

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 09 July 2003**

**BALCA Case No.: 2002-INA-106**  
ETA Case No.: P1997-CA-09057337/JS

*In the Matter of*

**E.H. BUTLAND DEVELOPMENT CORP.,**  
*Employer,*

*on behalf of*

**ERNESTO GRANADOS,**  
*Alien.*

Certifying Officer: Martin Rios  
San Francisco, CA

Appearance: Marita Flores, Centro Ayuda Legal  
For Employer

Before: **Burke, Chapman and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arose from an application for labor certification on behalf of Ernesto Granados (“Alien”) filed by E.H. Butland Development Corp. (“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 Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and the 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.

## STATEMENT OF THE CASE

On February 6, 1995, Employer filed an application for labor certification on behalf of the Alien for the position of Shielding Technician. (AF 30-31)

On October 25, 2000, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the ground that the Employer failed to document its actual minimum requirements, in violation of 20 C.F.R. § 656.21(b)(5). The CO noted that Employer's requirement of five years as an apprentice did not reflect the Employer's actual minimum requirements, as the apprenticeship the Employer requires is one that the Employer provides to its own selected employees. The CO noted that the Employer provided the five-year apprenticeship to the Alien, and consequently did not require that experience from the Alien. Therefore, the current requirements were not the Employer's true minimum requirements.

The CO advised the Employer that it could delete the requirements and retest the labor market. If the Employer wished to retain the requirements, then the Employer had to provide convincing evidence that it was not feasible to hire anyone with less experience, or Employer had to supply evidence that it was not possible to train a new worker. The Employer could also retain the job requirements if it demonstrated that the Alien acquired the experience with another employer.

In its Rebuttal dated November 10, 2000, the Employer agreed to delete the five-year apprenticeship requirement, agreed to provide a revised notice of job opportunity, and agreed to retest the labor market. Employer provided a revised job description for the position titled Shielding Technician. (AF 8-9)

On December 7, 2001, The CO issued a Final Determination (FD) denying certification (AF 3-4). The CO found that the Employer's Rebuttal was not responsive to the NOF. The CO found that while the Employer deleted the requirements the CO found deficient, they were replaced by

additional new requirements, including an unspecified period of experience, and an unspecified degree of knowledge. The CO noted that the changes made to the requirements were not part of the remedies available as per the NOF. The CO denied the application on the grounds that the Employer did not demonstrate that it was not feasible to train a new employee, nor did it prove that the Alien acquired his experience from another employer, and thus it did not properly comply with the changes to the requirements as per the NOF.

In Employer's Request for Review dated January 2, 2001<sup>1</sup> (AF 1-2), Employer argued that the field of Magnetic Resonance Imaging (MRI) did not exist in the USA before 1984 and since it is an evolving technology, there are not many people with the knowledge to work with MRI. Although the Alien's experience and knowledge at the time he was hired did not include MRI technology, it provided him the basis to learn the technology. The Employer noted that the Alien's experience with the firm predated the labor certification application, and at this time it is not economically feasible to hire and train someone new. Additionally, the knowledge acquired by the Alien during his fourteen years of employment with the company is proprietary. Accordingly, the Employer concluded that it had complied with all the rules and regulations and therefore the Board should reverse the CO's denial and grant the application.

The Appeal File does not reflect that a brief was filed by the Employer.

### **DISCUSSION**

The Employer in its Rebuttal started on the right path by offering to delete the five years apprenticeship requirement. However, its amended requirements included additional deficiencies as noted by the CO. Although the first two sentences of the amended job description are identical to the initial job description, the Employer added a list of minimum requirements in experience and

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<sup>1</sup> The date in the Request for Review should have reflected January 2, 2002.

knowledge that were not previously included. Further, the Employer did not quantify the amount of experience required.

Another troubling aspect of the instant labor certification application is the fact that the Employer in section 21 of the ETA 750-A stated: “Company hires from within only.” (AF 31) The Employer’s hiring philosophy does not permit us to characterize Employer’s recruitment efforts to be good faith efforts, as it excludes every U.S. applicant except those already employed by the Employer<sup>2</sup>.

Therefore, the elimination of the five-year training requirement is inconsequential if the Employer continues to assert that the Employer only hires from within the company. Employer must show that it seriously wants to consider U.S. applicants for the job, not merely go through the motions of a recruiting effort without serious intent. *Compare Dove Homes, Inc.*, 1987-INA-680 (May 25, 1988) (*en banc*) and *Suniland Music Shoppes*, 1988-INA-93 (March 20, 1989) (*en banc*).

The Employer in its Rebuttal did not challenge the CO’s finding that the Alien was hired without the experience currently required for the job opportunity.<sup>3</sup> 20 C.F.R § 656.25(e) provides

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<sup>2</sup> The state agency in its correspondence dated April 20, 1995 advised the Employer that limiting its hiring to those within the company who are chosen to attend the in-house training was too restrictive. Therefore, Employer had to justify the limitation or delete it. (AF 66-67). The Employer in its response dated May 31, 1995 (AF 61-65) asserted that the company provides the in-house apprenticeship to those employees that have proven their ability in their work. The Employer added that the Alien completed the apprentice training. The Employer affirmed that the training, knowledge and skills required for the job were not going to be waived. The Employer concluded that the replacement of the Alien with a less experienced person would cause substantial loss to the Employer. (AF 64-65). As noted, after being advised that the philosophy of hiring only from within the company was too restrictive, the Employer insisted that Employer had to hire and train the selected employees because it would be too costly to do it otherwise. Although Employer’s hiring philosophy may make business sense, by its nature excludes all U.S. applicants not currently working with the Employer. Consequently, the job opportunity was not truly open to any U.S. applicant in violation of 20 C.F.R. § 656.20(c)(8).

<sup>3</sup> The state agency in its correspondence of April 20, 1995 (AF 66-67) advised the Employer that the Alien did not appear to have the experience required for the job offer. The Employer was advised that

that an employer's rebuttal evidence must rebut all of the findings in the Notice of Findings and that all findings not rebutted shall be deemed admitted. On this basis, the Board has held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Further, failure to address a deficiency noted in the Notice of Findings supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993).

The Employer in its Request for Review acknowledged that the Alien, at the time he was hired, did not have the experience the Employer currently requires from the U.S. applicants. We note that in the ETA 750-B, (AF 70-71) the Alien does not indicate any work experience before his employment with the Employer. The only reference about previous experience of the Alien is found in the Request for Review, where the Employer indicates that the Alien was a radio equipment installer and operator for the army in El Salvador. (AF 01) In the sentence after that, the Employer admits that the Alien's experience is not similar to radio frequency shielding installer's work. Essentially, the Employer acknowledged that the Alien learned the skills needed to perform the job while working for the Employer. These are the same skills noted as the Employer's minimum requirements.

However, in *Iwasaki Images of America*, 1987-INA-656 (1988) we held that the Alien's on-the-job acquired experience can not be counted as required experience. Since Employer cannot require more experience from U.S. applicants than what it required from the Alien, Employer's stated

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the experience acquired with the Employer could not be used as a requirement. The Employer in its response dated May 31, 1995 (AF 61-65) did not provide any argument or documentation that showed that the Alien at the time he was hired had the required experience. The burden of proof, in the twofold sense of production and persuasion, is on the employer. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). The employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Employer, having the burden of proof and being provided the opportunity to support its labor certification application, decided to remain silent on the state agency's finding regarding the Alien's experience. Consequently, Employer did not meet its burden.

minimum requirements are not its true minimum requirements, as they exceed the Alien's experience at the time he was hired, which is a violation of 20 CFR § 656.21(b)(5).

As the record is sufficient to support the CO's denial of alien labor certification and for the above stated reasons, the following order will issue<sup>4</sup>:

### **ORDER**

The CO's denial of labor certification in this matter 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 of Labor unless within 20 days from the date of service,

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<sup>4</sup> Employer in its Request for Review made its initial reference to Employer's involvement in an evolving technology (MRI) that limited its pool of applicants and prevented the training of new employees. Employer's assertion of limited recruiting options due to MRI's nature as an evolving technology, which was first stated with its Request for Review, could not be considered by this Panel because our review must be based on the record upon which the CO reached his decision. Evidence first submitted with the Request for Review cannot be weighed. *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *Cappricio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Even if this Panel would consider Employer's assertions, they would be insufficient since Employer's unsupported assertion that it is involved in a developing technology is insufficient to prove its inability to train a new employee. Although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988). Denial of certification has been affirmed where the employer has made only generalized assertions, *Winner Team Construction, Inc.*, 1989-INA-172 (Feb. 1, 1990).

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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.