

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 09 July 2003

BALCA Case No.: 2002-INA 112
ETA Case No.: P1998-CA-09433823

In the Matter of:

DIAMOND TEAM INTERNATIONAL, INC.,
Employer,

on behalf of

SHIYAO YU,
Alien.

Appearance: Henry G. Chow, Esq.
San Francisco, California

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. 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 purchase price analyst.¹ The CO denied the application and the employer requested review pursuant

¹ Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8

to 20 C.F.R. §656.26.

STATEMENT OF THE CASE

On August 22, 1997, Diamond Team International, Inc. ("Employer") filed an application for labor certification to enable Shiyao Yu ("Alien"), to fill the position of Purchase Price Analyst. (AF 61). A Bachelor's Degree in business administration and two years of experience in the job offered were required. The position was described as follows:

Responsible for analysis of statistical data to conduct manufacturing cost analysis and determine purchase and manufacturing feasibility and price for contract transaction.
Prepare reports of findings for management review.

On July 22, 1997, the Employer submitted a letter to the California Employment Development Department ("EDD") detailing its recruitment efforts. (AF 137). Therein, it detailed the contacts had with several U.S. applicants, including Zahn, Cailteaux, and Welzien. Specifically, Zahn was interviewed and found not to have the required Bachelor's Degree or the experience required. Cailteaux was interviewed and found not to have experience in purchase-price analysis. He was also seeking a higher annual salary than that being offered. Welzien did not have a Bachelor's Degree or experience in the job offered. By letter dated March 26, 1999 to the EDD, Employer detailed its contact with two other U.S. applicants, Frerich and Soe-Len. Frerich had a Bachelor's Degree in business administration/marketing and several years of experience as a pricing analyst. (AF 103-104). Soe-Len's resume revealed experience as a pricing analyst and a Bachelor's Degree in managerial economics. (AF 82). Employer stated that Soe-Len was interviewed and found

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).

not to have a Bachelor's degree in business administration or any experience in purchasing and price analysis. Frerich was contacted on March 16, 1999, and indicated that he had already found a job and was not interested in the position.

In a Notice of Findings ("NOF") dated August 17, 2001, the CO proposed to deny certification because (1) it appeared that the Alien exercised a considerable degree of control over the operations of the company, and therefore, it was doubtful that an actual employer-employee relationship actually existed;² and (2) it appeared that U.S. workers were rejected for other than valid, job-related reasons. The CO found that Soe-Len, Zahn and Weltzen³ appeared to have degrees related to Business Administration and work experience touching on the major points of the job at issue, even if they were not employed in the exact job title given in the application. The CO further noted, with regard to U.S. workers Frerich and Cailteaux, that their names were provided to the Employer on March 9, 1999, and there was insufficient evidence that these two applicants were contacted in a timely manner. Employer was advised that rebuttal needed to explain, with specificity, the lawful, job-related reasons for not hiring Soe-Len, Zahn and Weltzen. Rebuttal also needed to establish proof of timely efforts to contact Frerich and Cailteaux, such efforts to include both attempts in writing (supported by dated return receipts) and by telephone (supported by telephone bills).

Employer submitted rebuttal on August 27, 2001. (AF 17). Therein, Employer contended that Zahn, Weltzen and Cailteaux were not on the applicant referral list. With regard to Soe-Len, Employer contended that her degree was in agricultural and management economics, and she did not have the experience required, and therefore she was not considered. Employer stated that it received the name of U.S. worker Frerich on March 12, 1999, and made numerous efforts to telephone Frerich. After finally interviewing Frerich on March 25, 1999, Employer ascertained that he did not have purchasing experience and he was not interested in the job offer. Employer included telephone

²As this finding was successfully rebutted by the Employer, it will not be detailed herein.

³The CO appears to have made a typographical error, the applicant's name being Welzien, not Weltzen.

bills verifying attempts to contact this applicant.

A Final Determination was issued on October 31, 2001. (AF 15). Therein, the CO denied certification, finding that while Employer claimed not to have received the names of Zahn, Welzien and Cailteaux, Employer mentioned these applicants in its July 22, 1997 recruitment letter. The CO also found that Employer failed to provide a valid, job-related reason for rejecting Soe-Len, or to document that it had made a good-faith effort to recruit Frerich, given that Employer's rebuttal asserting that Frerich was interviewed on March 25th, contradicted its recruitment report assertion that the applicant was telephoned on March 16th, and that he had already found a job.

By letter dated November 19, 2001, Employer filed a request for review of the denial of labor certification by the Board of Alien Labor Certification Appeal ("BALCA" or "Board"). (AF 1).

DISCUSSION

With its request for review, Employer provided what it termed "the supplement to the rebuttal submitted" earlier. Employer has also submitted a Statement of Position, wherein it provides new facts to rebut the issues raised in the NOF, and provides documentation not submitted to the CO. Section 656.26(b)(4) provides that the request for administrative-judicial review "shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." This Board is strictly an appellate body; our decision must be based only on the record on which the CO reached a decision, and on arguments submitted in any brief or position statement by the parties. Evidence first submitted before the Board may not be considered. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Therefore, the additional evidence submitted by Employer after the Final Determination was issued shall not be considered herein.

Employer was clearly advised in the NOF of the need to document its efforts to contact the U.S. applicants. Employer's rebuttal failed to provide that documentation, and with regard to

applicants Zahn, Welzien and Cailteaux, claimed never to have received their applications, an assertion it belatedly retracts after the issuance of the Final Determination.

An applicant is considered qualified for the job at issue where he or she meets the minimum requirements specified by an employer's application for labor certification. *The Worcester Co., Inc.*, 1993-INA-270 (Dec. 2, 1994). Furthermore, where an applicant's resume shows a broad range of experience, education and training that raises a reasonable possibility that the applicant is qualified, even if it does not state that he or she meets all requirements, an employer should further investigate the applicant's credentials by interview or otherwise. *Dearborn Pub. Sch.*, 1991-INA-222 (Dec. 7, 1993). The U.S. applicants at issue herein appeared to meet the minimum requirements specified in the application for labor certification.

The regulation at 20 C.F.R. §656.21(b)(6) requires that if U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons. Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). Actions which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications are a basis for denying certification.

In the instant case, Employer was requested to document its good faith efforts to recruit these U.S. workers and failed to do so. An employer must provide directly relevant and reasonable documentation sought by the CO. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). Failure to do so warrants denial of labor certification. *Rouber International*, 1991-INA-44 (March 31, 1994). As Employer failed to produce the requested information, which was critical to establishing good faith recruitment, certification was properly denied. Accordingly, the following Order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

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.

