



Issue Date: 10 February 2004

BALCA Case No.: 2002-INA-277
ETA Case No.: P2000-CA-09502271/ML

In the Matter of:

NATEL ENGINEERING CO., INC.,
Employer,

on behalf of

MANUJ DHINGRA,
Alien.

Appearances: Thomas H. Bohrer, Esquire
Manhattan Beach, 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 Natel Engineering Co., Inc. ("Employer") on behalf of Manuj Dhingra ("the Alien") for the position of Auditor.¹ The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

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).

STATEMENT OF THE CASE

On November 17, 1998, Employer filed an application for labor certification on behalf of the Alien for the position of auditor. (AF 19). A Bachelor's degree in business, commerce or economics was required, as was two years of experience in the job offered or in the related occupations of accountant or accounting manager. The job duties included reviewing financial records and conducting audits.

The CO issued a Notice of Findings ("NOF") on April 12, 2002, proposing to deny certification on the ground that Employer rejected qualified U.S. applicants because of undisclosed requirements. (AF 15-17). The CO found that three U.S. applicants were rejected because they did not possess the requirement of experience with electronics manufacturing and ISO 9001, requirements which were not shown on the ETA 750A. The CO pointed out that because these requirements were not shown on the ETA 750A, Employer could not cite the failure to meet these requirements as a justification for the rejection of otherwise qualified U.S. applicants. In addition, the CO found that Employer had hired the Alien in 1996 without this experience. In order to rebut these findings, Employer was directed to show that the U.S. applicants who applied were not qualified based on their failure to possess the requirements as set forth in the ETA 750A. (AF 16).

Employer submitted a rebuttal letter on May 2, 2002. (AF 11B-14). Employer argued that the CO failed to state why he felt the three U.S. applicants were qualified and that Employer's referral results statement indicated that the lack of experience with ISO 9001 auditing standards was not the only basis for their rejection. Employer contended that even if these applicants knew how to do an ISO 9001 audit, they still would not have been qualified for the position. Employer further contended that an applicant who did not know how to conduct such an audit lacked knowledge which was essential for the position. Employer also asserted that the portion of the job description stating the duty of "examining records of various departments to insure recording of transactions and compliance with regulations and quality control standards" referred to the ISO.

Employer argued that this requirement was inherent in the nature of the job offered and was not a special requirement. (AF 11B-12).

Employer argued that U.S. applicant Smith lacked the education and experience required for the position. With regard to applicants Figueroa and Ingram, Employer asserted that two years of experience in the job offered, specifically as an auditor for a microelectronics manufacturer, was required, not merely two years experience as an auditor. Applicants Figueroa and Ingram lacked experience in the microelectronics manufacturing business and therefore were not qualified for the position. (AF 12-13). Employer contended that the Alien had experience in ISO 9001 prior to his hire. Employer further argued that when the Alien was hired in 1996, he was hired as an accounts manager. During this time, he gained experience in the microelectronics field. When he was subsequently hired as an auditor, he thus had experience in the microelectronics manufacturing field. (AF 13-14). It remained Employer's contention that the U.S. applicants could not perform the job duties described in the ETA 750A because they lacked the knowledge and expertise to do so. (AF 14).

On May 29, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 10). The CO noted that Employer listed in Box 14 of the ETA 750A either two years of experience in the job described or two years of experience in the related occupations of accountant or accounting manager. Box 15 of the ETA 750A did not list any special requirements. (AF 19). The CO determined that Employer was willing to hire an accountant with two years of experience in any industry. The CO found that the qualified U.S. applicants had been unlawfully rejected and denied certification.²

² In the FD, the CO stated that the NOF afforded Employer the opportunity to amend the ETA 750B to show that the Alien had experience in ISO auditing standards. (AF 11A, 16). While this, in fact, is not the case, this is harmless error on the part of the CO, and does not alter the conclusions reached in this case.

On June 24, 2002, Employer filed a Request for Review and the matter was docketed in this Office on August 30, 2002. (AF 94). Employer filed a Statement of Position on September 24, 2002.

DISCUSSION

In the Statement of Position, Employer argued that the basis for denial, that “experience in a related occupation is acceptable means the applicants don’t need to be able to perform the core job duties” is lacking in legal justification and is made only in the FD. Employer contends that because this was only raised in the FD, Employer did not have the opportunity to rebut this finding. The CO, however, made clear the basis for the denial in the NOF. Employer acknowledged this, arguing that in the FD, the CO did no more than reiterate what was stated in the NOF. It is apparent that Employer had full opportunity and notice to rebut the findings made in the NOF.

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). It is the employer who 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*). In the instant case, the position required a Bachelor’s degree in business, commerce or economics and two years of experience in the job offered or in the related occupations of accounting or accounting manager. Employer rejected U.S. applicants Figueroa and Ingram because they lacked experience in ISO 9001 auditing and experience as an auditor for a microelectronics manufacturer. U.S. applicant Smith was rejected because he did not have the education or experience requirements.

Employer is seeking an individual with experience in the job offered or in the related occupations of accountant or accounting manager. The nature of Employer’s business is listed as microelectronics manufacture; however, there is no indication from the ETA 750A that experience in the microelectronics field is inherent in the job

requirements for an auditor. The job duties do not include any reference to a particular field or specific records or policies unique to that particular field. The position here is that of an auditor with general job duties to be expected of someone with auditing experience or experience as an accountant or accounting manager. The description of the job duties, which includes assessing the accuracy of financial records and the efficiency of operations, examining records of various departments to ensure recording of transactions and compliance with regulations and quality control standards, and analyzing data for evidence of deficiencies in controls, duplication of effort, fraud or lack of compliance with management policies or applicable laws, does not require experience in microelectronics manufacturing to ensure their satisfactory performance.

The minimum requirements for the job must be those listed on the ETA 750A in order that the CO can challenge them as unduly restrictive, if necessary. *Lakeview Food Store*, 1992-INA-258 (Dec. 22, 1993). The CO was not able to determine if the requirement of experience in the microelectronics manufacturing field was unduly restrictive because it was not listed as a requirement on the ETA 750A. (AF 19).

Employer attempted to argue that by virtue of the fact that Employer is a microelectronics manufacturing firm, the requirement of experience in this field was inherent. This was not clear from the ETA 750A. The position was described as “auditor, internal” and the job duties were those associated with experience in the financial and accounting field, not the microelectronics field. (AF 19). The worker needed to possess experience in the field of auditing. If Employer required more specific experience, it should have been noted in order that the CO could challenge the requirement, if necessary. Employer failed to do so and as such, U.S. applicants Figueroa and Ingram met the minimum requirements for the position.

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 he is 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*).

In this case, applicant Figueroa was rejected because he had no experience in the electronics manufacturing industry and no experience in ISO 9001 certification. Employer does not contest that Figueroa met the educational requirements. Indeed, Figueroa had an M.B.A. and a B.B.A. in accounting. He had experience as a controller, auditor, internal audit supervisor and internal audit manager for employers such as Dole Food Company, Petroterminal De Panama, S.A., Exxon Corporation and Empresas Serralles, Inc. (AF 26-27). From his resume, Figueroa appears to have more than met the stated minimum requirements of the position at issue herein. Applicant Ingram also met the minimum stated requirements, as he had nearly twenty years experience as an auditor. (AF 28).

Employer's claim that the applicants needed to know how to do an ISO 9001 audit is an unstated requirement and as such, an unlawful reason to reject any applicant. While Employer claims that this requirement is inherent in the position, there is no evidence of this fact. It was not listed on the ETA 750A or in the job advertisement. (AF 19, 37-39).

There is no evidence that applicants Figueroa and Ingram could not perform the duties of the job with at least average facility, as their resumes indicate that either applicant could perform the core duties of the job, those described in the ETA 750A. *See* 20 C.F.R. § 656.24(b)(2)(ii). Accordingly, the rejection of these applicants for these reasons was unlawful and labor certification was properly denied.

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.