



Issue Date: 18 February 2004

BALCA Case No.: 2002-INA-259
ETA Case No.: P2001-NY-02472319

In the Matter of:

CYBER DIALOGUE, INC.,
Employer,

on behalf of

IDIL M. CAKIM,
Alien.

Appearances: Neil A. Weinrib, Esquire
New York, New York
For Employer and Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Cyber Dialogue, Inc. (“Employer”), a Development & Implement Internet marketing company, for the position of Senior Analyst. (AF 19-20).² 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”).

¹ 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 20 C.F.R. Part 656.

² “AF” is an abbreviation for “Appeal File”.

STATEMENT OF THE CASE

On November 30, 2000, Employer filed an application for alien employment certification on behalf of the Alien, Idil Cakim, for the position of Senior Analyst. The job duties included conducting research on the entertainment and media industries, responding to client inquiries, writing reports and performing data analysis. Minimum requirements for the position were listed as a Bachelor of Arts or Bachelor of Science degree in Marketing/Communications or a related field and three months experience in the job offered or in the related occupation of Media & Public Relations. No other special requirements were listed. (AF 19-20).

Employer received twenty-one applicant referrals in response to its recruitment efforts, all of whom were rejected by Employer as not qualified for the position. (AF 37-70).

A Notice of Findings (“NOF”) was issued by the CO on March 22, 2002, proposing to deny labor certification based upon a finding that Employer had rejected six qualified U.S. workers for other than lawful, job-related reasons. (AF 72-73). Employer’s stated basis was their lack of entertainment or research experience. The CO noted that each applicant met the minimum educational requirement and that they all had substantially more than the three months experience required in the alternate area of Media & Public Relations. Employer was instructed to further document their lawful rejection. (AF 72).

In Rebuttal, Employer stated that each of the applicants was interviewed and rejected for lack of experience in conducting research on entertainment and media industries, which Employer stated is a core duty of the position and hence a lawful basis for rejection. (AF 74-81).

On June 4, 2002, the CO issued a Final Determination (“FD”) denying labor certification based upon a finding that Employer had failed to adequately document

lawful rejection of each of these identified U.S. workers. (AF 82-83). The CO reiterated the finding that each of these applicants met the minimum educational and alternative experience requirements and concluded that because there was no qualifier to the related/alternate experience requirement, these applicants were qualified.

Employer filed a Request for Review by letter dated July 8, 2002 and the matter was docketed in this Office on August 27, 2002. (AF 90-94).

DISCUSSION

Twenty C.F.R. § 656.24(b)(2)(ii) states that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed. Twenty C.F.R. § 656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job related reasons. Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

In the instant case, Employer has rejected U.S. workers for failing to meet undisclosed requirements. An employer must state all the requirements for the petitioned position on the ETA 750A application and if an applicant meets the requirements as stated by the employer, he or she is deemed qualified for the job. *Bell Communications Research, Inc.*, 1988-INA-26 (Dec. 22, 1988) (*en banc*). The actual test is whether the applicant meets the job requirements in the ETA 750A, item 14 (requirements). In general, labor certification is properly denied where an employer unlawfully rejects workers who meet stated minimum education and experience requirements. *ABC Home Video Corp.*, 1993-INA-480 (Nov. 16, 1994); *Banque Francaise Du Commerce Exterieur*, 1993-INA-44 (Dec. 7, 1993); *American Café*, 1990-INA-26 (Jan. 23, 1991). When the applicant meets the stated minimum requirements but is rejected for failure to

meet a requirement not stated on the application or the advertisement, the applicant is unlawfully rejected. *Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991) (*en banc*).

Employer's basis for rejection of each of the six U.S. applicants cited by the CO was their lack of experience in conducting research on entertainment and media industries, which Employer indicated is a core duty of the job. While the ETA 750A and the advertisement include duties of research on entertainment and media industries, according to both the ETA 750A and the advertisement, the minimum requirements for the position were a B.A./B.S. degree in Marketing/Communications or a related field and either three months experience in the job offered or three months experience in Media & Public Relations. (AF 20). There were no other special requirements listed for the job. Because there was no qualifier on the related/alternate experience requirement, these applicants' qualifications rendered them qualified on the basis of this experience requirement. The requirement of experience in conducting research on the entertainment and media industries was not included as a requirement for the job. As such, the requirements were undisclosed. We conclude that these applicants were unlawfully rejected on the basis of undisclosed requirements and that labor certification was properly denied.

ORDER

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

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.