

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 September 2003

BALCA Case No.: 2002-INA-215
ETA Case No.: P1999-CA-09471901/AT

In the Matter of:

V/H ELECTRICAL GENERAL MAINTENANCE,
Employer,

on behalf of

RODOLFO AVELAR,
Alien.

Appearance: Gloria Lara
Santa Ana, CA
For Employer

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification on behalf of Rodolfo Avelar ("Alien") filed by V/H Electrical General Maintenance ("Employer") pursuant to section 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 C.F.R. Part 656. The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. §656.26. The following decision is based 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 of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On August 25, 1997, Employer, V/H Electrical General Maintenance, filed an application for labor certification on behalf of the Alien, Rodolfo Avelar, for the position of electrician. (AF 44). The job duties for the position included installing and repairing electric fixtures, installing concealed wiring, circuit breaker panels and switches, and checking the functioning of the system, among other duties. The primary stated job requirement for the position was two years experience in the job offered. In addition, a resume or letter of qualification was required. (AF 44).

In the Notice of Findings ("NOF") issued on January 17, 2002, the CO proposed to deny certification on the grounds that Employer had rejected 14 qualified U.S. applicants [Angel Castaneda, Calvin Batiste, Jr., Dan Farden, Dana Lee, David Rivera, Garik Khachatryan, Jose Arrivillaga, Mehrad Mollebi, Miroslav Mijacevic, Patrick Biley, Sheldon Hotarek, Tae Kim, Duc Van Vo, and Juan Escobedo] for other than lawful job-related reasons in violation of 20 C.F.R. §656.21(b)(6) and/or 20 C.F.R. §656.21(j)(iii) and (iv). (AF 40-42). Employer submitted its rebuttal on or about February 18, 2002. (AF 11-39). The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated March 18, 2002, denying certification on the same basis. (AF 8-10). On or about April 5, 2002, Employer appealed the Final Determination and the matter was docketed in this Office on June 4, 2002 (AF 1-7).

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Therefore, an employer must take steps to ensure that it rejects qualified U.S. applicants only for lawful job-related reasons and does not reject U.S. applicants for subjective reasons which are either undocumented or unverifiable. Although the regulations do not

explicitly state a “good faith” requirement in regard to post-filing recruitment, such good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications are, therefore, a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are “able, willing, qualified and available” to perform the work. 20 C.F.R. § 656.1.

In the report of recruitment results, dated September 10, 1999, Employer set forth its reasons for not hiring any of the twenty-five applicants who had responded to Employer’s recruitment efforts. (AF 49-53). For the purpose of rendering our decision herein, we will focus on Employer’s rejection of U.S. applicants David Rivera, Patrick Biley, Sheldon Hotarek, and Juan Escobedo.¹

Employer stated that he contacted applicants Rivera, Biley, and Hotarek by mail on July 13, 1999. (AF 50-52). Employer scheduled interviews with these applicants on July 16-17, 1999. Employer determined that Mr. Rivera was over-qualified for the position, as he is actually an engineer. (AF 50). Mr. Biley and Mr. Hotarek were rejected because they were not familiar with the rewiring of supermarket meat cases. (AF 52). Employer contacted applicant Escobedo by mail on July 30, 1999 and scheduled him for an interview on August 2, 1999. Employer stated that his qualifications were in excess of those required and thus, he could not be hired. (AF 53).

In the NOF, the CO noted that some U.S. applicants were rejected for unfamiliarity with the rewiring of supermarket meat cases. The CO stated that this requirement does not appear on the ETA 750A, the newspaper advertisement or the job posting. The CO requested clarification as to how the rewiring of meat cases differs from other elements of the electrical maintenance business.

¹Although we are addressing only four of the fourteen U.S. applicants cited by the CO, this is not to suggest that we find Employer’s rejection of the remaining U.S. applicants to have been appropriate. Certification is properly denied for the unlawful rejection of even one qualified U.S. applicant. See *Richco Management, Inc.*, 1988-INA-509 (Nov. 21, 1989). Therefore, it is unnecessary to address the rejection of all fourteen U.S. applicants.

The CO advised Employer that it is unlawful to reject a qualified U.S. applicant for failing to meet a requirement which was not disclosed. (AF 42).

The CO also noted that some applicants were rejected for being over-qualified. The CO reported that if an applicant is considered over-qualified, he is considered qualified; “even if an applicant’s educational or experience level greatly exceeds the employer’s requirements, a job applicant who is found to be *minimally qualified* must be considered for the job opportunity.” (AF 42) (*emphasis in original*). The CO requested a detailed explanation of the lawful, job-related reasons for rejecting each applicant and advised Employer that applicants found to be over-qualified must be reconsidered for the position. (AF 42).

Employer’s rebuttal consisted of a letter, dated February 18, 2002, co-signed by Employer’s Owner, Victor Hugo Navarro, and its Immigration Specialist, Gloria Lara (AF 11-12); a copy of Employer’s business license (AF 13); the NOF (AF 14-16); various documents involving the same Employer but a different alien (*i.e.*, Rafael Mora-Delgadillo) (AF 17-34); a Facsimile Transmittal Sheet, dated September 14, 2001 (AF 35); and a “Profit or Loss From Business” form. (AF 36-39).

Much of the above-referred rebuttal evidence relates to another deficiency which had initially been cited in the NOF (*i.e.*, “Non-Existent Business or Non-Existent Job Opening”) (AF 41-42), but which the CO subsequently determined “has been remedied.” (AF 9).

Employer’s rebuttal regarding the unlawful rejection of qualified U.S. applicants is wholly inadequate. As stated above, most of Employer’s rebuttal documents regarding this cited deficiency pertain to a different alien. (AF 17-34). In addition, Employer’s Facsimile Transmittal Sheet, dated September 14, 2001, states, in pertinent part:

...In reference to the term “overqualified” used in the recruitment results of the Final Documentation Notice (9/10/99), we must state that we are indicating excessive experience or qualifications for the position being offered. The applicants who were not hired under the “overqualified” term, were individuals considered to have engineer levels and their experience exceeded the standard of the requested duties.

(AF 35).

In the Final Determination, the CO rejected Employer's rebuttal regarding this deficiency. (AF 9-10). In its request for review, Employer contends that this case is similar to the application for labor certification it had filed on behalf of alien Rafael Mora-Delgadillo. Employer noted that, in the other case, various U.S. workers had been rejected on similar grounds; the NOF had set forth similar deficiencies; however, in Rafael Mora-Delgadillo's case certification was granted by the CO in the Final Determination. (AF 1-2). As the appellate Board in this case, we are clearly not bound by a CO's ruling in a different case. *See Tedmar's Oak Factory*, 1989-INA-62 (Feb. 26, 1990).

The Board has consistently held that an employer may not reject an applicant solely because that applicant is overqualified. *World Bazaar*, 1988-INA-54 (June 14, 1989) (*en banc*); *Palacio Metal Works*, 1990-INA-396 (Mar. 27, 1991); *Matthew Sebastian*, 1994-INA-194 (Apr. 19, 1995). Furthermore, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job on the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991); *Microbilt Corp.*, 1987-INA-635 (Jan. 12, 1988). Accordingly, an employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified. *American Café*, 1990-INA-26 (Jan. 24, 1991); *Richco Management*, 1988-INA-509 (Nov. 21, 1989); *Coventry Place*, 1995-INA-319 (Feb. 6, 1997).

In the present case, Employer rejected various U.S. applicants because they were either overqualified (*e.g.*, David Rivera, Juan Escobedo) or they lacked experience in an *unstated* job requirement; namely, rewiring of supermarket meat cases (*e.g.*, Patrick Biley, Sheldon Hotarek).²

²If experience in "rewiring of supermarket meat cases" was so integral to the job opportunity, as suggested by Employer's rejection of otherwise qualified U.S. applicants, Employer should have clearly listed "rewiring of supermarket meat cases" as a job requirement on the ETA 750A form and in its recruitment. An employer cannot reject a U.S. applicant who meets the minimum qualifications for the job, but fails to meet requirements not stated in the application or advertisement. *See Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991) (*en banc*); *see also ChromatoChem*, 1988-INA-8

Accordingly, we agree with the CO's determination that Employer rejected the foregoing U.S. applicants for other than lawful, job-related reasons, in violation of 20 C.F.R. §656.21(b)(6). In view of the foregoing, we find that labor certification was properly denied.

ORDER

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

Entered at the direction of the panel:

A

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
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 ten days of the service of the

(Jan. 12, 1989) (*en banc*).

petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.