



Issue Date: 17 February 2004

BALCA Case No.: 2002-INA-296
ETA Case No.: P2000-CA-0904913/JS

In the Matter of:

PRECISE ELEVATOR PRODUCTS, INC.,
Employer,

on behalf of

CARLOS GUTIERREZ CANTOS,
Alien.

Appearances: Esperanza V. Bada, Esquire
La Puente, California
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for alien labor certification filed by Precise Elevators, Inc. ("Employer") on behalf of Carlos Gutierrez Cantos ("the Alien") for the position of Elevator Cab Repairer - Helper.¹ The Certifying Officer

¹ Permanent alien labor certification is governed by § 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).

(“CO”) denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

STATEMENT OF THE CASE

On April 15, 1998, Employer filed an application for labor certification on behalf of the Alien to fill the position of "Elevator Cab Repairer-Helper." (AF 25). Six years of grade school and six years of high school were required. Listed as special requirements were the use of special finishing tools used on metals such as stainless steel, bronze and aluminum, and use of planers, special saws and routers for cab cut outs. On August 27, 1999, the ETA 750A was amended to add the requirement of two years of experience in using handtools and power tools used in repairs of elevators and two years of experience in carpentry, including the use of handtool and power tools used in carpentry. (AF 33).

Applicant Steve B. Smith submitted a resume, indicating that from June 1994 to September 1994, August 1995 to December 1996, and October 1997 to May 1998, he worked for Otis Elevator Co., performing elevator construction, elevator maintenance, elevator servicing and repairs. (AF 48). From February 1995 to May 1995, and February 1997 to May 1997, he worked at Tri-County/Thyssen Elevator, performing elevator repairs. On July 13, 2000, Employer submitted the results of recruitment efforts, indicating that applicant Smith was rejected because he had no experience in carpentry. (AF 39). Smith indicated that he could learn, but Employer “felt [it] needed someone that could teach others.”

On May 7, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification. (AF 21-23). The CO determined that, pursuant to 20 C.F.R. §656.21(b)(6) and 20 C.F.R. §656.24(b)(2)(ii), Employer rejected Applicant Smith for other than lawful job-related reasons. (AF 22). Applicant Smith, who showed more than two years of experience in the specific occupation, was rejected because he did not have experience in carpentry. The CO found that based upon his resume, he appeared, by his experience, to be able to perform the job duties. The CO pointed out that Employer had amended the

application to show that it required two years of experience in using handtools and power tools used in repair of elevators and two years of experience in carpentry and use of handtools and power tools used in carpentry. The Alien's experience was in carpentry. The CO found no evidence that a person who had several years of experience in the job itself did not meet the requirements of the job. Therefore, Applicant Smith was unfairly rejected as the job requirement appeared to have been tailored to accommodate the background of the Alien. Employer was directed to provide rebuttal which documented that Applicant Smith was rejected solely for lawful, job-related reasons. (AF 22).

Employer submitted rebuttal on June 11, 2002. (AF 7-20). The general manager for Employer stated that he had interviewed Applicant Smith and that Smith indicated that he did not do elevator repair work, only maintenance and servicing. (AF 11). He did not know anything about carpentry and had very little knowledge of elevator repairs. Applicant Smith admitted that he did some repair work for a few months in 1995, but stated that he performed approximately thirty percent repair work. Employer asserted that he was rejected because Employer needed someone who had knowledge of carpentry. Employer also alleged that the applicant admitted he was not familiar with tools used in elevator repairs and Employer needed someone who did not need additional training but could start working right away. (AF 12).

A Final Determination ("FD") was issued on June 17, 2002. (AF 5-6). The CO noted that Employer did not require any experience in the position, yet had special requirements. The CO determined that rebuttal failed to show that Applicant Smith lacked the ability to use Employer's tools as set forth in its "special requirements." Based on this applicant's experience in elevator maintenance and repair, the CO determined that Applicant Smith could use the required tools and perform the job duties that he had previously performed. The CO also pointed out that the position at issue was only for a helper and that Smith's experience appeared to have been more than that of a helper. (AF 6).

On July 19, 2002, Employer requested review of the denial of labor certification and the CO denied reconsideration on July 30, 2002. (AF 1-4). The matter was docketed in this Office on September 13, 2002.

DISCUSSION

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988); *Aquatec Water Systems*, 2000-INA-150 (Sept. 21, 2000). Actions by an employer which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§ 656.1, 656.2(b). The employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). If an applicant's resume indicates he is qualified for the position, the employer must demonstrate by convincing evidence that the applicant is not qualified. *Fritz Garage*, 1988-INA-98 (Aug. 17 1988)(*en banc*).

Employer argued that U.S. applicant Smith was evaluated fairly and found to be lacking the minimum requirements for the position. (AF 2). Employer contended that Applicant Smith lacked the necessary degree and breadth of experience and that the requirements of the position included the ability to teach others, which was implicit in the job duties of the position offered. In its brief, filed on October 22, 2002, Employer reiterated the arguments, claiming that Applicant Smith was not familiar with the special tools required for the position and could not teach others. Employer contended that it should be given latitude because Employer determined, based on an interview, that Smith could not perform the job duties.

Applicant Smith had more than two years of experience in the specific job. Employer initially claimed that Smith was rejected because he did not have experience in carpentry and could not teach others. Upon receipt of the NOF, Employer then argued that Applicant Smith did not have experience in elevator repair. However, Smith's

resume revealed considerable experience in elevator repair. (AF 48-50). Indeed, Employer conceded that he appeared qualified based on his resume; but based upon an interview of Smith, Employer asserted that he could not perform the job duties.

Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13 1988) (*en banc*), in the instant case, Employer's bare assertion that Applicant Smith did not have the experience necessary to perform a job which he has performed for at least two years is not persuasive. Employer did not claim lack of experience in elevator repair in its initial statement of recruitment efforts. Rather, Employer claimed to have rejected Smith because of his lack of experience in carpentry and the need to hire someone who could teach others. It was only after issuance of the NOF that Employer raised the lack of elevator repair experience as a reason for the rejection of Applicant Smith.

Employer's assertion that Applicant Smith was not familiar with the tools necessary to perform elevator repairs is not credible in light of his resume. No verification of this fact was provided via prior employer's statements or any other documentation. Employer also rejected Smith due to his lack of ability to teach others, a requirement that was not disclosed either in the job application or in the job advertisement. (AF 25, 44).

Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Banque Francaise Du Commerce Exterieur*, 1993-INA-44 (Dec. 7, 1993). If an applicant clearly meets the minimum qualifications for the job they are considered qualified. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991). Thus, an employer unlawfully rejects an applicant where the applicant meets the employer's stated minimum requirements but fails to meet requirements not stated in the application or the advertisement. *Phyllis Rowland*, 1992-INA-366 (Dec. 17, 1993); *Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991)(*en banc*). Because Applicant Smith met the minimum requirements as stated in the

advertisement and ETA 750A, his rejection on the basis of a lack of ability to teach others was unlawful.

Given the discrepancies in Employer's statement of recruitment and its rebuttal, Employer's bare assertions regarding the reasons for this applicant's rejection are unfounded. In sum, Employer's rejection of this applicant was not sufficiently and convincingly documented, given the applicant's represented qualifications. Labor certification was properly denied and the following order shall issue:

ORDER

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

Entered at the direction of the panel by:

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