United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

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DATE: July 24, 1997

CASE NO. 95 INA 547

In the Matter of:

CATHOLIC MEDICAL CENTER,
Employer

on behalf of

GEORGE SURLA,
Alien

Appearance: S. A. Cohen, Esq., New York, New York

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the application for alien labor certification filed on behalf of George Surla (Alien) by the Catholic Medical Center (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United`States who are able,

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[1]This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF") and written arguments. 20 CFR § 656.27 (c).

willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.[2]

STATEMENT OF THE CASE

On December 10, 1993, the Employer filed an Application for Alien Employment Certification (ETA 750A) to permit its permanent employment of the Alien as a Physician (Resident) to work 40+ hours a week from 8:00 a.m. to 4:00 p.m. performing the following duties:

> Diagnoses and treats variety of diseases and injuries in general practice; Examines patients, using medical instruments and equipment. Orders or executes various tests, analysis, and diagnostic images to provide information on patient's condition. Analyzes reports and findings of tests and of examination and diagnoses condition. Administers or prescribes treatments and drugs.

This job is classified as Internist under DOT No. 070.101-042.[3] AF 13. The only qualification for the position set forth in the ETA 750A was graduation as Doctor of Medicine, with no requirement for experience in the Job Offered.

In a Statement of Qualifications of Alien (ETA 750B), the Alien represented that he had received an M.D. degree in 1985, that he was a Resident at a hospital in Romania from the date of his graduation until October 1988, and that he engaged in a Family Practice in that country from November 1988 to September 1990. The only other employment he reported at that time was as a Pathology Assistant at a New York hospital from May 1991 to December 1992.

The Employer advertised for the position using the same job title, job description, hours of work and qualifications as were set forth in its original ETA 750A. Six resumes were referred to the Employer as a result of its recruitment efforts. The applicants included Dr. Zhongkin Ding and Dr. R.C. Kapoor. Dr. Ding's resume showed that he had a M.D. degree and that he had served an internship and residency in hospitals in China for

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[2]Administrative notice is taken of the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration of the U. S. Department of Labor.

[3]**070.101-042 INTERNIST (medical ser.) alternate titles: internal medicine specialist** Diagnoses and treats diseases and injuries of human internal organ systems: Examines patient for symptoms of organic or congenital disorders and determines nature and extent of injury or disorder, referring to diagnostic images and tests, and using medical instruments and equipment. Prescribes medication and recommends dietary and activity program, as indicated by diagnosis. Refers patient to medical specialist when indicated.

a total of nine years. Dr. Kapoor's resume showed that he, too, had a M.D. degree and that he had served a one year internship and two years of residencies at hospitals in India.

In its recruitment report of March 28, 1994, the Employer stated the following in regard to these two U. S. applicants:

> DR. R.C. KAPOOR and DR. ZHONGKIN DING responded by telephone and were advised of the nature of the position and both declined to make an appointment for a interview.
>
> DR. DING has been employed for the last seven years as an Instructor and Researcher and a personal interview would have been necessary to interview him before any determination could be made.
>
> DR. KAPOOR'S resume indicated that his last employment was in June 1992 and it would be necessary to interview him before any determination could be made.

Dr. Kapoor reported in the questionnaire sent to him by the New York Department of Labor (NYDOL) that the Employer had mailed him a letter asking that he make an appointment for an interview and that when he contacted the Employer by phone he was told that he was not eligible for said post, and no appointment for an interview was given to him for this reason.

In answer to a similar questionnaire from the NYDOL Dr. Ding said that when he responded to a letter from the Employer to schedule an interview the woman who answered the phone told him that the position was for a "PGY-2." When he observed that the recruiting advertisement did not mention anything about the position being for a PGY-2, she declined to make an appointment for an interview. He added that he felt very confident that he was qualified "for each word mentioned in the ad."

Upon referral of the ETA 750 A&B to the CO, the Employer advised the NYDOL that even though the ETA 750A indicated that the job was for a medical resident, the duties described therein were for a General Practitioner, which is a Medical Doctor and not a resident. She noted further, in effect, that there is no residency program for a General Practitioner. The ETA 750B was also questioned by the CO regarding its completeness. The NYDOL was requested to obtain clarification.

The ETA 750A was later amended by the Employer to show that the job title was an Internal Medicine Physician (Resident), to substitute Internal Medicine for General Practice and to add that the job duties were to be performed "under supervision of medical attending." The ETA 750B was amended to disclose that the Alien had worked for the Employer as a Medical Resident since December

1992.[4]

Notice of Findings. The CO's February 23, 1995, Notice of Findings (NOF) stated that the application for certificating would be denied on the grounds that the Employer had rejected Dr. Kapoor and Dr. Ding for other than lawful job-related reasons.

Referring to the two U. S. applicants' responses to the NYDOL followup questionnaire, the CO noted that their resumes indicated that they were February 23, 1995, "at the same level alien was when he began his residency with the employer." The Employer was notified that it could rebut the NOF in the following manner:

> Employer must further document his reasons for rejecting these applicants. This is not to be considered a request for him to recontact them at this time. He must document that they were not qualified, willing or available at the time of initial referral. Such documentation must include an explanation as to why Dr. Kapoor was not "eligible for said post." What post was employer recruiting for and how did he present this post to the responding applicants? It seems to have been some kind and level of resident, even though this was not clearly spelled out in his recruitment efforts.

The Employer was then told that it must be willing to readvertise since the original advertisements did not describe the job opening accurately, which was a violation of 20 CFR § 656.21(g). First, however, the Employer was told that it first document its reasons for rejecting these U. S. applicants, whose resumes appeared to qualify them for the position, both before and after it was amended.

Rebuttal. on March 24, 1994, the Employer filed a rebuttal in which it contended that the recruitment advertisement was for a Physician "Resident" and that at "no time did anyone indicate that the position is for a first-year resident." Employer then argued maintained that, as both Dr. Kapoor and Dr. Ding completed their internship overseas they were not at the same level as the Alien, who had completed his internship at their hospital prior to beginning his residency there. The Employer then said,

> These individuals were in fact applying for their medical internship and not their residency; and in fact when they were advised that this was for a residency position, both individuals declined to make an appointment for an interview.

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[4]The record does not indicate that the position was readvertised with the new job title and description, however.

> We have consistently recruited for a Physician Resident. At the time Dr. Kapoor called for an interview he was not eligible for such post because he had not completed his internship in the United States.
>
> Dr. Ding Has been employed as an instructor and researcher since 1987 and did his residency in 1982 in China. He has not been performing as an intern or resident for over a ten year period.
>
> We would be willing to readvertise.

A further amendment to the ETA 750 B was submitted with the Employer's rebuttal, in which the Alien now admitted that he was employed by the Employer as a medical intern from December 1992 to June 1994 and as a G.S. Resident from June 1994.

Final Determination. On April 13, 1994, the CO's Final Determination denied the certification on the grounds that the Employer's rebuttal failed to establish that Dr. Ding and Dr. Kapoor were rejected for other than lawful job-related reasons. The CO observed in this regard that "[m]edical residents enter a program and expect to finish it in a normal progression and are not promoted from one job to another" and that "residency includes internship."

Appeal. The Appellate File was referred to the Board after the Employer requested a review of the denial of certification.

DISCUSSION

20 CFR § 656.21(b)(7) provides that, if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful job related reasons. Where an applicant's resume indicates that he is qualified for the position, the employer is required to investigate the applicant's credentials further by offering an interview. **Gorchev & Gorchev Graphic Design**, 89-INA-118 (Nov. 29, 1990)(en banc). Although an applicant's response to a questionnaire is not automatically entitled to greater weight that the assertions of the Employer, where there is direct contradiction between statements of an employer and applicant, a burden is placed upon the employer to substantiate its original declaration with persuasive documentation. The mere repetition of its original assertion does not meet the employer's burden of proof. **Morris Cleaners, Inc.,** 93-INA-120 (Feb. 7, 1994).

In this case, there is a direct conflict between the statements of the Employer's recruitment report and the responses of both Dr. Kapoor and Dr. Ding in the followup questionnaires as to what transpired when they attempted to arrange an interview

with the Employer. The U. S. applicants maintain that Employer declined to interview either of them. On the other hand, the Employer contends that the applicants declined to be interviewed. In this case, something more than the mere repetition of the assertions in its recruitment report that "both individuals declined to make an appointment for an interview" was required to rebut the NOF, which had set forth the applicants' answers to the followup questionnaire. The credibility of the Employer's rebuttal is impaired in that it made no attempt to identify by name and official position the person to whom the applicants spoke when they responded to the letter inviting them to request an interview. Moreover, the Employer did not offer a firsthand, detailed statement from that person that would furnish reliable support for the Employer's representations regarding both of these conversations.

The Employer's position, in substance, is that it had no obligation to interview either applicant because they were not qualified for the position in its opinion. The Board has held to the contrary, that an employer's rejection of an applicant, who meets the employer's stated minimum requirements but fails to meet requirements for the position that are not stated in the employer's application or advertisement, is unlawful. **Jeffrey Sandler, M.D.,** 89-INA-316 (Feb. 11, 1989)(en banc).

While the Employer appeared confused as to just what position it was offering--mentioning at various points an internship, a first year residency, and a second year residency--the fact remains that the only qualification Employer stated in its ETA 750A and in its advertisement was a degree in medicine. The Employer did not state that it required completion of an internship in the United States. Moreover, it did not require any experience, and certainly not the recent experience that is noted in the reports of its conversations with the U. S. appli-cants. The resumes of the U. S. applicants showed that they had the one qualification for the position that the Employer speci-fied in its application, a medical degree. It follows that the U. S. applicants were at all times qualified by the resumes they submitted, and they should have been interviewed by the Employer.

For these reasons the Board finds that Drs. Kapoor and Ding were rejected for other than lawful job-related reasons.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of certification is hereby affirmed for the reasons hereinabove set forth.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. 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, N.W., Suite 400
Washington, D.C. 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, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO. 95-INA-547

CATHOLIC MEDICAL CENTER, Employer
GEORGE SURLA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

June 5, 1997