



Issue Date: 25 February 2009

BALCA No.: 2008-PER-00149
ETA No.: A-006040-84771

In the Matter of:

**DURACRAFT OF GEORGIA
SIDING & WINDOW COMPANY,**
Employer,

on behalf of

FRANCISCO SIMOES RAMALHO NETO,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Adebimpe Jafojo-Esan, Esquire
Stone Mountain Georgia
For the Employer and Alien

John Powell
General Manager
*Pro se for the Employer*¹

Gary M. Buff, Associate Solicitor
Clarette H. Yen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Chapman, Vittone and Wood**
Administrative Law Judges

¹ The Employer's attorney filed the motion for reconsideration before the CO, but did not appear before the Board.

DECISION AND ORDER

PER CURIAM. This matter arises under Section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”)².

BACKGROUND

The Employer, Duracraft of Georgia Siding & Window Company, filed an online labor certification application on behalf of Francisco Simoes Ramalho Neto which was accepted for processing on February 10, 2006. (AF 10-19). The Employer was seeking to sponsor the Alien for the job of Construction Supervisor, Carpenter. The Employer required two years of experience in the job offered.

On December 15, 2006, the CO issued a denial letter. (AF 7-9). The CO stated that the reason for the denial was that Section K of the ETA Form 9089 application showed that the Alien did not have two years of experience as required by Section H of the application at the time he was hired. Therefore, the application was in violation of Section 656.17(i) since the requirements described on ETA Form 9089 did not represent the Employer’s actual minimum requirements.

The Employer filed for reconsideration on January 9, 2007. (AF 3-5). The Employer argued that the Alien did have two years of experience in construction, installation, and repairs of wooden structures, siding, and fixtures, etc. and some experience in supervisory positions such as a crew leader. The Employer argued that the job did not require two years of experience in a supervisory role.

On August 22, 2008, the CO denied reconsideration. (AF 1-2). The CO noted that in the job order posted with the Georgia Department of Labor, the minimum skills

² The Final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 77386, and are applicable to permanent labor certification applications filed on or after March 28, 2005. The regulations were amended on June 21, 2006, 71 Fed. Reg. 35522, and May 17, 2007, 72 Fed. Reg 28903.

required were stated to be two years' experience as a construction supervisor, carpenter, and an ability to speak Spanish, Portuguese, and English. Since the Alien did not possess two years of supervisory experience at the time of hire, the CO denied reconsideration and forwarded the Appeal File to BALCA.

BALCA docketed the appeal on August 25, 2008, and issued a Notice of Docketing on August 27, 2008. The Employer filed a Statement of Intent to Proceed on September 3, 2008. The CO filed a Statement of Position, received by the Board on October 10, 2008. The CO argued that the grounds stated in the letter denying reconsideration were valid.

DISCUSSION

Recruitment of U.S. workers is a mandatory element of the certification process. 20 C.F.R. § 656.17(e). As part of the recruitment process, the job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity and the employer must not have hired workers with less training or experience for the job opportunity. 20 C.F.R. § 656.17(i)(1) and (i)(2).

In the instant case, the Employer's argument that the job offer only required two years of experience in construction work and no experience in supervision is contradicted by the description of the job duties in Section H-11 of the Form 9089. Therein, the Employer stated that the job duties included **supervision** and coordination of employees engaged in construction, installation and repair of wooden structures, siding and fixtures as well as the ability to speak Portuguese and English. (AF 12). Since the Employer required two years of experience in the job at Section H-6, experience in the duties, including supervision, for two years was required. This conclusion is supported by the fact that the Notice of Job Availability also listed supervision as a job duty, and two years of experience as a job requirement. (AF 44). In addition, in the State Workforce Agency job order, the minimum skills section stated: "Must have two years experience as a construction supervisor, carpenter. . . ." (AF 45).

Since the job descriptions in the application, the posting and the job order all required two years of experience in the job offered, which clearly included supervision as a prominent job duty, we find that the Employer's argument that the job requirements did not include two years of supervisory experience is without merit. If supervision was not a job requirement, the Employer failed to convey this fact when describing the job.

Furthermore, the evidence of record establishes that the Alien did not have the required two years of supervision experience.

Therefore, we affirm the CO's finding that the application was in violation of 656.17(i) since the job requirements listed on the application did not represent the Employer's actual minimum requirements. *Michelle Guervarra Pena PLLC, 2007-PER-116* (June 4, 2008). Thus, we find that the CO properly denied certification.

ORDER

Based on the foregoing, it is **ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **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, NW Suite 400
Washington, DC 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 granting of a petition the Board may order briefs.