



**Issue Date: 08 June 2004**

**BALCA Case No.: 2003-INA-89**  
ETA Case No.: P1999-CA-09458948/AT

*In the Matter of:*

**VINTAGE V-12,**  
*Employer,*

*on behalf of*

**JUAN ANTONIO DORADOR,**  
*Alien.*

Appearances: John Lee, Esquire<sup>1</sup>  
Santa Ana, California  
For the 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 labor certification<sup>2</sup> filed by an antique airplane restoration company for the position of Ground Mechanic & Parts Refinisher. (AF 82-83).<sup>3</sup> The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification, together with the Employer’s request for review, as contained in the Appeal File (“AF”) and written arguments of the parties. 20 C.F.R. § 656.27(c).

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<sup>1</sup> Richard Montano, Esquire previously filed a G-28 Notice of Entry; the AF does not reflect that a withdrawal was filed.

<sup>2</sup> 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 20 C.F.R. Part 656.

<sup>3</sup>“AF” is an abbreviation for “Appeal File.”

## **STATEMENT OF THE CASE**

On January 15, 1998, the Employer, Vintage V-12, filed an application for alien employment certification on behalf of the Alien, Juan Antonio Dorador, to fill the position of Ground Mechanic & Parts Refinisher.<sup>4</sup> The job duties included assembly, installation and repair of antique World War II airplane engines. Minimum requirements for the position were listed as two years experience in the job offered. (AF 61-62).

A Notice of Findings (“NOF”) was issued by the CO on August 1, 2001, regarding a prevailing wage issue. (AF 56-59). On August 22, 2001, the Employer amended its wage offer and stated a willingness to test the labor market with the amended wage offer. (AF 49).

The Employer received seventeen applicant referrals in response to his recruitment efforts, all of whom were rejected as either unqualified or unavailable for the position. In its recruitment report, the Employer detailed the bases for rejection of each applicant, including assessment score results on a scale of 100. (AF 172-175).

A Supplemental Notice of Findings (“SNOF”) was issued by the CO on October 11, 2002, proposing to deny labor certification based upon a finding that the Employer’s advertisement lacked specificity, in violation of 20 C.F.R. § 656.21(g)(1)-(9). The CO cited the Employer’s failure to state that “[a] test will be administered and scored from which applicants must meet a non-specified number of points in order to be qualified.” The prescribed corrective action was listed as re-advertisement and including the undisclosed requirement. In addition, the Employer was instructed to respond to ten questions regarding the test. (AF 46-48).

In Rebuttal, the Employer stated that a test was not given to any of the job applicants and that a score sheet was a tool used by the Employer to keep track of how

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<sup>4</sup> The Employer initially filed the application with the job title of Aircraft Engine Mechanic, which was amended on September 10, 2001 in conjunction with a rate of pay amendment.

each applicant answered the questions. The Employer stated that the applicants were asked the same questions to determine if they had the capacity for the skills required for the job. The Employer gave the applicants a numeric score in addition to taking notes during the interview. The Employer stated that because a test was not given it could not forward the results, but that it could forward copies of the score sheets if required. (AF 32-42).

A Final Determination (“FD”) denying labor certification was issued by the CO on December 17, 2002, based upon a finding that the Employer had failed to comply with any of the requirements stated in the NOF. The CO found the Employer’s rebuttal unresponsive in that the Employer declined to retest the labor market and further failed to forward copies of all tests administered to job applicants, despite the fact that such documentation was requested in the NOF. (AF 30-31).

The Employer filed a Request for Review by letter dated January 16, 2003, and the matter was docketed in this Office on March 13, 2003. (AF 1-17).

## **DISCUSSION**

The burden of proof in the labor certification process is on the employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b). Moreover, as noted in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), “[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer’s last chance to make its case. Thus, it is the employer’s burden at that point to perfect a record that is sufficient to establish that a certification should be issued.”

In the instant case, the Employer failed to adequately rebut the issues raised by the CO in the NOF, and accordingly, labor certification was properly denied. In the NOF, the CO was specific as to both the finding and the necessary corrective action. The CO challenged the use of a test without disclosure and instructed the Employer to re-

advertise with this requirement. The Employer was further provided with ten enumerated questions regarding the test. The Employer presented no evidence to justify its recruitment procedures and failed to properly respond to the NOF.

The issue in this case is whether the Employer may lawfully require a U.S. worker to submit to a questionnaire designed to measure his or her qualifications, without listing it as a requirement for the advertised position. The CO apparently mischaracterized the answering of the questionnaire as a term or condition of employment. The ETA 750A and the recruitment advertisements were explicit in requiring knowledge of the antique airplane restoration process. (AF 61, 109). It is this knowledge that is the true condition of employment for the position, not the answering of the questionnaire. Thus, assuming the questionnaire simply asks the same questions that would inevitably be asked at any typical interview in order to determine a worker's qualifications the Employer may require a worker to submit to such a questionnaire without prior notice. *See, e.g., Allied Towing Service*, 1988-INA-46 (Jan. 9, 1989)(*en banc*).

However, the Employer failed to produce the questionnaire and its results. The Employer's Recruitment Results Report repeatedly cited low numerical scores as the basis for rejecting the majority of the U.S. workers who applied for the position. The CO's concern over the validity of the test may well have been warranted and the request for copies of the test and results appears entirely reasonable and justified. The NOF requested that the results be forwarded and the Employer stated that copies of the "score sheets" could be forwarded, yet failed to do so. The Employer specifically stated that "[i]n preparing to conduct the applicant interviews we chose to ask specific questions and document the answers because we know that your department would require us to support our position if we were to disqualify any applicant." However, the Employer failed to provide the documentation requested.

Where a document requested by the CO has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document must be produced. *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). The employer has the burden of proof

of production and persuasion. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). In the instant case, the Employer, in failing to produce the results of the questionnaire, failed to perfect a record that is sufficient to establish that certification should be granted. *See, e.g., Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*). On this basis, labor certification was properly denied.

## **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.