

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 March 2004

BALCA Case No.: 2002 – INA - 158
ETA Case No.: P2000-CA-09482432/AT

In the Matter of:

FLAVURENCE CORP.,
Employer,

on behalf of

JESUS LINARES,
Alien

Appearance: Gloria Suazo, Esquire
Los Angeles, 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 arose from an application for labor certification on behalf of Jesus Linares (“the Alien”) filed by Flavurence Corp. (“Employer”) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(“the Act”), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer (“CO”) denied the application and 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. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 3, 1997, Employer filed an application for labor certification on behalf of the Alien for the position of Quality and Flavor Coordinator, classified as Supervisor, General. The job duties for the position included responsibility for production scheduling, inventory, quality control, and ingredient specification. There was no education requirement; the experience requirement was three years experience in the occupation or three years experience in the related occupation of Quality and Flavor Coordinator. (AF 888).

On October 1, 2001, the CO issued a Notice of Findings (“NOF”) indicating his intent to deny labor certification based on Employer’s rejection of thirty-two qualified U.S. applicants. Citing 20 C.F.R. § 656.21(b)(6), the CO found that Employer had failed to document lawful, job-related reasons for rejecting the thirty-two applicants. (AF 494A-495). The CO noted that based on their resumes, these applicants appeared qualified, willing and available for the job offered. *See* 20 C.F.R. § 656.24(b)(2). The CO stated that handwritten notes indicating why the applicants were rejected were difficult to read and did not support a finding of a lawful rejection. The CO instructed Employer to document lawful, job-related reasons for the rejection of the U.S. applicants. (AF 494A-495).

On December 3, 2001 and December 27, 2001, in response to Employer’s deficient rebuttals, the CO issued two Supplemental Notices of Findings (“SNOF”). (AF 17-23). The CO found that the U.S. workers were rejected because of undisclosed requirements: specifically their failure to correctly answer some of the company’s test questions. Although Employer attempted to justify the imposition of a test requirement by arguing that it evaluated all applicants using this test, the CO found that because the U.S. applicants were not put on notice of the test by either the ETA 750A or Employer’s newspaper ads or job posting notice, Employer’s determination that the applicants were unqualified based on this test was not justified.

To rebut the finding of unlawful rejection, the CO instructed Employer to submit documentation clearly showing that U.S. workers were not qualified based on their failure to possess the requirements set forth on the ETA 750A. Employer filed timely rebuttals, arguing that it had documented lawful, job-related reasons for rejection of U.S. applicants.

On February 11, 2002, the CO issued a Final Determination (“FD”) denying certification. The CO found that the test was not a disclosed requirement on either the ETA 750A or the job advertisement. As such, using poor performance on the test as a reason for rejecting an otherwise qualified U.S. applicant was not valid. (AF 459A-D). The CO stated that it appeared as if these requirements were imposed during the recruitment process and not made known to applicants prior to recruitment. (AF 459B). The CO took issue with the facts that Employer (1) administered a test, (2) presented the applicants’ responses in a subjective manner, (3) failed to demonstrate how the applicants’ responses compared to the Alien’s responses, (4) failed to show whether the test was even administered to the Alien, and (5) failed to show how Employer’s grading system works, as well as the uncertainty as to whether applicants would have been willing to proceed with the recruitment process if they had known in advance that such a test would have been administered, support a denial of certification. (AF 459B-C).¹

Employer requested review of the FD on February 26, 2002. (AF 1-459). The request for review reiterated Employer’s arguments in rebuttal and additionally argued that Employer’s required test did not need to be listed on the ETA 750A because the form includes “job requirements,” not “interview requirements.” Id. The matter was docketed in this Office on April 19, 2002 and subsequently, Employer filed a brief in support of its position.

¹ The CO referred specifically to the fact that in evaluating the U.S. applicant answers, Employer recorded “partially correct” answers in addition to correct and incorrect answers. Employer, in doing so, provided no explanation of how partially correct answers were factored in with each applicants’ overall score, or how these answers were objectively evaluated in comparison to other applicants’ answers. (AF 459B).

DISCUSSION

The issue on appeal is whether Employer documented lawful, job-related reasons for rejecting thirty-two U.S. applicants; specifically, whether the test administered to U.S. applicants was a valid basis on which to reject these applicants. In accordance with 20 C.F.R. § 656.20(c)(8), an employer must document that the job opportunity for which labor certification is sought is clearly open to any qualified U.S. worker. Twenty C.F.R. § 656.21(b)(7) states that if U.S. workers have applied for the job, an employer must document that they were rejected solely for lawful, job-related reasons. An employer that fails to explain or document U.S. applicants' lack of qualifications has therefore failed to document lawful, job-related reasons for their rejection. *Seaboard Farms of Athens, Inc.*, 1990-INA-383 (Dec. 3, 1991); *Tulasi Polavarapu, M.D.*, 1990-INA-333 (Oct. 29, 1991).

If a U.S. applicant meets the minimum requirements as stated on the ETA 750A and in the job advertisement, that applicant is considered qualified for the position. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991). An employer unlawfully rejects a U.S. applicant who meets the requirements stated on the ETA 750A and in the job advertisement. *American Café*, 1990-INA-26 (Jan. 24, 1991). An applicant who meets the minimum stated requirements for the position cannot be rejected for the failure to meet an undisclosed requirement. *Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991) (*en banc*). Rejection of U.S. workers for not meeting unspecified requirements constitutes unlawful rejection of qualified U.S. workers pursuant to 20 C.F.R. § 656.21(b)(7). *Photo Network*, 1989-INA-168 (Feb. 7, 1990); *Musicrafts International*, 1988-INA-461 (Jan. 10, 1990).

In this case, the CO determined, based on the applicants' resumes, that they met the stated minimum requirements for the position. However, the applicants were rejected based on their poor performance on a test administered by Employer. As the CO noted in the NOF and FD, this test was not listed on the ETA 750A or in the job advertisement. Employer's use of this test as a reason for rejection of otherwise qualified U.S. applicants was a means to discriminate against U.S. applicants in favor of the Alien. *See, e.g.*,

MITCO, 1990-INA-295 (Sept. 11, 1991). Employer cannot reject U.S. applicants for failure to pass a test that was not disclosed as a requirement for the job. Therefore, rejection of otherwise qualified U.S. applicants on this basis was unlawful.

In view of the foregoing, we find that 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.