

Issue date: 13Jun2002

BALCA Case No. 2001-INA-122
ETA Case No. P2000-CT-01297119

In the Matter of:

A.T. SCLAFANI MAINTENANCE,
Employer,

on behalf of

RUBEN D. MEJIA,
Alien.

Appearance: Andrew F. Dora, Jr., Esq.
Darien, Connecticut

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Before: Chapman, Holmes and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

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 for the position of Supervisor, Spray, Lawn & Tree Service.¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

STATEMENT OF THE CASE

¹ Permanent 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 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. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

On January 14, 1998, Employer, A.T. Sclafani Maintenance, filed an application for labor certification to enable the Alien, Ruben D. Mejia, to fill the position it described as “Manager” of a Landscape Contractor. (AF 48). The job was described as follows:

Direct & coordinate business operations & personal service function of landscape contracting. Confer with employees to insure quality service, such as cutting, pruning[sic], planting, leaf & snow removal. Promote new business, maintain quality service for clients. Keep accounts of receipts & expend & make payroll. Order maintain & repair equipment & supplies. Supervise & schedule employees.

The rate of pay was listed as \$40,185.60 per year. Four years of college and two years of experience in the job offered were required.

On January 3, 2001, the Certifying Officer (“CO”) issued a Notice of Findings, (“NOF”), proposing to deny certification. (AF 11). Therein, it was noted that the Alien’s statement of qualifications did not establish that he met the requirement of two years of experience. A review of his Statement of Qualifications revealed that he had been employed as a Maintenance Assistant from 1978 to 1986 and since 1993 had been self-employed doing all types of house maintenance, landscaping, cutting, cleanup, etc. The CO found that the job opportunity was not being represented at the employer’s minimum requirements as mandated by 20 C.F.R. §656.21. Employer was advised to provide additional documentation establishing that the Alien did have the two years of experience in the job offered, or amend the application after which new recruitment would be done.

Counsel for Employer submitted rebuttal on February 6, 2001, which rebuttal consisted of letters regarding the Alien’s employment history and qualifications. (AF 7). A letter dated January 16, 2001, from Dr. Carlos Bastilla, General Manager of “Proleche” Milk Processors, S.A., certified that the Alien acted as Administrative Manager for his firm from February of 1987 to November of 1990. (AF 9-10).

A Final Determination was issued on February 27, 2001. (AF 5). The CO pointed out that the job description and functions closely mirrored that of the occupation of Supervisor, spray, lawn and tree service, as set forth in 408.131-010 of the Dictionary of Occupational Titles (“DOT”). The CO found that the rebuttal did not establish that the Alien had the required two years of experience in the job offered, i.e., as supervisor of a spray, lawn and tree service as specified on the application, in the advertisements, the posting and the job order. Accordingly, the stated experience requirements did not represent the employer’s minimum requirements in violation of 20 C.F.R. §656.21(b)(5).

On March 29, 2001, Employer filed a Request for Review of Denial of Certification with the Board of Alien Labor Certification Appeals (“BALCA” or “Board”). (AF 1)

DISCUSSION

With the request for review submitted by counsel for Employer, Employer has submitted a letter stating it was including a “detailed experience letter describing the duties performed and evidencing that the alien in fact has the prerequisite qualification for the job.” The latter is a second letter from Dr. Carlos Bastilla of “Proleche.”

This Board will not consider the material submitted by the Employer in connection with the request for reconsideration. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. §656.27(c). *See also* 20 C.F.R. §656.26(b)(4). Employer does not argue that it provided adequate rebuttal to the NOF. Instead, it attempts to provide new material which it claims establishes that the Alien has the prerequisite qualifications for the job. Employer provides no basis for not having submitted the subject documentation as part of its rebuttal, however and it will not be considered now. *See Sharp Screen Supply, Inc.*, 1994-INA-214 (May 25, 1995); *ST Systems, Inc.*, 1992-INA-279 (Sept. 2, 1993).

Employer’s rebuttal failed to establish that the Alien had the qualifications for the position it was requiring of U.S. applicants. Therefore, the stated experience requirement did not represent Employer’s minimum requirements in violation of 20 C.F.R. §656.21(b)(5). Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a/ Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990). Thus, an employer may not require more experience of U.S. workers than the Alien possesses. *Capricorn Systems, Inc.*, 1993-INA-333 (Aug. 30, 1995). Labor certification has been found to have been properly denied where the employer’s documents failed to establish that the alien was qualified for the job such that the job was not offered at its actual minimum requirements. *Light of America, Inc.*, 1991-INA-123 (Nov. 30, 1992). Such is the case here. Labor certification was properly denied, and the following Order shall issue.

ORDER

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

For the panel:

A
JOHN C. HOLMES
Administrative Law Judge

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 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 Board decisions; or (2) when the proceeding

involves a question of exceptional importance. Petitions for review 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 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.