



Issue Date: 11 September 2003

BALCA Case No.: 2002-INA-99
ETA Case No.: P2000-TX-06317200

In the Matter of:

CUSTOM PRECISION SHEET METAL,
Employer

on behalf of

JUAN JESUS RANGEL,
Alien.

Certifying Officer: John W. Bartlett
Houston, Texas

Appearances: Iris Juarbe, Esquire
Houston, Texas

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a precision parts fabrication company for the position of Machinist. (AF 137-138).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 section 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 December 18, 1997, Employer, Custom Precision Sheet Metal Inc., filed an application for alien employment certification on behalf of the Alien, Juan Jesus Rangel, to fill the position of Machinist. The job to be performed was described as follows:

1. Operate vertical mills and engine lathes.
2. Fabricate parts and components (i.e. plastics, stainless steel, aluminum, and cold finished steel) Based on specifications from customers, and
3. Maintain tolerances within +/-001 thousandths of an inch.

Minimum requirements for the position were listed as four years experience in the job offered and three years experience in the related occupation of machinist. Other Special Requirements were listed as ability to maintain tolerances within +/-001 thousandths of an inch, possible frequent overtime and having the required amount of tools. (AF 137). The position was advertised at Employer's place of employment and in the newspaper as requiring four years experience in the job offered **and** three years of machinist experience as a related occupation. (AF 128, 151).

Employer was notified by the local job service office on July 14, 1999 that its combination of education/training/experience was determined to be excessive for the position offered. (AF 141-143). Employer elected to advertise for the position without amending its requirements. Employer received nineteen applicant referrals in response to its recruitment efforts, all of who were rejected for the position. (AF 122-124, 47-51).

A Notice of Findings (NOF) was issued by the CO on June 29, 2001, proposing to deny labor certification based upon a finding that Employer's job requirement of four years experience in the job offered **and** three years experience in the related occupation of machinist was unduly restrictive, and thus in violation of 20 C.F.R. § 656.21(b)(i)(A), in that it is not normally required for the successful performance of the job in the United States. Employer was instructed to rebut the findings either by deleting the restrictive

requirement and retesting the labor market; by documenting that the requirement is a common one for the occupation in the United States; or by justifying the restrictive requirement on the basis of “business necessity.” (AF 40-43).

In Rebuttal, Employer attempted to document business necessity for its experience requirement, stating that it is a small business and due to its size, does not have the personnel to teach or assist a machinist effectively. (AF 337-38).

A Final Determination denying labor certification was issued by the CO on August 24, 2001, based upon a finding that Employer had failed to provide adequate documentation justifying its excessive requirement as based on business necessity. (AF 35-36).

Employer filed a Request for Review by letter dated September 20, 2001. (AF 5-34).

DISCUSSION

Federal regulations at 20 C.F.R. 656.21(b)(2), require an employer to document that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the successful performance of the job in the United States. Abnormal requirements would preclude the referral of otherwise qualified U.S. workers. One of the measures by which a job requirement is tested to determine whether it is unduly restrictive is inclusion of the requirement in the definition of the job in the *Dictionary of Occupational Titles* (DOT). To determine whether a particular job requirement falls within the applicable DOT code, the CO must determine the job title which best describes the job and determine whether the job requirements specified by the employer fall within those defined in the DOT. *LDS Hospital*, 87-INA-558 (Apr. 11, 1989)(*en banc*). Where the employer cannot document that the job requirement is normal for the occupation or that it is included in the DOT, Employer must establish business necessity for the requirement. 20 C.F.R. 656.21(b)(2).

Pursuant to the Board of Alien Labor Certification Appeals' holding in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*), in order to establish "business necessity" an employer must show that the requirement is essential to performing, in a reasonable manner, the job duties as described.

In the instant case, according to the DOT, the Specific Vocational Preparation (SVP) for the occupational title of Machinist is "over two years up to and including four years." (AF 41). In the NOF, the CO observed that Employer's experience requirement exceeded the prescribed standard, and thus, instructed that Employer either eliminate the restrictive requirements or provide documentation to support a finding of business necessity. In rebuttal, Employer alleged business necessity for the excessive requirements. However, Employer proffered no documentation of business necessity other than to say it was small in size. Employer submitted no documentation whatsoever to show why seven years experience, as opposed to the normal two to four years, was essential to perform the job in a reasonable manner. *Information Industries supra* .

The burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. 656.2(b). Moreover, as was noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." In this case, Employer advertised the position with an excessive seven years experience requirement and failed to justify its business necessity. On this basis, 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 of Labor 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, 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.