of two years of experience based on the face of their resumes. The DOL denied labor certification, finding that the employer rejected a potentially qualified U.S. applicant without an interview even though there was a reasonable possibility that the applicant met the requirements of the job opportunity. The applicant's resume clearly indicated that the applicant lacked the required two years of experience in the job offered. Nonetheless, the DOL argued that the employer did not meet its burden by failing to investigate the applicant further and conducting an interview. The DOL pointed to the applicant's resume which indicated experience similar to the job duties described on Form 9089 as well as the applicant's four years of experience in the Operations Analyst/Strategic Sourcing Coordinator industry.

In the matter before the BALCA, the employer, on reconsideration, thoroughly expanded on its reasons for rejecting the applicant and detailed why the applicant was unqualified for the job opportunity such that an interview or further inquiry was unnecessary. The employer argued that it was not able or willing to accept less than two years of experience, as stated on Form 9089, nor should it have been required to do so, given the high specific vocational preparation level ("SVP") of 8 assigned by the DOL for the occupation of

Operations Analyst under O*Net Code 13-1111. An SVP of 8 generally requires between four and ten years of education, training, and/or experience, but the employer was only requiring two years of experience in the job offered. The employer compared each duty identified in the Form 9089 to the applicant's resume and determined that the applicant only had experience in 25% of the job duties described in the form. The employer also stated that the applicant lacked any experience in three important job duties described in the form. According to the employer, it was "unrealistic to . . . consider an applicant completely lacking experience in nearly 40% of the job duties," especially given the employer's requirement of a minimum of two years of experience in each job duty. The employer claimed not to have a duty to investigate the applicant further given the level of detail in the applicant's resume which allowed it to readily determine that the applicant's experience was not similar or relevant to the job opportunity.

The BALCA was satisfied with the employer's explanation for rejecting the applicant and that the employer, in the selection process, concluded that based on the applicant's resume and its business operations and staffing, that the applicant possessed two years of experience in only 25% of the job duties, and that for the remaining 75% of the job duties, the applicant would require a full two years of training in 40% of the job duties, and more than the normal six months of training in the remaining 55% of the job duties. The BALCA found that the employer's explanation, which the employer substantiated by detailing the specific period of time that training would take, sufficiently demonstrated that the applicant could not acquire the necessary experience through a reasonable period of on-the-job training. The BALCA accepted the employer's argument that it should not be required to offer more than 6 months of on-the-job training for an Operations Analyst assigned an SVP level of 8 because the additional training "would severely jeopardize the operational and financial well-being of the business, particularly when the specific purpose of is to improve and maximize efficient and effective operations" of the business.

While the BALCA's conclusion appears helpful to employers, it should not be taken to mean that all employers can avoid a labor certification denial by relying on the argument that necessary job experience cannot be acquired through a reasonable period of on-the-job training. Indeed, in a 2012 decision, *Kennametal Inc.*, 2010-PER-01512 (Mar. 27, 2012), the BALCA found that the employer rejected a number of applicants for other than lawful, job-related

reasons. There, the employer did not merely reject applicants based on their resumes alone but rather interviewed them and only after the interview determined that they did not possess the requisite qualifications, namely knowledge in Unigraphics and heat transfer and fluid dynamics. According to the BALCA, the employer's argument that training unqualified employees in using Unigraphics and learning heat transfer and fluid dynamics would involve a substantial and unreasonable amount of training was "not acceptable." Apparently, the employer had not met its burden in establishing that it was not feasible to train a U.S. worker. The employer's failure to substantiate its claims that the applicants would only be qualified if they already possessed these skills and failure to give the specific time that training would take proved fatal to its application.

While *Florida Detox Centers* may offer a reprieve from the rather harsh ruling of *Matter of Goldman Sachs & Co.* by allowing employers to reject unqualified candidates on the basis of their resumes alone, employers must detail the specific period of time that training the applicant would take and explain why the applicant could not acquire the necessary experience through on-the-job training. However, coupled with *Kennametal Inc.*, it is clear that what the DOL or the BALCA really care about is that employers investigate how long training an unqualified applicant would take. In *Florida Detox Centers*, the employer clearly required that an applicant possess two years of experience in a number of job requirements and thus an unqualified applicant could only acquire that experience in two years' time. Whereas in *Kennametal Inc.*, the employer wholly failed to consider that training unqualified applicants in two specific job duties could take six months, or a reasonable period of time. Indeed, had the employer in *Kennametal Inc.*, determined that such training would take much longer, the BALCA may have decided differently. In *JP Morgan Chase & Co.*, 2011-PER-01000 (Jul. 16., 2012), the employer too won based on a resume review alone when the resumes did not indicate that the applicants met the employer's requirement, which was "*Proficiency in Excel or Access, . . . understanding of databases (Lotus Notes and SharePoint), must have experience liaising with a technology team to develop/update product enhancement tool, databases and work flow engines . . .*" The key issue for the BALCA was whether or not the employer's stated minimum requirements were established as a business necessity. Note that in *Florida Detox Centers*, on the other hand, the employer did not ask for any specific requirements which it could establish

through business necessity and instead simply required two years of experience in the duties of the offered position. The BALCA in *JP Morgan Chase* stated that the employer had submitted a business necessity explanation in its recruitment report detailing why it requires an understanding of Lotus Notes and SharePoint and why job training was not feasible; the DOL did not contend that these requirements were unduly restrictive; and the resumes of the U.S. worker applicants showed that they did not have the required skills. Based on this, the BALCA held that the DOL cannot dismiss the employer's stated requirements and substitute its judgment for the employer's.

Therefore, while employers may survive a labor certification denial even where they fail to interview potentially qualified applicants, they must provide details of why the applicant did not meet the duties or requirements of the position based on a review of the resume as well as detail the specific period of time that training the applicants would take. A bare assertion that it is not feasible to train a U.S. worker will not be accepted.

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