



Issue Date: 29 September 2003

BALCA Case No.: 2003-INA-83
ETA Case No.: P2001-CA-09509917/GH

In the Matter of:

NEW AGE GRAPHICS,
Employer,

on behalf of

JOSE VALDEZ,
Alien.

Appearance: Ruben H. Hernandez
For Employer and Alien
Santa Ana, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by New Age Graphics (“Employer”) on behalf of Jose Valdez (“Alien”) for the position of Shipping and Receiving Supervisor. (AF 12). This decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s Request for Review, as contained in the Appeal File (“AF”). 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

STATEMENT OF THE CASE

On November 18, 2002, the CO issued a Notice of Findings (“NOF”) questioning whether Employer rejected U.S. workers for lawful, job-related reasons. (AF 8-10). Based on a review of their resumes and applications, the CO found that U.S. applicants Michael Laws, Gary Wiebler, Ricardo Olivera, and Jesse McClellan appeared to meet the minimum requirements for the position offered. (AF 9-10). Regarding applicants Laws, Wiebler, and Olivera, the CO noted that Employer rejected them for a lack of experience working with textiles and garments. (AF 9). However, the CO indicated that Employer’s job application did not require such experience.

According to Employer’s recruitment report, applicant McClellan did not respond to Employer’s telephone messages and “it can only be assumed [he] had no further interest in the position.” (AF 10). However, the CO found the recruitment materials submitted by Employer did not support this assumption, but rather indicated Employer unlawfully rejected the applicant because he was not qualified for the position. Furthermore, in reference to telephone communications with Mr. McClellan on January 3, 2001, Employer submitted a completed one-page form that indicated the reason for rejecting Mr. McClellan was his lack of experience in the garment and textile industry and screen printing industry, as well the fact that he was not bilingual. The CO requested that Employer detail with specificity why each U.S. worker was rejected for lawful job related reasons. (AF 10).

Employer filed a Rebuttal to the NOF dated December 20, 2002. (AF 6-7). Employer asserted that in the final documentation to EDD, he explained in detail the reasons why the four U.S. workers were found not qualified for the position. (AF 6). Employer stated that he had determined that the applicants were not qualified for the position and questioned the CO's assessment that the applicants were qualified. (AF 6).

On December 31, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 3-5). After reviewing Employer's rebuttal, the CO found that Employer unlawfully rejected the four applicants in question, even though they were considered qualified for the position. (AF 4). The CO clarified that it was not disputed that Employer provided EDD with a detailed explanation as to why each applicant was found unqualified; however, the CO determined that the rejections were not for lawful, job-related reasons, rather the applicants were rejected for failing to meet requirements not specified on the ETA 750A. (AF 5).

By letter dated January 17, 2003, Employer filed a Request for Review and the matter was docketed in this Office on March 13, 2003. Employer asserted that the CO did not understand the duties of the position offered. (AF 1). By letter dated April 4, 2003, Employer maintained that the position required experience with textiles and garments, but that this requirement was overlooked by the U.S. Department of Labor in San Francisco, CA.

DISCUSSION

There is an implicit requirement that employers engage in a good faith effort to recruit qualified U.S. workers. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (October 27, 1988). Actions by an employer that indicate a lack of good faith recruitment effort or actions which prevent qualified U.S. workers from pursuing their applications are grounds for a denial of certification. Employer must prove that there are not sufficient U.S. workers who are able, willing, qualified and available to perform the work, as required under 20 C.F.R. § 656.1.

Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity must have been open to any qualified U.S. worker. If a U.S. applicant applies for the position, the CO should consider the applicant able and qualified for the job opportunity if the applicant, by education, training, experience or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. 20 C.F.R. § 656.24(b)(2)(ii). If the U.S. applicant is able and qualified, the employer must document that the applicant was rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6).

The CO determined that, based upon a review of the applicants' resumes or applications, the four applicants in issue appeared to meet the minimum requirements, two years of experience in the job advertised. (AF 9). Michael Laws had over five years of experience in shipping and receiving, holding positions of warehouse supervisor, warehouse manager, and shipping and receiving manager. (AF 24-25). Gary Wiebler had over twenty years of experience in shipping and receiving, including fourteen years

of experience as a warehouse supervisor. (AF 26-27). Ricardo Olivera had more than eight years of experience as a warehouse manager, including responsibility for supervision of the shipping and receiving department, inventory control, and interaction with contractors. (AF 28). Jesse McClellan's resume indicated seven years of experience as a shipping and receiving manager. (AF 29).

On the ETA 750A, Employer described the duties of the position as "required to supervise and coordinate the activities of workers engaged in shipping and receiving. Will train workers, keep their time records and oversee orders both incoming and outgoing." (AF 12). Despite Employer's assertion in its April 4, 2003 letter that "one of the qualifications for the position was that the occupant's experience be in the area of working with textiles and garments," neither the ETA 750A nor Employer's advertisement in the Los Angeles Times indicate that experience working with textiles and garments is a requirement for the position. (AF 12, 37).

Based upon requirements not stated on the ETA 750A or Employer's advertisement, Employer rejected these four applicants who satisfied the minimum stated requirements for the position of shipping and receiving supervisor. Mr. Laws, Mr. Wiebler, and Mr. Olivera were rejected for their lack of experience working with textiles. (AF 9). Mr. McClellan was rejected for the same reason, as well as not being bilingual. (AF 10). Neither of these requirements was specified in the ETA 750A.

Employer has not satisfied his burden of proof to demonstrate that he rejected applicants for lawful, job-related reasons. An applicant cannot be rejected for failing to meet a requirement not stated in the advertisement or application when that applicant meets the minimum requirements for the position. *See American Café*, 1990-INA-26 (Jan. 25, 1991); *see also Project Resources*, 1994-INA-298 (May 30, 1995). If the U.S. applicant cannot satisfy an undisclosed requirement, an employer cannot subsequently reject that worker on that basis. *See Fritz Garage*, 1988-INA-98 (Aug. 17, 1988) (*en banc*). As such, these four applicants were rejected for their failure to meet an undisclosed requirement, the requirement of experience in the textile industry. This constitutes unlawful rejection of qualified U.S. workers pursuant to 20 C.F.R. § 656.24(b)(2)(ii).

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 twenty days from the date of service a party petitions for review by the full Board. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the