



Issue Date: 16 June 2004

**BALCA Case Nos.: 2003-INA-160, 2003-INA-161, 2003-INA-162, 2003-INA-163,
2003-INA-164, and 2003-INA-165**

ETA Case Nos.: P2001-NV-09508076, P2001-NV-09508077,
P2001-NV-09508075, P2001-NV-09508074,
P2001-NV-09508073, P2001-NV-09508072

In the Matters of:

ALVAREZ, INC.,
Employer,

on behalf of

**LAZARO SARABIA,
JOSE TABARES,
HUGO RIVERA,
ALEJANDRO RIVERA,
LEONARDO HERNANDEZ,
FRANCISCO AGUILA,**
Aliens.

Appearances: Ricardo Marquez, Esquire
Las Vegas, Nevada
For the Employer and the Aliens

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from six applications for labor certification filed on behalf of Lazaro Sarabia, Jose Tabares, Hugo Rivera, Alejandro Rivera, Leonardo Hernandez, and Francisco Aguila (“the Aliens”) by Alvarez Inc. (“the 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 Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) denied the applications 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 arguments of the parties. 20 C.F.R. § 656.27(c).¹ Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

On November 7, 2001, applications for labor certification were filed by the Employer on behalf of the Aliens for the position of Marble Setter. Minimum requirements for the position included completion of the sixth grade and two years of experience in the job offered. Duties of the position included trimming, facing, and cutting marble to specified size, using power sawing, cutting, and facing equipment and handtools. (AF 40).

On November 6, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification on grounds that the Employer unlawfully rejected U.S. workers in contravention of 20 C.F.R. § 656.21(b)(6). (AF 31-33). In particular, the CO noted that four U.S. applicants appeared qualified for the job offered, but there was no indication that three of these applicants were actually contacted for an interview. Moreover, the CO noted that one applicant was rejected because he called to cancel his interview, but the Employer failed to explain why the applicant canceled his appointment and why the interview was not rescheduled. The CO required that the Employer “[s]ubmit rebuttal which documents how each U.S. worker . . . has been rejected solely for lawful, job-related reasons.” (AF 33).

¹ As all of the files contain the same relevant information, page references are to Aguila Francisco’s Appeal File, 2003-INA-165.

The Employer responded with rebuttal dated December 11, 2002. (AF 29-30). In its letter, the Employer assessed the qualifications of the U.S. workers and stated that they did not meet the actual minimum requirements for the job offered based on their resumes. The Employer stated that it required its workers to be “able to install all type(s) of stone to all surfaces of residential areas and industrial areas.” The Employer also asserted that it required “full knowledge of all type(s) of stone to be able to fill this position.” For one of the applicants, the Employer noted that the worker would be required to use “high speeders.”

On December 27, 2002, the CO issued a Final Determination (“FD”) denying certification on grounds that the Employer did not provide evidence that the U.S. applicants were actually contacted. (AF 27-28).

By letter dated January 28, 2003, the Employer requested review of the FD. The Employer submitted certified mail receipts documenting its attempt to contact the four U.S. applicants in January 2003 for scheduled interviews that month. The letter further explained the Employer’s alleged attempts to contact the U.S. workers in June 2001. At that time, letters advising U.S. applicants of scheduled interviews were sent only by regular mail with no follow-up telephone calls. None of the applicants attended the scheduled interviews. Only one applicant called to cancel the interview. The Employer stated that it did not ask the applicant why he canceled the interview, nor did the Employer seek to reschedule it. The Employer believed that the U.S. worker was not interested in the position. The Employer further reiterated that none of the applicants were qualified for the position. (AF 1-26).

The matter was docketed in this Office on April 30, 2003. On appeal, the Employer argues that it was unable to provide evidence that the U.S. applicants were actually contacted in July 2001 because the interview letters were sent only by regular mail. Moreover, the Employer did not attempt to contact the applicants by telephone.

The Employer stated that it “re-contacted the U.S. applicants again and this time (he) did it by certified mail, proof of this (was) included in the request for review of denial.”

DISCUSSION

Initially, it is noted that the CO issued a confusing NOF. The CO found that the Employer violated the regulatory provision at 20 C.F.R. § 656.20(b)(6), which provides that “[i]f U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons.” In the text of the NOF, the CO stated that the applicants were qualified for the job offered and the Employer must submit documentation to establish that the workers were rejected for lawful, job-related reasons. However, the CO also notes that the Employer did not demonstrate good faith efforts to recruit qualified U.S. workers because there was no evidence that the Employer made “actual contact” with the applicants to advise them of the interview dates and times. Unfortunately, the CO never referenced 20 C.F.R. § 656.20(c)(8), which requires that the Employer establish that the job opportunity was “clearly open to any qualified U.S. worker,” nor did the CO explicitly require that the Employer demonstrate good faith efforts to recruit as part of the NOF’s corrective action requirements.

Confusion engendered by the NOF resulted in the Employer submitting rebuttal that only addressed its rejection of the U.S. workers. However, as will be discussed, we find that the Employer’s applications for labor certification cannot be approved and the CO’s error is harmless.

I Unlawful rejection of U.S. workers

First, the Employer argues that the applicants are not qualified for the job offered because, *inter alia*, they must have complete knowledge of all types of stone and be able to install such material in residential and commercial areas. An applicant was also rejected for alleged failure to be able to use “high speeders.” The Employer based its

determinations of the applicants' knowledge, skills, and abilities solely from their resumes.

The actual minimum requirements for the job, as set forth on the ETA 750A, provide that the employee would cut, tool, set, trim, face, repair, and polish marble using a power saw, cutting and facing equipment, and hand tools. The resume of each U.S. worker sufficiently indicates the necessary experience to meet these requirements such that they should have been afforded a proper opportunity for an interview. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*) (where a U.S. applicant appears qualified based on his or her resume, an employer has a duty to investigate further by interviews or otherwise). Moreover, the ETA 750A sets forth no requirement of "complete knowledge of all types of stone," which we find to be a vague requirement at best, and there is no specific mention of "high speeders" such that denial of the U.S. workers on these grounds was improper. *Sarah and Norman Jaffe*, 1994-INA-513 (Oct. 30, 1995) (it is improper to reject a U.S. worker based on a requirement that exceeds the actual minimum requirements for the job offered).

II Lack of good faith recruitment

Turning to the issue of good faith recruitment under 20 C.F.R. § 656.20(c)(8), the Employer noted, by letter dated August 16, 2001, that none of the applicants appeared for his scheduled interview. One applicant called to cancel the interview appointment and the Employer stated that "we believe(d) he was not interested in the position being offered." Although the Employer submitted copies of interview letters allegedly sent to the applicants, there are no certified mail receipts or documentation to indicate that the Employer also attempted contact by telephone. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*). Moreover, the Employer's submission of certified mail receipts to document attempts to contact the U.S. workers *after* issuance of the FD does not cure its initial lack of good faith recruitment efforts and improper rejection of the workers. *Arcadia Enterprises, Inc.*, 1987-INA-692 (Feb. 29, 1988) (an attempt to contact U.S. workers seven months after completion of the recruitment period "does not cure the defect of the initial improper rejection"). Indeed, the provisions at 20 C.F.R. §

656.24(b)(4) preclude consideration of the Employer's evidence submitted on appeal, which includes the January 2003 certified mail receipts, because such evidence was not part of the record "upon which the denial of labor certification was based." *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*).

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.