



Issue Date: 25 February 2004

BALCA Case No.: 2003-INA-4
ETA Case No.: P2000-CA-09508426/JS

In the Matter of:

ALAR STAFFING CORP.,
Employer,

on behalf of

MARIA ELENA HERNANDEZ,
Alien.

Appearances: Mary Elizabeth Orr, Esquire
Orange, 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 arises from an application for alien labor certification filed by Alar Staffing Corp. ("Employer") on behalf of Maria Elena Hernandez ("the Alien") for the position of Employee Relations Specialist.¹ The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

¹ Permanent alien labor certification is governed by § 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 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).

STATEMENT OF THE CASE

On January 31, 2000, Employer filed an application for labor certification on behalf of the Alien to fill the position of Employee Relations Specialist. (AF 40). Eight years of grade school and four years of high school were required. Employer also required a worker bilingual in English and Spanish. No experience or training was required and the job duties included communicating company policy and regulations to workers and acting as a liaison between staff and management.

On July 2, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification pursuant to 20 C.F.R. §§ 656.21(b)(6) and 656.24(b)(2)(ii), inasmuch as U.S. workers appeared to have been rejected for other than lawful, job-related reasons. (AF 35). Specifically, Employer rejected U.S. applicant Cesar Galarza, who was considered qualified because his resume indicated that he was bilingual in Spanish and English. Employer was directed to provide rebuttal which documented that this applicant was rejected solely for lawful, job-related reasons. The CO also found that the foreign language requirement was unduly restrictive, as the occupation was not one which normally required a foreign language. Employer was advised that it needed to establish that the requirement was a business necessity or a customary requirement for such employment in the United States. Alternatively, Employer could delete the requirement and retest the labor market.

Employer submitted rebuttal on August 1, 2002. (AF 8). Employer questioned the CO’s determination that applicant Galarza was considered qualified only because he was bilingual. Employer contended that the ability to speak Spanish was not indicated on his resume but was presumed because of his Hispanic name; however, the applicant did not have any experience as an employee relations specialist. With regard to the language requirement, Employer argued that of its 622 active employees, 356 of them spoke Spanish as a first language with limited or no English. Employer stated that the worker needed to be bilingual to ensure that the employees understood the rules and were able to articulate any concerns or complaints they might have to Employer.

A Final Determination (“FD”) denying certification was issued on August 8, 2002. (AF 6). The CO pointed out that Employer had failed to state in the ETA 750A that any experience was required for the position and it was too late to indicate that there was an experience requirement. The CO also pointed out that Employer was wrong in its assertion that the applicant’s resume did not indicate that he was bilingual. The CO indicated that applicant Galarza was a qualified candidate. Accordingly, the CO concluded that Employer failed to show that Galarza was rejected for a lawful, job-related reason.

On August 19, 2002, Employer requested review and the matter was docketed in this Office on October 8, 2002. (AF 1).

DISCUSSION

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment are grounds for denial of certification. 20 C.F.R. §§ 656.1, 656.2(b).

An employer must only reject qualified U.S. applicants for lawful, job-related reasons. Labor certification is properly denied when an employer unlawfully rejects a U.S. worker who meets the stated minimum requirements for the job. *Banque Francaise Du Commerce Exterieur*, 1993-INA-44 (Dec. 7, 1993). The employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). If the applicant clearly meets the minimum stated qualifications for the job, he or she is considered qualified. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991). If an applicant’s resume indicates he is qualified for the position, the employer must demonstrate by convincing evidence that the applicant is not qualified. *Fritz Garage*, 1988-INA-98 (Aug. 17, 1988) (*en banc*).

Applicant Galarza met the minimum requirements for the position: he had the required level of education and he was bilingual in English and Spanish. (AF 47).² Employer rejected Applicant Galarza based on his lack of experience in the job offered. Experience in the position was an undisclosed requirement, as it was not listed on the ETA 750A or in the job advertisement. (AF 40, 48-50). An employer cannot lawfully reject an applicant who meets the minimum requirements but fails to meet an undisclosed requirement. *Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991) (*en banc*). Employer's rejection of Applicant Galarza on this basis was therefore unlawful.

Employer filed a Statement of Position on November 19, 2002. The Statement of Position offers new argument and evidence. This Board will not consider that material, as our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c); *see also* 20 C.F.R. § 656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992).

Furthermore, even if it could be considered, Employer's submission failed to provide a basis for granting certification. Employer requested that the case be remanded for re-recruitment due to a deficiency in the job advertisement. Employer claimed that the printed advertisement in The Los Angeles Times inadvertently left out the requirement of two years of experience. However, the ETA 750A did not contain this requirement. (AF 40). The advertisement as printed was in conformance with the ETA 750A. As the actual minimum requirements for the position must be those listed on the ETA 750A,³ a deficiency in the advertisement does not change the analysis. Employer advertised the position as described on the ETA 750A and therefore, applicants who met

² Employer argued that the CO determined that Applicant Galarza spoke Spanish because he had a Hispanic surname. However, as noted by the CO, "bilingual Spanish/English" was listed on Applicant Galarza's resume under "qualifications." (AF 47).

³ *See Lakeview Food Stores*, 1991-INA-258 (Dec. 22, 1993).

these qualifications were considered qualified. Labor certification was properly denied based on Employer's failure to provide a lawful, job-related reason for the rejection of qualified U.S. applicant Galarza.

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.