

---

---

**UNITED STATES DEPARTMENT OF LABOR  
BOARD OF ALIEN LABOR CERTIFICATION APPEALS**

**800 K. Street, NW, Suite 400-N**

**Washington DC 20001-8002**

---

*In the Matter of*

**EAST TENNESSEE STATE UNIVERSITY  
Employer,  
2010-PER-00038  
ETA Case# A-07204-58927**

*On behalf of*

**JEROME BANAYS MWINYELLE  
Alien**

---

**On Appeal of a Certifying Officer Decision**

---

**Brief of the American Immigration Lawyers Association, Amicus Curiae**

---

**AMERICAN IMMIGRATION LAWYERS  
ASSOCIATION  
1331 G Street NW Suite 300  
Washington DC 2005**

**Counsel listing on following page**

---

**Attorneys for Amicus Curiae,  
American Immigration Lawyers Association**

**Scott D. Pollock  
Scott D. Pollock & Associates, P.C.  
105 W. Madison, Suite 2200  
Chicago, IL 60602  
(312) 444-1940  
(Lead attorney)**

**Prasant D. Desai  
Iandoli & Desai, P.C.  
38 Third Avenue, Suite 100E  
Boston, MA 02129  
(617) 482-1010**

**Michael Pfahl  
Office of the General Counsel  
Kent State University  
Kent, OH 44242-0001  
(330) 672-2982**

**Stephen W. Manning  
Immigrant Law Group PC  
PO Box 40103  
Portland OR 97240  
(503) 241-0035**

**David A.M. Ware  
David Ware and Associates  
3850 N. Causeway Boulevard #555  
Metairie, LA 70002-1774  
(504) 830-5900**

## Introduction

"America is losing competitiveness for international students for one primary reason...America lacks [ ] a proactive national strategy that enables us to mobilize all the tools and assets at our disposal, and that enables the federal bureaucracy to work together in a coherent fashion, to attract international students." *Report of the Secure Borders and Open Doors Advisory Committee* at 13 (2008)<sup>1</sup>. Foreign language instruction in higher education is the zero-target for the "security, stability, and economic vitality of the United States in a complex global era[.]" *See* The Higher Education Act Amendments of 1998, Pub. L. No. 105-244, § 601, 112 Stat. 1581, 1774 (codified at 20 U.S.C. § 1121(a)). Indeed, "[s]ystematic efforts are necessary to enhance the capacity of institutions of higher education in the United States for. . .producing graduates with international and foreign language expertise and knowledge [and] research regarding such expertise and knowledge." *Id.*

How the United States maintains global competitiveness in the field of international education -- a function that is both critical to United States public diplomacy, *see Open Doors Report* at 10, and our economy, *see* NAFSA: Association of International Educators, *Policy Brief* Vol.4 Issue 9 (Nov. 16, 2009)(indicating an \$18 billion industry in the United States)<sup>2</sup> -- Congress has clearly provided a statutory edge to American universities in attracting, hiring, and retaining foreign-born professors.

---

<sup>1</sup> Available at [http://www.dhs.gov/xlibrary/assets/SBODAC\\_011608-Accessible.pdf](http://www.dhs.gov/xlibrary/assets/SBODAC_011608-Accessible.pdf) (last visited Oct. 5, 2010)

<sup>2</sup> Available at: <http://www.nafsa.org/publications/default.aspx?id=17265> (last visited Oct. 15, 2010)

There are two ways in which American universities are uniquely positioned under the Immigration and Nationality Act (the Act) and its implementing regulations. First, applications for certification for foreign-born professors are adjudicated under a special statutory standard. To aid in recruiting the best and brightest members of the teaching profession, § 212(a)(5)(A) of the Act directs the Secretary of Labor to determine whether any equally qualified U.S. workers are available for the job. And so, too, do the regulations. 20 C.F.R. § 656.24(b)(2)(ii). It is the occupation, not the procedure, that determines the standard. *E.g.*, 20 C.F.R. §§ 656.17 and 656.18. Consistent with the statute, regardless of the method of filing chosen by the employer, the certifying officer must determine whether any equally qualified U.S. worker was available for applications involving members of the teaching profession. *Id.*

Second, American universities and colleges may use *bona fide* preferences when recruiting, and such *bona fide* preferences are authorized by statute and regulation. Indeed, the real-world recruitment practices of American universities and colleges demonstrate that no U.S. worker seeking such a position would be discouraged from applying because of a *bona fide* advertised preference.

Amicus, the American Immigration Lawyers Association, proffers this brief to state its own concerns that a clear Congressional intent to advance international education in the United States is undermined by a series of recent missteps by the Department of Labor in reviewing and processing applications for the teaching professions under the Act. As demonstrated here and elsewhere, *see* Brief of AILA in *Matter of Syracuse University*, ETA Case # A-10035-84990, available at [www.aila.org/content/default.aspx?docid=32894](http://www.aila.org/content/default.aspx?docid=32894), it would appear that DOL is working at “cross purposes with other parts of the federal

bureaucracy in ways that inhibit congressional policy objectives.” *Open Doors Report* at 13. The Secretary cannot limit or redefine the accepted real-world parameters of university and college faculty recruitment in derogation of the statute.

Through the process known as “special handling,” the teaching professions are treated -- by statute and regulation -- differently than other industries. Notwithstanding the ultimate merits of the application of Eastern Tennessee State University (on which AILA takes no position), the Board, en banc, should take the opportunity to set forth in clear terms how the statute and regulations work together to provide colleges and university employers with autonomy and legal authority to prefer more qualified teacher candidates and to inform those candidates in advance of the employer’s preferences by way of advertisements and other accepted academic recruitment mechanisms.

### **Statement of Interest**

The American Immigration Lawyers Association (AILA), founded in 1946, is a nonpartisan, not-for-profit organization comprised of over 11,000 attorneys and law professors who practice and teach immigration law. AILA members provide professional services, continuing legal education, information and, additionally, represent U.S. families, businesses, foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. AILA has participated as amicus curiae in numerous cases, such as *Matter of HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc); *Matter of Albert Einstein Medical Center*, 2009-PER-00379 and *Abingdon Memorial Hospital*, 2009-PER-433; *Matter of Hawaii Pacific University*, 2000-PER-00127 (June 30, 2009) and *Matter of Syracuse University*, 2010-PER-00772 (September 15, 2010). As a friend of the court, AILA hopes to provide a larger context for the present appeal in order to promote the just administration of law.

## Argument

The teaching professions are statutorily unique under the Act in terms of the standard by which applications for labor certification are adjudicated, and the statute and regulations authorize the use of preferences in recruitment.

### **(A) The Equally Qualified Standard**

Since its amendment in 1976<sup>3</sup>, the Act has required the Secretary of Labor to certify applications filed on behalf of members of the teaching profession where the employer is able to show that no equally qualified U.S. worker was available. Applying the statutory standard, the Secretary's regulations have made clear that the equally-qualified standard governs all applications filed on behalf of college and university teachers *regardless* of the method by which the application is filed. Likewise, the recent PERM regulations repeated the clear statutory mandate: the equally qualified standard applies to all applications filed on behalf of "college and university teachers," whether filed under 20 C.F.R. §656.17 (basic process) or 20 C.F.R. §656.18 (optional special recruitment). *See* 20 C.F.R. 656.18(d).

Though the specific statutory language has changed in the last 34 years, the Act's delineation of two separate standards for determination, one for the teaching profession and one for all other occupations, remains unchanged.<sup>4</sup> Applications filed on behalf of

---

<sup>3</sup> Immigration and Nationality Act Amendments of 1976, Pub. L. 94-571 (October 20, 1976)

<sup>4</sup> As originally enacted, section of 5 of P.L. 94-571 amended INA 212(a)(14) to provide for the exclusion of: "(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (*or equally qualified in the case of aliens who are members of the teaching profession* or who have exceptional ability in the science or the

members of the teaching profession are subject to the special rule which requires the Secretary to determine whether or not an equally qualified U.S. worker was available. The equally qualified standard allows “an alien who has superior qualifications to be hired before a minimally qualified U.S. worker[.]” *Matter of Stanford University*, 91 -INA- 40, 1992 WL 74310 (BALCA 1992).

There is no doubt that this is the correct and only permissible reading of the statute. The plain language of the statute mirrors the legislative process that shaped and passed the statute. For example, the legislative history of the 1976 amendments confirms that Congress enacted the “equally qualified” standard to enable institutions such as colleges and universities to choose the best qualified candidate for positions involved in the training of students. The impetus for the amendment, as noted by Representative Eilberg, was “to overcome the rigid interpretation given by the Department of Labor to the labor certification provision as it pertains to applications submitted by foreign scholars..... Rep. Eilberg then stated that he had “received letters from the American Association of Universities representing 48 major U.S. universities strongly supporting [the amendment] and stating that current law ‘denies the institutions and students the benefit of the teaching and research talents of foreign scholars and frustrates the search for excellence....’ See 122 Cong. Rec. 33,633 (Sept. 29, 1976).

The House Judiciary Committee Report which accompanied the amendment echoes Representative Eilberg’s statement on the House floor. The Committee noted:

---

arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.” (emphasis added).

...the Committee believes that the Department of Labor has impeded the efforts of colleges and universities to acquire outstanding educators or faculty members who possess specialized knowledge or a unique combination of administrative and teaching skills. As a result this legislation includes an amendment to section 212(a)(14) which requires the Secretary of Labor to determine that 'equally qualified' American workers are available in order to deny a labor certification for members of the teaching profession...

H.R. Rep. No. 94-1553, 94th Cong., 1st Sess., U.S. Cong. and Admin. News (1976) 6073, 6083.

Shortly after Congress enacted the equally qualified standard, the Secretary of Labor promulgated regulations implementing the new standard. These new rules explained that Certifying Officers were to use the equally qualified standard in reviewing an application filed on behalf of college and university teachers.<sup>5</sup> The newly codified section 656.24 provided, in pertinent part:

(b) The regional or national Certifying Officer, as appropriate, shall make a determination either to grant the labor certification or to issue a Notice of Finding on the basis on the basis of whether or not:

...

(2) There is in the United States a worker who is able, willing, qualified and available for...the job opportunity according to the following standard:

...

---

<sup>5</sup> In fact, Certifying Officers were directed to apply the equally qualified standard as of the effective date of the statutory amendment, January 1, 1977 rather than the effective date of the new regulations, February 18, 1977. 42 Fed. Reg. at 3441 (January 18, 1977). The Department's early adoption of the new standard is further evidence that applicability of standard rests on the occupation involved in the application, not the method of filing.

(ii) the Certifying Officer shall consider a U.S. worker able and qualified if the worker, by education, training, experience, or a combination thereof, is able to perform the duties involved in the occupation as customarily performed...*except that, if the application involves a job opportunity as a college or university teacher...the U.S. worker must be at least as qualified as the alien.*

42 Fed. Reg. 3440, 3447 (January 18, 1977) (emphasis added).

The pre-PERM regulations thus reflected the Department of Labor's understanding that the equally qualified standard applied to all applications filed on behalf of college and university teachers. This understanding that college and university teaching positions are subject to a unique standard of review has been a constant since 1977 and is memorialized in the present PERM regulations at 20 C.F.R §656.24.

The PERM regulations today make the same allowance for teachers as was first codified in 1977. The present regulations make clear that the equally qualified standard applies regardless of whether an application is filed under the basic process at 20 C.F.R. §656.17 or the optional special recruitment and documentation procedures at 656.18. This is emphasized at 20 C.F.R. §656.18(d) which provides:

(d) Alternative procedure. ...An employer that files for certification of employment of college and university teachers under § 656.17...must be able to document, if requested by the Certifying Officer, in accordance with § 656.24(a)(2)(ii) (sic), the alien was found to be more qualified than each U.S. worker who applied for the job opportunity.

Notwithstanding an evident typographical error in the regulation- the reference to § 656.24(a)(2)(ii) in fact refers to § 656.24(b)(2)(ii)-, the plain meaning of the PERM rules thus continues the Department's consistent application of the statutory "equally" or "more

qualified” standard. These rules mean that the *occupation*, and not the method of filing, determines whether the more qualified standard applies.

**(B) The Use of Preferences in Recruitment**

Real-world recruitment for the teaching professions at a college or university requires the listing of preferences in advertisements. When a teaching position becomes available at a university, the academic department convenes a search committee charged with finding a candidate that will not only “do the job” but will be able to provide a multi-faceted advantage to the department in both teaching *and* research. While in years past a college or university professor simply stood in front of a lectern and pontificated on the topic of the day for 50-or-so minutes, departments now must search for college and university teachers who will be able to teach multiple classes with the capabilities to take on multiple responsibilities. Congress has clearly recognized this shift as previously stated in this brief. At its core, the college or university teacher must be able to teach about the subject central to the position requirement. Knowledge of new technologies, methods of learning, and related academic experience, in addition to subject matter expertise, is often also desired if not essential.

When a search committee convenes to create the advertising description of a position, the committee lists the core requirements as necessary to determine who, at a very minimum, can do the job - degree, subject, prior experience are usually among them. However, the committee will also draft preferences to be considered (or not) in determining who is better qualified for the position. These preferences are usually the tie-breaker and, by creating the “equally” or “more qualified” standard, even Congress has recognized, accepted and mandated this necessary exception.

In the context of the equally qualified standard of review, advertisements for college and university teaching positions which list preferences are consistent with the basic certification process rules. The Board should hold that employers may list preferences in advertisements for college or university teaching positions filed under 20 C.F.R. §656.17. A college's or university's listing of preferences in advertisements supporting applications subject to the equally qualified standard does not conflict with the rules governing the conduct of the labor market test. In addition, prior decisions of the Board addressing preferences are distinguishable. The use of preferences in this limited context is consonant with the policy goal embodied in the equally qualified standard—i.e. that American colleges and universities be able to recruit the most qualified applicants for teaching positions regardless of nationality. In light of the special allowance for college and university teachers, the Board should hold that advertisements like the ones used by ETSU which list true preferences comply with 20 C.F.R. §656.17(f).<sup>6</sup>

**1. The Department's rules governing the basic filing process do not prohibit the listing of preference for applications involving college and university teachers.**

The Department's rules governing the submission of labor certifications delineate four principal methods by which an employer may file an application for permanent employment certification. *See* 20 C.F.R. § 656.16 (labor certification for shepherders); § 656.17 (basic labor certification process); § 656.18 (optional special recruitment for

---

<sup>6</sup> Should the Board conclude that the inclusion of preferences by Eastern Tennessee State University in its advertisements in *this case* violates provisions of the basic PERM process, it should state clearly that its holding is limited to the specific process under consideration at 8 C.F.R. § 656.17, and explain that such conclusion does not extend to cases processed under the special handling provisions of 8 C.F.R. § 656.18. AILA is concerned that a Board decision that restricts the recruitment practices of universities and colleges should not, through dicta, extend beyond the specific context in which this case arose.

college and university teachers); and § 656.19 (labor certification for live-in household domestic workers).

At issue in this matter is the filing of a labor certification application for a university teacher under the “basic recruitment” which is governed by 20 C.F.R §§ 656.10 and 656.17. *See also* 656.18(d). Under the basic method, the employer is required to conduct a pre-filing test of the labor market. For applications involving a college or university teaching position, the goal of the test is to determine whether any equally qualified U.S. worker is available for the job offered the beneficiary. 20 C.F.R. § 656.24(b)(2)(ii). If the beneficiary is determined to be more qualified, the Certifying Officer should grant the labor certification application. *Id.*

An essential component of the basic pre-filing labor market test consists of at least two print advertisements. 20 C.F.R. §656.17(e)(1)(ii). The contents of such print advertisements must comply with 20 C.F.R. §656.17(f) which provides, in relevant part:

Advertisements placed in newspapers of general circulation or in professional journals before filing the Application for Permanent Employment Certification must:  
...(6) Not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089...

In fashioning the rule governing pre-filing print advertisements, the drafters of 20 C.F.R. § 656.17(f) noted that:

The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment; rather, employers need only apprise applicants of the job opportunity.

...

If an employer wishes to include *additional information* about the job opportunity, such as the minimum education and

experience requirements or specific job duties, the employer may do so, provided these requirements also appear on the ETA Form 9089.

69 Fed. Reg at 77347 (emphasis added). The drafters' comments indicate that the principle purpose of the regulation was to ensure that potential applicants were aware of the job opportunity. The drafters specifically noted that employers can include "additional information" in their advertisements. The regulatory scheme therefore does not expressly or specifically prohibit the listing of preferences in advertisements supporting applications involving college and university teachers.

**2. This Board's decisions which equate preferences with requirements are distinguishable and do not address the content of advertisements for college or university teaching positions filed under the basic processing procedures.**

Prior decisions of the Board which address employer preferences do not categorically equate preferences with requirements. A review of these prior decisions shows that the Board has been confronted with two basic fact patterns involving preferences. One line of decisions involves employers who attempt to characterize what are actual job requirements listed in advertisements as preferences, as exemplified in *Matter of Southern Connecticut State University*, 90-INA-384, 1991 WL 284414 (BALCA 1991) and *Matter of Mobile Fleet Maintenance*, 2008-INA-00014 (BALCA 2008). The second line of cases involves employers who use previously undisclosed and unadvertised criteria to reject otherwise minimally qualified applicants, as in *Matter of the Frenchway, Inc.*, 95-INA-451, 1997 WL 764785 (BALCA 1997). A review of these cases shows that the Board will not allow employers to skew a labor market test through the listing of restrictive

requirements or to invalidate the results of the test through unstated requirements mischaracterized as preferences.

But these cases do not categorically equate all employer preferences with requirements. Rather, they can indeed be harmonized with federal policy objectives for college and university teachers and may actually support ETSU's assertion that it neither used the preferences in place of requirements, nor sought to use unstated preferences to determine whether a candidate failed to meet the minimum requirements for the position.

**a. Requirements disavowed after conclusion of labor market test.**

In *Matter of Southern Connecticut State University*, involving an application filed under the special handling procedures, the Board found that the employer failed to establish that the beneficiary was the most qualified applicant for a university teaching job. The Board noted that the university's advertisements for the position clearly listed a Ph.D. as a requirement for the job. In its application, however, the employer stated that a Ph. D. was only a preference. Based on the employer's advertisements, the Board rejected the claim that a Ph.D. was a preference finding that "none of the Employer's advertisements for the position made it clear to potential U.S. applicants that persons without a doctoral degree would have been considered." *Southern Connecticut State*, 1991 WL 284414 at \*3. In addition to the preference issue, the Board, citing *Matter of Gencorp*, found that the employer failed to document that the beneficiary was the most qualified applicant.

Similarly in *Matter of Mobile Fleet Maintenance*, the Board rejected an employer's attempt to use advertisements which listed job requirements that exceeded the requirements on its application. As in the *Southern Connecticut State* case, the employer in *Mobile Fleet Maintenance* claimed that its advertisements did not actually list requirements

but rather preferences. Contrary to the employer's claim, the Board found that a plain reading of the advertisements "would have led applicants to believe that they were requirements." *Mobile Fleet Maintenance* at 5. In both *Mobile Fleet Maintenance* and *Southern Connecticut State*, the Board correctly prohibited employers from recasting requirements in advertisements as preferences on applications. The holdings of those cases aptly demonstrate the policy in 20 C.F.R. §656.17(f) to disallow advertisements containing requirements in excess of those listed in the employer's application. Certainly, excessive requirements taint the labor market test, which is at the heart of any labor certification application filed under §656.17, by discouraging applications from potentially qualified applicants. Amicus does not argue the validity of such excessive requirements, but rather seeks to clarify that ETSU's preferences appear to have been used to determine if there existed an equally qualified candidate, not a minimally qualified one.

**b. Undisclosed requirements used to invalidate results of labor market test.**

The Board's other major line of decisions involve employers who sought to use undisclosed requirements, couched as preferences, to reject U.S. applicants. An example of this line is *Matter of The Frenchway, Inc.*, 95-INA-451, 1997 WL 764785 (BALCA 1997). In *The Frenchway, Inc.* an employer sought to reject applicants who met the minimum requirements listed in its application but who failed to meet several unstated "preferences." By using preferences to reject otherwise qualified applicants, the Board equated the employer's so-called preference with that of an unstated requirement. The Board correctly rejected the employer attempt to use unstated requirements, as such practice nullifies the mandate that an application list all minimum requirements for the job opportunity. See 20 C.F.R. §656.17(i)(1)(PERM); 20 C.F.R. §656.21(b)(5)(2004 edition).

A common theme of the Board's decisions centers on the integrity of the labor market test. In each of the cases discussed above, the employer attempted to distort the accuracy of the labor market test by restricting the applicant pool, as in *Mobile Fleet Maintenance* and *Southern Connecticut State*, or by rejecting the results of the test, as in *The Frenchway, Inc.* These cases however do not address an employer's listing of preferences, *qua* preferences, in advertisements which do not act to restrict the applicant pool or where preferences are used to disqualify applicants under the equally qualified standard. In ETSU, the preferences were used by the university's search committee to meet the statutory standards invoked by 20 CFR 656.17, not to circumvent them.

**3. Allowance of preferences in advertisements for college and university teachers is consistent with congressional policy embodied in the equally qualified standard without distorting the integrity of the labor market test.**

In the context of the equally qualified standard, advertisements for college and university teachers containing preferences do not distort the results of the labor market test. Instead, their use is common in the industry and in fact furthers important public policy goals. By invoking a different standard, Congress provided institutions of higher education with the ability to look beyond the "minimum requirements" test provided to other occupations in the basic recruitment process. This fundamental and statutorily based divergence from the purpose of the standard labor market test is of crucial importance to furthering the specific policy. As previously explained, under a recruitment process where ascertaining the availability of a minimally qualified worker is the goal, an employer's preference is simply irrelevant, such that once a minimally qualified worker is found to be available the application must fail. 20 C.F.R. §656.24(b)(2)(i). But where an

employer's burden in applications involving college and university teachers is to show that the beneficiary was the most qualified applicant for the position, 20 C.F.R. §656.18(d), a comparison of the beneficiary's credentials in relation to other applicants and the job is required. *Matter of Stanford University*, 91 -INA- 40, 1992 WL 74310 (1992 BALCA). Where a college or university employer adequately documents the beneficiary's superior qualifications for the teaching job, the Certifying Officer should certify the employer's application. In this regard, advertised preferences would provide the Certifying Officer with additional criteria to assess whether any U.S. applicants were equally qualified for the job.

In addition to promoting a more thorough review process, an allowance for the limited use of preferences in advertisements associated with applications involving college and university teaching positions better comports with real world recruitment activities of American colleges and universities<sup>7</sup> This practice also better aligns with the very congressional concerns that promoted enactment of the equally qualified standard - that the Department of Labor was impeding the efforts of colleges and universities to recruit the best candidate for jobs relating to the training and education of American students.

**4. The DOL should not place certain college and university employers at a competitive recruitment disadvantage simply because the job pool may include foreign nationals in need of a labor certification.**

As noted, unlike the situation where non-academic employers must establish there are no minimally qualified U.S. workers, prohibiting the use of preferences in university and college advertisements does not advance the same recruitment goals. To the contrary,

---

<sup>7</sup> In a recent review of advertisements posted at the website of the Chronicle of Higher Education, a leading American journal focusing on higher education, 8 out of 10 advertisements listed one or more preferences. See Appendix A.

federal priorities support systematic efforts to develop international education resources so as to produce graduates with certain areas of specialization that include foreign language capabilities. The DOL's regulations require a college or university to provide a "copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements." 20 C.F.R. § 656.18(b)(3). This same national advertisement is also required for applications filed by colleges and universities under the basic process. 20 C.F.R. § 656.17(e)(1)(i). The goal of this recruitment is not to identify a minimally qualified applicant, but rather to identify the more qualified applicant. In fact, the use of preferences in advertisements is common in the education field, and cannot be said to discourage a minimally qualified applicant for a teaching position. Barring the use of preferences entirely in advertisements used to support a PERM labor certification application will necessarily place educational employers at a competitive disadvantage, without advancing the DOL's own regulations' objectives.

As a standard practice, most university or college teaching positions are advertised nationally in publications such as The Chronicle of Higher Education, where advertising costs on average can reach \$1300 USD per job description for a single advertisement in the weekly publication. This advertising method is not only preserved as the de facto standard for posting open positions in academia, but is also one of the few publications directly recognized by the Department of Labor for its role in meeting the recruitment provisions of a "national publication" for labor certification purposes. With academic budgets facing cuts nationwide as well as the growing realization that many current graduate students fail to move toward their terminal degree which is often a standing requirement for tenured

faculty, the preferences included within the advertising are essential for providing the department with the flexibility to determine the future direction of its department without having to conform to the rigidity of other occupation classifications under the basic recruitment model.

ETSU's advertisements stated: "Qualifications: MA required, PhD preferred with specialty in Applied Linguistics; near native or native fluency; second language-acquisition or Hispanic/Romance Linguistics helpful." (AF 34). The Certifying Officer understood all of the listed criteria to consist of requirements. But this use of requirements and preferences is common for this type of position. *See* attached Appendix A. For example, a recent survey of teaching positions posted on the online job service of The Chronicle of Higher Education, <http://chronicle.com/jobs>, demonstrates a wide range of recruitment language, with many of the ads stating a combination of requirements and preferences. A posting for Goshen College, like ETSU, states "Ph.D. preferred, MA required in Spanish with native or near-native fluency speaking ability." App. A at 1. Several employers provide specific sections for "minimum qualifications" and "preferred qualifications." *Id.* at 4, 6, 15. Many educational employers include a wide range of preferred expertise or specialization in their advertisements, sometimes indicating that these are "desirable," "a plus," or will be given "special consideration." *Id.* at 4, 9, 12, 13, 16, 21,22,23,25.

Given the prevalence of stated preferences in advertisements for teaching positions similar to the one in this case, it is not reasonable for Certifying Officer to assume that the most qualified candidates for a position will be discouraged from applying, simply because the ads contain preferences.

## Conclusion

Colleges and universities should be able to select the more qualified candidate regardless of whether they recruit using the basic or special recruitment process. The Board should reverse the Certifying Officer's denial of East Tennessee State University's labor certification application on behalf of Jerome Banaya Mwinyelle on the specific grounds stated, because the decision rests upon an impermissible basis that violates the plain language of INA § 212(a)(5) and 20 C.F.R. § 656.24(b)(2)(ii) which require use of an equally qualified standard for recruitment of college and university teachers. In addition, the Board should hold that advertisements for college and university teaching positions can include preferences that are clearly stated to be preferences in the advertisements.

Submitted this 18<sup>th</sup> day of October, 2010

---

SCOTT D. POLLOCK

American Immigration Lawyers Association  
Suite 300,  
1331 G Street, NW  
Washington, D.C. 20005-3142

Attorney for Amicus