U.S. Department of Labor

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

Date Issued: August 9, 1999

Case No.: 1996-INA-95

In the Matter of:

JOSEPH'S SERVICE STATION,
Employer,

on behalf of

ELMER HUDZSA,
Alien.

Certifying Officer: Delores Dehaan, NY

Appearance: Linda G. Nanos, Esq.
For Employer and Alien

Before: Burke, Neusner and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER
VACATING MARCH 1, 1999 DECISION
AND REMANDING CASE

On March 18, 1999, Joseph's Service Station (Employer), through counsel, moved this Board of Alien Labor Certification Appeals (BALCA or Board) to review its March 1, 1999, Decision and Order on grounds that this matter was decided in light of a recent development in the law regarding alternative occupational requirements pursuant to Kellogg/Winner's Circle/North Central, 94-INA-465, 544, 95-INA-68, (Feb. 2, 1998) (*en banc*). Employer argues that "[s]ince [we] relied upon the law as it existed at the time the case was pending with the Regional Office, at very least, the case should have been remanded to the Certifying Officer to allow amendment and readvertise using the new required wording of 'any suitable combination of education, training or experience.'" *See* Employer's Petition for Review, March 18, 1999. Upon review of the file and the Decision and

Order[1], we agree with Employer. Accordingly, the Decision and Order dated March 1, 1999, is hereby **vacated**.

STATEMENT OF THE CASE

This case arises from an application for labor certification[2] filed by an Automobile Repair Shop for the position of Automotive Electrician. (AF 5-6).[3]

The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. §656.27(c).

On April 21, 1994, Employer, Joseph's Service Station, filed an application for alien employment certification on behalf of the Alien, Elmer Hudzsa, to fill the position of Automotive Electrician. Minimum requirements for the position were listed as four years experience in the job offered or four years experience in the related occupation of Automotive Engineer. The job to be performed was described as follows:

> Repairs and overhauls electrical systems in automotive vehicles. Diagnoses malfunction by interviewing vehicle owner and using testing devices such as oscilloscope, voltmeter, ammeter. Adjusts ignition timing. Adjusts distributor breaker point gaps using dwell meter. Tests & repairs starters, generators and distributors. Repairs or replaces defective wiring using hand tools. Rebuilds electrical units.

(AF 5-6).

Employer received five applicant referrals in response to its recruitment efforts, all of whom were rejected by Employer as either unqualified or not interested in the position. (AF 51-52).

A Notice of Findings, (NOF), was issued by the CO on August 15, 1995, proposing to deny labor certification based upon a finding that the 750B form did not clearly reflect that the Alien had the requisite four years experience. In addition, the CO challenged Employer's related experience requirement. The CO observed that the duties performed under the related occupation would not normally qualify anyone to perform the job offered and thus determined that the related experience requirement was restrictive and tailored to the Alien's qualifications. Employer was requested to

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[1]The record reflects that on March 1, 1999, a Decision and Order was entered which affirmed the denial of certification.

[2]Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[3]"AF" is an abbreviation for "Appeal File."

either reduce its requirements and document a willingness to train or submit evidence that clearly shows that the Alien has four years experience performing duties clearly related to those required by the position offered. (AF 59-61).

In Rebuttal, Employer contended that adding a related occupation opens the job to additional applicants and therefore cannot be restrictive. Employer stressed that the related occupation is reasonably related to the job offer as "an Automotive Engineer would have detailed knowledge of the electrical systems of an automobile since it would be his job to design them". Employer noted that an Automotive Engineer might be considered over qualified for the position, but that since the Department of Labor has always taken the position that an employer should consider over qualified applicants, it should not object to Employer's opening the recruitment to overqualified applicants. Employer cited the Dictionary of Occupational Titles wherein the job of Automotive Engineer (007.061.010) is to design, direct building and test automobiles including "electromechanical components and systems". In regards to the Alien's qualifications, Employer submits that the Alien was responsible for designing race cars with very sophisticated electrical and mechanical functions well in excess of four years. Employer submitted copies of contracts from the Alien's former employers in support thereof. (AF 62-93).

A Final Determination denying labor certification was issued by the CO on October 5, 1995, based upon a finding that Employer's related experience requirement is restrictive. The CO concluded:

> While requiring experience in a related occupation could broaden U.S. applicant response, it is the duties performed in the related occupation and not the occupation (occupational title) which determines whether an applicant's experience in the related position makes him/her remotely qualified for the position offered. The requirements for the position must be those normally required for the performance of the job in the U.S. & as defined in the D.O.T. The duties described for an Automotive Engineer under 007.061.010 in the D.O.T. mainly entail developing designs for automotive structures. Such duties appear no way relevant to those required by the position offered or as described for an Automotive Electrician under 825.281.022. The related occupation is restrictive and has not been adequately documented.

(AF 103-105).

In response, Employer submitted a Request for Administrative-Judicial Review of the denial determination dated October 31, 1995. (AF 97-115).

The file was transferred to the Board of Alien Labor Certification Appeals (BALCA) on December 4, 1995.

DISCUSSION

Employer has listed primary requirements which the CO has found are in compliance with 656.21(b)(2); however, the Alien does not meet these requirements. The Alien has qualified for the position by virtue of Employer's stated alternative experience requirement, and the CO objected to Employer's related experience requirement on the basis that it was restrictive and tailored to the Alien's qualifications. Pursuant to the Board's recent decision in Kellogg/Winner's Circle/North Central, 94-INA-465, 544, 95-INA-68, (Feb. 2, 1998) (*en banc*), where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. The new standard under Kellogg requires that all minimum requirements, including alternative requirements shall be read as the stated minimum requirements for the position, and unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, shall be those defined for the job in the Dictionary of Occupational Titles, and shall not include requirements for a language other than English. According to Kellogg, legitimate alternative job requirements must be substantially equivalent to the primary requirements with respect to whether the applicant can perform in a reasonable manner the duties of the job being offered. Because this change in the law alters Employer's burden, due process requires that this case be remanded for the submission of documentation under the new standard. Employer herein relied on case law that has been reversed and did not have an opportunity to justify the alternative experience requirement under Kellogg. Therefore, the denial of certification must be reconsidered. *See, e.g.,* Warren Blakely, 98-INA-65 (August 21, 1998).

ORDER

The Decision and Order dated March 1, 1999 is hereby **VACATED.**

Further, the CO s denial of alien labor certification is hereby **VACATED** and this matter is **REMANDED** for the CO to issue a Supplemental NOF which is to provide instructions for justifying the alternative experience requirement under Kellogg.

SO ORDERED.

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JOHN M. VITTONE
Chief Administrative Law Judge
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 twenty days from the date of service a party

petitions for review by the full Board. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.