

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 16Apr2002

Case No.: 2002-INA-74

In the Matter of:

FORMOSA PLASTICS CORP.,

Employer,

on behalf of

TING-WU WANG,

Alien

Appearance: William Y. Sim, Esq.

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Ting-Wu Wang ("Alien") filed by Formosa Plastics 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") of the United States Department of Labor denied the application, and the 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 argument of the parties.

STATEMENT OF THE CASE

On July 13, 1995, Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Polymer Engineer. Minimum requirements for the position were listed as a Master's Degree in Chemistry or Polymer science. Alternatively, the Employer was willing to consider a candidate with a Bachelor of Science degree in either field, and two years experience on the

job. The Employer also required that the candidate be “knowledgeable in Polymer Technology, Physical Properties of Polymer, and Polymer Structure & Characterization (2 hrs. of course work or 1 yr. hands on experience in each area).” (AF 162) The job to be performed was described as follows:

Duties include synthesizing polymer in laboratory scale reactor and study catalyst reactivity and kinetics. Analysis of polymer using Differential Scanning Calorimetry. Fourier Transfer Infrared, Nuclear Magnetic Resonance Spectroscopy, High Performance Liquid Chromatography, and Microscopy. Test of Polymer physical properties including: dart impact strength, Charpy impact strength, Izod impact strength, Hardness, flexural Modulus, etc. Analyzing polymer rheology using capillary rheometer, cone and plate rheometer. Setting up polymer processing machine, such as blown film, cast film, and twin extruder, injection and blow molding machine.

(AF 162)

The CO issued a Notice of Findings (NOF) on June 27, 1996, proposing to deny labor certification based on several grounds (AF 67-70). The CO stated that documentation in the file showed that the Alien gained the required course work while attending the University of Akron, working toward a doctoral degree. Although the CO acknowledged that the Employer submitted documentation to support its excessive job requirements, the CO was not persuaded by the documentation. The CO also noted that the Employer had not submitted documentation to show that the specific course work could be gained at other U.S. colleges or universities. The CO concluded that the requirements for the job had been tailored to meet the Alien’s background and qualifications, and were not normal requirements for the occupation in the area of intended employment. Thus, the requirement was unduly restrictive, and violated Section 656.21(b)(2)(i)(a).

The Employer was instructed to provide documentation establishing that these were normal requirements for the occupation in the area of intended employment. Specifically, the Employer was instructed to present affidavits from at least three U.S. colleges and universities, other than the University of Akron, which offer Master’s degree plans in Chemistry, and have the specific course work listed by the Employer on the ETA 750. The Employer was also instructed to present documentation, including statements from disassociated professionals in the field of chemistry, who were familiar with similar jobs in the field with the same or similar requirements for similar positions. Finally, the Employer was requested to provide position descriptions of the same or similar jobs within the Employer’s organization with the same job requirements.

In Rebuttal, the Employer submitted letters from Katsumi Kumahara, the General Manager, Technologies of Chisso America, Inc., and Andy Yang, the Technical Manager of AMTOPP Corporation, affirming that the job duties and special requirements were appropriate. In addition, the Employer submitted university graduate catalogs and bulletins from the University of Massachusetts, the University of Tennessee, Lehigh University, Texas A & M University, University of Missouri-Rolla, and

Southwest Texas State University. The Employer also noted that candidates could either possess the specific course work in each area, or have one year of hands on experience in each area. The Employer stated that there were no position descriptions of the same or similar job within the Employer's organization, with the same job requirements as in the application.

In his letter, Mr. Kumahara set out his experience and qualifications, and stated that he was familiar with the Employer's plant, and had carefully read the advertisement. In his opinion, the two hours of course work, or alternatively one year of hands on experience, in the areas of polymer technology, physical properties of polymer, and polymer structure and characterization would be the minimum requirements for the worker to competently carry out the described duties. (AF 60)

In his letter, Mr. Yang stated that his work was in a "similar area" as that done by the Alien, and that he was familiar with the Alien's work for the Employer. Mr. Yang stated that he had read the advertisement for the position, and that anyone who filled it would need to have expertise in the area of polymer technology, physical properties of polymer, and polymer structure and characterization. He stated that, in his professional opinion, course work or one year experience in these areas would be a minimum requirement for the polymer engineer to perform the described duties satisfactorily. (AF 63)

On August 28, 1996, the CO issued her Final Determination (FD) denying certification. The CO noted that the NOF required the Employer to present degree plans from three U.S. colleges or universities which had the same specific course titles in similar degree plans. The CO stated that although the degree plans submitted by the Employer offered similar courses in polymer chemistry, the specific course title listed in Item 15 of the ETA 750 was not available at any university other than the University of Akron. Accordingly, the CO concluded that the job requirements were tailor made to fit the background and qualifications of the Alien.

The CO also noted that the Employer stated that there were no position descriptions of the same or similar jobs within the Employer's organization with the same requirements, and concluded that the Employer imposed unduly restrictive job requirements. The CO stated:

The employer has not been successful in establishing that the specific course work listed on the ETA 750, Part A is based on a business necessity, is not unduly restrictive, and is normal to similar jobs in the United States.

(AF 25-27)

On September 30, 1996, the Employer submitted a Motion for Reconsideration, or in the alternative, review by the Board. The Employer argued that it had provided a written statement which was reasonable and specific, and indicated its sources and bases, to establish the business necessity of the requirements. The Employer pointed out that it had provided statements from two qualified experts in the field of polymer engineering attesting to the appropriateness of the job duties for the Employer's

needs, and the minimum requirements for those job duties. The Employer also stressed that it required the applicant to have the necessary knowledge in the **areas** of polymer technology, physical properties of polymer, and polymer structure & characterization. However, the Employer never required that the qualified applicant have taken a course with these specific titles. All the Employer required was that there be an objective qualifiable standard to determine if an applicant qualifies for the position. Thus, the Employer set up two alternative standards. Under the first, an applicant would be qualified if he possessed two hours of course work in each **area**, or if he possessed one year of hands on experience in each **area**. The Employer noted that the “essential and relevant content” of each of these courses was available at the universities cited in the Rebuttal. The Employer stated:

Please note that we have never required, that we are not requiring, and that the advertisement on its face does not require, that the qualified applicant possess the specific course titles as listed in Item 15 of the ETA 750, Part A.

The Employer stressed that no requirement of specific course titles was ever made, but that the required knowledge in the areas of polymer technology, physical properties of polymer, and polymer structure and characterization could be acquired either through job experience or education.

The Employer also submitted letters from two professionals interpreting the use of the word “area” in the Employer’s advertisement, and concluding that it was a broadening, rather than a limiting term.

On November 21, 1996, the CO denied the Request for Reconsideration, stating that motions for reconsideration would be entertained only with respect to issues which could not have been addressed in the rebuttal, citing to *Harry Tancredi*, 1988-INA-441. (AF 1).

The Appeal File was transmitted to the Board on January 23, 2002. The file does not contain any explanation for the fact that it took over five years to forward this file to the Board. The matter was docketed in this office on January 28, 2002.

DISCUSSION

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because they may have a chilling effect on the number of U.S. workers who apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 1987-INA-569 (Jan. 13, 1989)(*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for the job in the United States. *Ivy Cheng*, 1993-INA-106 (June 28, 1994); *Lebanese Arak Corp.*, 1987-INA-683 (Apr. 24, 1989)(*en banc*).

In *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*), the Board defined the standard for establishing business necessity as requiring that the Employer show: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) that the requirement is essential to performing in a reasonable manner the job duties as described by the employer. The first prong establishes a link between the job requirements and the employer's business, and the second prong ensures that the job requirement is related to the job duties which the employee must perform.

Here, the Employer argued that the requirement of education, or alternatively, on the job training, in the areas of polymer technology, physical properties of polymer, and polymer structure and characterization, arise from business necessity. The Employer explained in detail how these qualifications are necessary for the position of polymer engineer, and offered opinions from eminently qualified professionals that these requirements are standard for this position.

The CO summarily dismissed the evidence provided by the Employer in rebuttal, finding that the requirements had been tailored to the qualifications of the Alien. According to the CO, these requirements were restrictive because no other college or university, other than the one that the Alien attended, offered courses with the specific titles listed in the ETA 750. However, the CO ignored the plain language in the ETA 750, as well as the Employer's arguments in rebuttal, that the Employer was looking for applicants with either education or experience in the **areas** listed. Indeed, it seems unlikely that any college or university would offer courses with the exact title as set out in the Employer's ETA 750. But the job requirements listed in the ETA 750 clearly convey that the Employer is interested in applicants who have obtained, either through education or on the job training, knowledge in the **areas** of polymer technology, physical properties of polymer, and polymer structure and characterization. The Employer supplied course descriptions from six universities, in addition to the University of Akron, reflecting that they offered courses that were not titled exactly as listed in the ETA 750, but that offered the substance of the requirements of the Employer.

We find that the CO's extremely narrow interpretation of the Employer's requirements was incorrect, and that the CO ignored the plain meaning of the requirements as listed by the Employer.¹

We agree with the Employer that the requirements of education, or in the alternative, on the job training in the areas of polymer technology, physical properties of polymer, and polymer structure and characterization are not unduly restrictive requirements. These were not requirements that were tailored to the Alien; they were clearly stated in the job advertisement, and were an objective method designed to ascertain whether the applicants could perform the stated job duties, which the CO never challenged.

¹ The Board does not consider the evidence offered by the Employer in its motion for reconsideration, interpreting the meaning of the word "area." In any event, the assistance of linguistic experts is not necessary to determine the plain meaning of the language in the Employer's ETA 750.

In her NOF, the CO indicated that she was reserving judgment as to the validity of the Employer's rejection of the seven applicants referred by the Texas Workforce Commission. The CO raised no issues in the NOF as to whether the Employer engaged in good faith recruiting efforts, nor did the CO raise such issues in the FD as a grounds for denial. Thus, we do not consider this issue on appeal. Nor will we remand this matter for further consideration by the CO, as the CO did not offer any reason for "reserving judgment" on this issue, or give the Employer the opportunity to address it in rebuttal.

Accordingly, the CO's Final Determination is reversed.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and labor certification is **GRANTED**.

SO ORDERED.

For the panel:

A
LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF OPPORTUNITY TO 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. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five

double-spaced pages. Upon the granting of a petition the Board may order briefs.