U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

DATE: April 8, 1998

CASE NO. 96-INA-96

In the Matter of:

JAMES HAGEDORN,
Employer,

on behalf of

BRIGIDA MARTINEZ,
Alien.

Appearance: Peter J. Kelley, Esq.,
for Employer and Alien

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam: This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A) and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. 656.27(c).

STATEMENT OF THE CASE

On October 15, 1994, Employer, James Hagedorn, filed an application for alien employment certification on behalf of the Alien, Brigida Martinez, to fill the position of Tutor/Child Monitor Live-in. Minimum requirements for the position were listed as a two-year teaching degree in elementary teaching, three years experience in the job offered, fluency in Spanish and English and good checkable references. The job to be performed was described as follows:

Teaching the Spanish language to the children. In addition, assume responsibility for the

> caring and supervising of the children during the day. Supervision and participation in activities for children, read stories in English and Spanish, preparation of all their meals, care of their clothes and rooms.

(AF 18-19).

Employer received one applicant referral in response to its recruitment efforts who was rejected by Employer as not qualified for the position. (AF 41).

A Notice of Findings ("NOF") was issued by the Certifying Officer ("CO") on February 28, 1995, proposing to deny labor certification on several bases. The CO challenged Employer's stated minimum requirements as excessive, challenged his language requirement, and challenged his rejection of the U.S. applicant. (AF 48-51).

In Rebuttal, Employer defended its stated requirements as not excessive, contending that the job primarily involves tutoring three children in a foreign language and that a "private instructor" should be no less qualified than an instructor at a public or private elementary school. Employer maintains that it is reasonable for Employer to require that an employee demonstrate by academic and practical experience her ability to perform the principal task of this position, which is teaching the children the Spanish language. In addition, Employer further documented his bases for rejection of the U.S. applicant referred. (AF 52-55).

A Supplemental NOF was issued by the CO on April 19, 1995. Employer's rejection of the cited U.S. worker was accepted; however, the CO again challenged Employer's stated minimum requirements, and whether the Alien met these requirements at the time of hire. The CO commented:

> It should be noted that the job described on the ETA 750 A form is not that of a[n] educational teacher, but in fact a children's tutor with other duties of child monitor. The fact remains that the duties described require 6 months to 1 year of experience and that [the] job of a[n] educational teacher would be a higher level job and would require a higher salary.

The CO further commented:

> Employer is requiring that applicant for this position have experience as a Children's Tutor/Child Monitor.
>
> It is noted that alien did not have this experience prior to hire with this employer. While applicant did have experience teaching, there is not documentation provided to show that she [had] the experience employer is requiring prior to hire.

The CO also questioned whether Employer's job opportunity is considered "employment"

(permanent full-time work) pursuant to 20 C.F.R. §656.50, recodified at §656.3. (AF 56-59).

In Rebuttal, Employer stated his willingness to reduce the job experience requirements "to those demanded by the Department, namely, one year" and, if necessary, re-advertise. Employer insisted, however, that an "at least two years of college" requirement be maintained. In addition, Employer asserted that the Alien's resume clearly demonstrated many more than three years of experience in teaching and child care. Employer also documented the full-time nature of its employment offer. (AF 60-61).

A Final Determination denying labor certification was issued by the CO on June 14, 1995, based upon a determination that Employer had failed to adequately document that the Alien met Employer's stated requirements at the time of hire. The CO commented:

> Alien's prior experience is that of an elementary teacher, not as a Children's Tutor/Child Monitor. Employer was advised that the two job titles are not the same.

Employer's documentation with respect to the 20 C.F.R. 656.3, "employment" issue was accepted. Employer's rebuttal evidence regarding his minimum requirements was not addressed. (AF 62-63).

Employer filed a Request for Reconsideration, dated July 19, 1995, which was denied by the CO on September 15, 1995. (AF 85-87). Employer then requested Administrative-Judicial Review by letter dated October 20, 1995. (AF 88-89).

DISCUSSION AND CONCLUSION

Pursuant to 20 C.F.R. 656.21(b)(5), an employer is required to document that the stated requirements for the job opportunity are the minimum necessary for the performance of the job and that Employer has not hired or that its is not feasible for it to hire workers with less training and/or experience.

In the instant case, Employer set his requirements for the job at two years of college and three years experience in the job offered. [1] Employer provided for no alternative experience requirement. Hence, in denying labor certification the CO cited the lack of this specific experience in finding the Alien unqualified for the job. Because the Alien failed to meet this stated requirement, labor certification was appropriately denied.

The CO correctly focused on the fact that Employer required and advertised for the greater

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[1] Employer offered to amend its experience requirement to one year in the job offered in its May 24, 1995 Rebuttal; however, this in no way alters the outcome of this case as the Alien still does not meet this requirement. The CO cited the normal requirements for the job duties described, which are based on the higher job of Childrens' Tutor, as a total of six months to one year of experience, training and/or education.

educational and experience requirements of a Teacher, when the job it has represented in its application for alien employment certification, and for which the prevailing wage has been set, is that of Children's Tutor/ Child Monitor, a lower level job.

An employer must establish that the alien possesses the stated minimum requirements for the position. ***Charley Brown's***, 90-INA-345 (Sept. 17, 1991). Employer has failed to meet that burden.[2] While we note that a U.S. worker under these same set of circumstances, with the Alien's same qualifications, may well have been deemed qualified to perform this job; in the labor certification process the burden is on the Employer. Employer was advised that the Alien's qualifications were at issue - yet failed to adequately address it, and accordingly we conclude that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of panel:

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Todd R. Smyth,
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary 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

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[2] Pursuant to the April 19, 1995, supplemental NOF, Employer was clearly notified of the deficiency that it appeared the Alien did not have the required experience prior to hire, and was provided the opportunity to "submit evidence which clearly shows that the Alien at the time of hire had the qualifications which the Employer is now requiring". Employer chose not to submit such evidence, rather, in rebuttal, Employer simply stated: "Ms. Martinez shows in her resume that she did not merely care for children but taught them both in formal schoolroom situations and in non-academic circumstances". Her resume does not reflect this; rather, it shows experience as a houseworker/home attendant and as an elementary school teacher. (AF 15).

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