

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date issued: April 23, 2003

BALCA Case No.: 2002-INA-145
ETA Case No.: P1997-CA-09058998/ML

In the Matter of:

SWEDA CORPORATION,
Employer,

on behalf of

VILMA O. SEE,
Alien.

Appearance: David M. Sturman, Esquire
Encino, California

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONI
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of accountant.¹ The CO denied the application and the employer requested review pursuant to 20 C.F.R. §656.26.

¹ Permanent alien labor certification is governed by Section 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 February 1, 1995, Sweda Corporation ("Employer") filed an application for labor certification to enable Vilma O. See ("Alien") to fill the position of "Accountant." (AF 38). A Bachelor's degree in accounting was required, as were six months of experience in the job offered or a related occupation, and the "Other Special Requirement," that the experience include (1) contract administration and verification; (2) product pricing/purchasing; (3) accounts receivable/payable; and (4) internal auditing.

The CO issued a Notice of Findings ("NOF") on May 12, 1998, proposing to deny certification on the ground that Employer had failed to show that the job requirements as described represented the actual minimum requirements for the job, inasmuch as the Alien was hired having only had experience as an accounting clerk prior to hire and lacking the six months of experience required of U.S. applicants. (AF 34). Employer was advised it (1) could remove the restrictive requirements; (2) show why it was not feasible to hire anyone with less than these requirements or (3) show that the Alien obtained the required experience or training elsewhere. Employer was advised that following receipt of the rebuttal, the reasons for rejection of any U.S. applicants would be reassessed. If Employer intended to retain the restrictive requirements, it was advised that it had to provide substantial documentation that it was not now feasible to hire anyone with less than these requirements or that the occupation in which the Alien was hired was dissimilar from the occupation for which Employer was seeking labor certification. In order to show that the Alien had the required background prior to hire, Employer was directed to submit an amendment to the ETA 750B signed by the Alien showing background in the items at issue.

Citing 20 C.F.R. §656.24(b)(2)(ii), the CO also determined that there were seven U.S. workers who, based on their resumes or applications, had a combination of education, training and/or experience which enabled them to perform the usual requirements of the occupation, and therefore, were considered to be able and qualified for the position. The CO found that the academic training

of these applicants was equivalent to the experience had by the Alien as an accounting clerk, and that Employer had failed to detail how these applicants did not qualify. Employer was directed to provide rebuttal evidence which established with specificity why each U.S. worker was rejected for job-related reasons.

Counsel for Employer and Employer's general manager submitted rebuttal on June 16, 1998. (AF 26). Therein, Employer contended that it was providing documentation that the Alien had the required experience or training prior to hire. On the ground that it had established that the Alien did possess the qualifications at issue prior to hire, the Employer argued that the U.S. applicants at issue were unqualified and/or unavailable. Included with the rebuttal was a letter from the general manager of Office Mate File Systems. (AF 32). Therein, the general manager stated that the Alien was employed by Office Mate File Systems from June 1988 to November 1992 as an accounting clerk. Her duties included the fundamentals of accounting functions, contract administration and verification, product pricing, accounts receivable and payable, internal auditing of material pricing discrepancies, inventory control, semi-monthly payroll and computer equipment familiarity. An amendment to ETA750B, Item 15, signed by the Alien, was also submitted. (AF 113). It provided the same job description as set forth by her former employer.

A Final Determination was issued by the CO on January 6, 1999, denying certification. (AF 24). The CO found that the letter from the Alien's prior employer was not convincing evidence that the Alien had the Special Requirement experience required of U.S. workers when she was hired. According to the CO, that letter indicated that the extent of the Alien's contract administration experience was "checking documents," the extent of her product pricing experience as "research...relied upon by management to...set prices," the extent of her accounts receivable/payable experience was "updating monthly," and the extent of her internal auditing experience was "verification of documents." The CO found that Employer had failed to offer its actual minimum requirements in violation of 20 C.F.R. Part 656, and concluded that Employer had rejected seven U.S. applicants each of whom appeared to meet the requirements usual for the occupation. While Employer contended that these applicants did not meet the Special Requirements, the CO found that

those requirements were non-compliant.

Employer filed an appeal of the Final Determination on January 26, 1999, requesting that the CO reconsider the denial, further requesting that if the CO denied reconsideration, that it be forwarded as an appeal to the Board of Alien Labor Certification Appeals (“BALCA” or “Board”). (AF 4, 6). The CO responded on April 12, 1999, stating that Employer’s Request for Reconsideration was being denied, and that the application was being forwarded to the Board. (AF 5).

DISCUSSION

Counsel for Employer submitted a letter dated April 2, 2002, attaching the appeal originally submitted on January 26, 1999. Employer contends that the Final Determination “misquotes, mischaracterizes and trivializes the duties” set forth in the Alien’s amended ETA750B, and as confirmed by her prior employer. Employer argues that the Alien’s experience exceeded the minimum requirements prior to her employment with Employer.

In her original ETA750B, the Alien listed employment as an accounting clerk with Office Mate File Systems from 1988 to 1992, working 20 hours per week. The description of the work was as follows:

Provided standard accounting functions including contract administration and verification, product pricing and purchasing, accounts receivable and payable, internal auditing, cash control, data entry, payroll and inventory control.

In her amendment to ETA750 B, the Alien provided a more detailed description, which description included the Special Requirements listed by Employer. (AF 112). The Alien’s prior employer also provided a description of her job duties, indicating that the Alien performed duties for it which included the Special Requirements listed in the instant application.

While an accounting clerk -- the Alien's position with her prior employer -- is not the equivalent to an accountant, Employer has provided documentation that her position included the requisite experience in the job duties at issue herein. There has been no allegation that the Alien lacks the education required by Employer. Therefore, based upon the fact that the ETA750 required six months of experience in accounting or a related accounting occupation, and the documentation provided in response to the NOF establishes same in the manner directed by the CO in the NOF, the Employer has established that the Alien meets the fundamental education and experience requirements being requested. In so doing, Employer has rebutted the NOF finding that it failed to offer the job at its actual minimum requirements. 20 C.F.R. § 656.21(b)(5).

The issue, then, is whether the Employer has rebutted the second finding made in the NOF, that it failed to establish that seven U.S. workers were rejected for lawful job-related reasons. In the NOF, the CO had stated that following receipt of rebuttal, the reasons for the rejection of any U.S. applicants would be reassessed. In the Final Determination, the CO continued to find that the seven U.S. applicants at issue showed a combination of education, training and experience basically qualifying for the position, determining that they were rejected by Employer solely because they did not meet the Special Requirements listed in the ETA 750. The CO then concluded that because the Special Requirements were found to be non-compliant, those seven applicants showed a combination of education, training and experience basically qualifying them for the position and were unlawfully rejected.

What the CO has not addressed, however, is whether these seven applicants showed a combination of education, training and experience basically qualifying them for the position even with the Special Requirements in place. Thus, as the CO pointed out in the NOF, these seven applicants had an average of eleven years of accounting experience each. While the CO notes that the Employer found these applicants did not have the Special Requirements, it does not appear that the CO herself investigated the resumes and other documentation presented, in order to determine whether these applicants did, in fact, have a combination of education, training and experience which would render any one of them basically qualified for the position when considering the Special Requirements as well

as the basic job description. If, in fact, any of the applicants is found by the CO to have been qualified, when taking into consideration the Special Requirements, then the CO must determine whether good faith recruitment occurred. If this results in additional questions, then a Supplemental NOF may then be necessary in order to afford the Employer the opportunity to respond to same.

This Board has the authority to remand matters to the CO for further consideration, fact-finding and determination. *See Le Tourneau College*, 1989-INA-276 (June 1, 1990). Where the CO's ground for denial is without merit and the record contains no other evidence to sustain the finding, the CO may be reversed and certification granted. *See Altobeli's Fine Italian Cuisine*, 1990-INA-130 (Oct. 16, 1991). A remand is appropriate, however, where the CO based the denial of certification on an erroneous ground but the record contains other evidence that could support the finding. *See Patisserie Suisse, Inc.*, 1990-INA-131 (Oct. 16, 1991). Such is the case here. Employer submitted the rebuttal requested of it with regard to the first finding made in the NOF, regarding the Special Requirements and the Alien's apparent lack of same at the time of hire. The issue of whether the seven U.S. applicants were lawfully rejected, however, is one which has not yet been fully explored, and which needs to be addressed in order to determine whether certification should be granted or denied. Accordingly, the following Order will issue.

ORDER

The Certifying Officer's Final Determination denying labor certification is **VACATED**, and this matter is **REMANDED** to the Certifying Officer further consideration.

For the panel:

JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review 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 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.