

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: 20 August 2003

BALCA Case No.: 2003-INA-133
ETA Case No.: P2002-PA-03377749

In the Matter of:

JP PRODUCTS,
Employer,

on behalf of

MAGNO DA SILVA GOMES,
Alien.

Appearance: David E. Piver
for Employer and Alien
Wayne, Pennsylvania

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. JP Products (“Employer”) has filed an application for labor certification on behalf of Magno da Silva-Gomes (“Alien”).¹ Employer sought to employ Alien to fill the position of Quality

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 records upon which the CO denied certification and Employer’s request for review, as contained in the respective appeal files and any written arguments. 20 C.F.R. § 656.27(c).

Assurance Supervisor. (AF 11). Two years of experience in the job offered or two years of experience as an Auto Mechanic was required. The job duties were described as follows:

Supervise and coordinate activities in inspecting and testing assembly of motor vehicles components and parts as parts proceed through stages of assembly process, applying knowledge of auto mechanics, quality assurance standards and procedures. Review quality assurance instructions, assembly specifications, and production schedules to determine method of conducting auto parts inspections and tests, and work assignments. Direct quality assurance inspection and testing. Review, report, and confer with quality assurance, production, management, and engineering personnel to solve work-related problems.

(AF 46).

The CO issued a Notice of Findings (“NOF”) on July 11, 2002 proposing to deny certification on the grounds that the Alien does not meet either the experience requirement in the job offered or, alternatively, as an Auto Mechanic. (AF 34-36). Specifically, the CO noted that the stated experience requirements as a quality assurance supervisor appeared to be specialized in the area of motor vehicle components and parts, since U.S. applicant Galloway possessed the stated requirements and was rejected. Additionally, the CO questioned how the Alien, at age 17, without any apparent training and/or prior experience, was able to perform the duties of an auto mechanic as listed on the ETA-750 B, including training other workers and using welding and grinding equipment. (AF 36). The CO directed Employer to either delete the requirements by amending the application for certification or by submitting evidence that clearly shows that the Alien, at the time of hire, had the qualifications now required.

Employer submitted its timely rebuttal on August 15, 2002. Employer’s rebuttal evidence included affidavits from the Alien and the Alien’s father (Alien’s previous employer). (AF 29-33). These stated that the Alien comes from a family of auto mechanics and that he began learning the skills

of an auto mechanic when he was a boy. (AF 32-33). In a Final Determination, dated September 21, 2002, the CO denied certification on the grounds that Employer's rebuttal was not credible. (AF 26-28). The CO did not question Employer's rebuttal that the Alien comes from a family of auto mechanics and received auto-mechanic training, but nonetheless concluded that it was not credible that at the age of 17, the Alien, without any prior education, training, and/or experience would have been able to perform the job duties listed on the ETA-750. (AF 27). The CO found it particularly unreasonable to believe that the Alien was coordinating the activities of automobile mechanics at age 17.

DISCUSSION

Under section 656.21(b)(6), the employer must document that the requirements for the job opportunity represent the actual minimum requirements, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by employer's job offer. The Board has consistently held that where an employer hires an alien with less training or experience than that required for the job opportunity and fails to offer the same opportunity to U.S. workers, such disparate treatment violates section 656.21(b)(6). *Brent-Wood Products, Inc.*, 1988-INA-259 (Feb. 28, 1989) (*en banc*); *Mario Kopeiken*, 1988-INA-299 (June 27, 1989).

In this case, Employer's only rebuttal evidence was an affidavit from the Alien and the Alien's father stating that the Alien possessed the requisite qualifications. Employer also asserted that the Alien possessed these qualifications before hire. These affidavits and Employer's assertions, while they must be considered, are unsupported assertions, generally insufficient to carry an employer's burden. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Here, we concur with the CO's observations in the Final Determination explaining why Employer's rebuttal was insufficient:

The alien was born on November 20, 1974. Although the alien came from a family of auto mechanics, it is not reasonable that in January 1992 at the age of 17 the

alien was performing the job duties listed on the ETA 750 B form. The duties are that of a fully qualified mechanic. It is reasonable that the alien at that age was learning the job from his father, brother and Mr. DaSilva. This on-the-job training concept is actually supported by the Occupational Outlook Handbook. However it is not reasonable that the alien was 1) coordinating the activities of automobile mechanics engaged in repairing, adjusting, servicing and storing motor vehicles. It is not reasonable that the alien was training other workers and demonstrating the repair and maintenance of vehicles using handtools, welding and grinding equipment. In all likelihood the alien was the person being trained. In addition, it is not reasonable that the alien at age 17 was evaluating the performance of other workers.

(AF 28). Implicit in the CO's finding is the concern that the alternative experience requirement was tailored to the Alien's background, – and that his background as a trainee is not the type of fully qualified, supervisory mechanic suggested by the application. Simply put, the question is whether Employer included the alternative requirement merely to attempt to qualify the Alien for the job. Accordingly, we affirm the CO's finding that the Employer has not listed its actual minimum requirements in violation of 20 C.F.R. § 656.21(b)(6).

Employer asserts in its appellate brief that "[s]ubmission of affidavits is sufficient to prove the employee-beneficiary meets the requirements for the job" citing *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7 (D.C.C. 1988). The court in that case, which involved revocation of a visa by the INS ruled only that the INS erred when it required proof of contemporaneous evidence and did not consider that plaintiffs presented sufficient evidence in the form of affidavits under 8 C.F.R. § 204.2(i)(1). The court wrote:

The Court's ruling does not, of course, mean that the INS must accept as true or accurate the affidavits presented by the petitioner, nor does it mean that the INS may not consider as evidence the lack of contemporaneous evidence in its determination whether the petitioner has the requisite experience. What the INS cannot do, however,

is deny or revoke a petition because of the fact that contemporaneous evidence has not been presented without making a conclusive determination that the affidavits presented are not accurate or credible or otherwise concluding that the petitioner does not have the requisite experience.

705 F.Supp. at 12.

Needless to say, this is not a revocation hearing and this case is not governed by 8 C.F.R. § 204.2(i)(1). Moreover, the CO did not refuse to consider the affidavits of the Alien and the Alien's father. Indeed, the CO accepted as true that the Alien came from a family of auto mechanics and received training in auto repair. What the CO found to be implausible, however, was the conclusion Employer would like to have drawn based on those circumstances – that the Alien, because of his informal family training, was therefore qualified for the position for which Employer is seeking alien labor certification. In *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), this Board held that "written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a certifying officer must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve." A contention that is inherently implausible may be found not to be credible. See *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) at footnote 21 and surrounding text. It is not inconceivable that a precocious 17 year old might be qualified for the position offered herein – but the Alien and Alien's father's affidavits are also obviously self-serving and they simply do not provide adequate proof to negate the CO's concern that the Employer was willing to accept the Alien with lower qualifications than were being required of U.S. applicants.

Employer's appellate brief also asserts that "absent situations of facially unqualified beneficiaries," the Department of Labor has only the authority to assess "the sufficiency of the test of the labor market and the impact of the beneficiary's certification on similarly employed workers." Employer asserts that " It is then the responsibility of the Attorney General and not the Department of Labor to assess the employee-beneficiary's qualifications and the employer-applicant's ability to pay

the proffered wage." This Board has long held, however, that an employer must establish that the alien possesses the stated minimum requirements for the position. *Charley Brown's*, 1990-INA-345 (Sept. 17, 1991); *Pennsylvania Home Health Services*, 1987-INA-696 (Apr. 7, 1988). Stated another way, an employer may not require more experience of U.S. workers than the alien possesses. *Western Overseas Trade and Development Corp.*, 1987-INA-640 (Jan. 27, 1988). Where the alien does not meet the employer's stated job requirements, certification is properly denied under § 656.21(b)(6). *Marston & Marston, Inc.*, 1990-INA-373 (Jan. 7, 1992). Similarly, a job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary experience prior to being hired by the employer. *Super Seal Manufacturing Co.*, 1988-INA-417 (Apr. 12, 1989) (*en banc*); *Bear Sterns & Co., Inc.*, 1988-INA-427 (July 29, 1989).

ORDER

Accordingly, 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 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.