

Issue Date: 19 March 2004 **U.S. Department of Labor**

Board of Alien Labor Certification Appeals

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**BALCA Case No. 2003-INA-103**  
**2003-INA-104**  
ETA Case No. P2002-NV-09517404/IW  
P2002-NV-09517400/IW

*In the Matter of:*

**WEAVER PROPERTIES, LLC,**  
*Employer,*

*on behalf of*

**CESAR RAMIREZ,**

*and*

**AVELINO RAMIREZ,**  
*Aliens.*

Certifying Officer: Martin Rios  
San Francisco, California

Before: Burke, Chapman and Vittone  
Administrative Law Judges

### **DECISION AND ORDER**

**PER CURIAM.** This case arose from two applications for labor certification filed by Weaver Properties LLC (“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 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 requests for review, as contained in the Appeal File ("AF")<sup>1</sup> and any written arguments of the parties. Because the same or substantially similar evidence is relevant and material to both appeals, we have consolidated these matters for decision. See 29 C.F.R. § 18.11.

### **STATEMENT OF THE CASE**

On March 30, 2001, Employer filed an application for labor certification on behalf of the Alien, for the position of Farm Hand. (AF 26-27).

On November 19, 2002, the CO issued a Notice of Findings ("NOF") indicating intent to deny the application on the grounds that Employer's six-month experience requirement was not the true minimum requirement and that the requirement was unduly restrictive, in violation of 20 CFR § 656.21(b)(2)(i)(A). (AF 22-25). The CO noted that the Alien did not have any experience as a Farm Hand when he was hired by Employer. Accordingly, the Alien required training or was provided the learning opportunity to be able to perform the job. Therefore, Employer's six-month experience requirement did not reflect the true minimum requirement. (AF 23-24).

As a remedy, the CO advised Employer to delete the six-month experience requirement and to retest the labor market. If Employer wished to retain the requirement, Employer had to demonstrate that it was not possible to hire anyone with less experience or to document that the Alien had acquired the required experience with another employer. (AF 25).

Additionally, the CO found that in accordance with the *Dictionary of Occupational Titles* ("DOT") the position of Farm Hand normally required experience of

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<sup>1</sup> In this Decision, "AF" refers specifically to the Cesar Ramirez Appeal File as representative of the Appeal Files in both cases. A virtually identical application was filed for both applicants and the issues raised and dealt with by the CO (*ie.*, NOF, FD, etc.) in both cases are identical.

thirty days to three months. Therefore, Employer's six-month experience requirement was excessive and restrictive in violation of 20 CFR § 656.21(b)(2)(i)(A). The CO noted that although Employer provided a statement loosely referring to a three-month training period<sup>2</sup>, it did not conclusively indicate that the six-month requirement would be amended. To remedy the deficiency, Employer was advised to delete the requirement and to retest the labor market. If Employer wished to retain the requirement, Employer was required to document that the requirement was common for the occupation. Alternatively, Employer needed to justify the requirement as a business necessity. (AF 24-25).

Employer's Rebuttal was received by the CO on December 23, 2002. (AF 9-21). Employer questioned the CO's assertion that it required six months of experience because Employer had agreed with the state agency to reduce the requirement to three months. Employer noted that it was never required to amend the application and because Employer already had agreed to the three months of experience requirement, it was unwilling to amend the application. Employer also noted that it had already advertised the position with the three months experience requirement at the prevailing wage. Therefore, Employer did not see the benefit to readvertising. (AF 9-12).

On December 26, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 7-8). The CO found that Employer remained in violation of 20 C.F.R. § 656.21(b)(5). The CO noted that although Employer clarified that the minimum requirement was three months of experience, that requirement was not Employer's true minimum requirement, as the Alien did not have such experience at the time he was hired. As stated on the ETA 750B, the Alien's experience as a Farm Hand had been exclusively with Employer. Therefore, allowing the requirement to stand would give undue advantage to the Alien over a U.S. applicant who was not given a similar opportunity. The CO added that because Employer declined to retest the labor market,

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<sup>2</sup> Employer in its Rebuttal asserted that although the experience requirement was originally six months of experience, Employer had agreed with the state agency to reduce the experience requirement to three months of experience and one month of training. As the month training requirement was not defined by Employer and for clarity, we will refer to Employer's experience requirement solely as three months of experience.

Employer failed to take the corrective actions suggested by the CO. For those reasons, the CO denied the application. (AF 8).

On January 20, 2003, Employer filed a Request for Review/Motion for Reconsideration (AF 2-3). Employer alleged that upon receiving the FD, Employer realized its failure to submit documentation of the Alien's previous experience as a Farm Hand for another employer. (AF 2). To remedy this deficiency, Employer submitted a letter from a previous employer asserting that the Alien had worked on its farm in 1991. (AF 3). On January 28, 2003, the CO denied the Motion for Reconsideration and the matter was docketed in this Office on February 20, 2003. (AF 1).

### **DISCUSSION**

Twenty C.F.R. § 656.21 (b)(5) provides:

[t]he employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, 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 the employer's job offer.

Therefore, in accordance with 20 C.F.R. § 656.21(b)(5), an employer cannot require more stringent qualifications of a U.S. worker than it requires of the alien. Thus, the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990).

An employer must establish that the alien possesses the stated minimum requirements for the position that is being offered. *Charley Brown's*, 1990-INA-345 (Sept. 17, 1991). In this case, Employer required three months of experience as a Farm Hand. Employer's sole supporting documentation that the Alien had three months of experience as a Farm Hand consisted of a two-sentence letter by the Alien's former employer, submitted after the FD was issued. (AF 3). The letter simply stated that the

Alien worked irrigating and putting up hay in 1991. The letter did not specify the length of time the Alien worked performing those duties.

The only details regarding the Alien's length of job experience are found in the ETA 750B. (AF 28-29). However, the ETA 750B did not mention the Alien's employment with another employer as a Farm Hand, or that the Alien performed the duties of a Farm Hand in another job. The only other document that indicates the Alien's work experience as a Farm Hand is Employer's Request for Reconsideration. An employer's unsupported statement that the alien meets its minimum requirements does not constitute adequate documentation that the alien meets those requirements. *Wings Wildlife Production, Inc.*, 1990-INA-69 (Apr. 23, 1991).

Therefore, we find that Employer has not fulfilled its duty to provide evidence that the Alien had the three months of experience required for the position at the time he was hired by Employer. According to 20 C.F.R. § 656.21(b)(5), when an alien does not meet the employer's stated job requirements, certification is properly denied.<sup>3</sup>

### **ORDER**

The CO'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

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<sup>3</sup> We note that the CO's assertion that Employer had a six-month experience requirement, instead of the three month experience requirement that Employer indicates it required, is troublesome, as the ETA 750A was not amended. However, we find that this discrepancy is not critical, as the Alien did not have the three months of experience required by Employer at the time the Alien was hired. Employer decided to disregard the remedies to the deficiencies offered by the CO. Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993).

**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.