U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 September 2004

BALCA Case No.: 2003-INA-251
ETA Case No.: P2000-CA-09508811/ML

In the Matter of:

BETH AND DAVID DASSA,
Employer,

on behalf of

SILENE CONCEICAO,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Ralph Ehrenpreis, Esquire
Los Angeles, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Beth and David Dassa ("the Employer") filed an application for labor certification[1] on behalf of Silene Conceicao ("the Alien") on December 26, 1997. (AF 37).[2] The Employer seeks to employ the Alien as a Social Secretary. This decision is

[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.

[2] In this decision, AF is an abbreviation for Appeal File.

based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as assisting the Employer in the coordination of professional activities, scheduling and business and personal affairs. The position required travel approximately 40% of the time. The Employer required no advanced education but required two years of experience in the job offered or two years of experience as an administrative assistant or experience in a management capacity. (AF 37).

On November 27, 2002, the CO issued a Notice of Findings ("NOF") stating that under 20 C.F.R. § 656.24(b)(2)(ii), a U.S. worker should be considered able and qualified for the job opportunity if the worker by education, training, experience, or a combination therefore, 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. The CO found that Applicant #1 showed a combination of education, training and/or experience enabling him to perform the usual requirements of the occupation. The CO stated that the Employer could rebut this finding by showing with specificity how that applicant was rejected for lawful, job-related reasons. (AF 31-35).

In its rebuttal, dated January 20, 2003, the Employer stated that the applicant was not disqualified for the position solely on the basis of his lack of required experience, but he was found to be unavailable on the basis of his specific indication that his long-term goal was to obtain a position in marketing services management or other management or marketing field and he would only be available to fill the position on a temporary basis. The Employer stated that the Applicant was not seeking employment in the job on a permanent full-time basis. (AF 7-30).

The CO issued the Final Determination ("FD") on February 25, 2003, denying certification. (AF 5-6). The CO found that the rebuttal statement regarding the applicant's long-term goal to seek a position in marketing was only relevant if it clearly conflicted with performing the job duties. Because the applicant was qualified for the position and available to perform the job duties, the CO denied certification.

On March 14, 2003, the Employer requested review and the matter was docketed in this Office on August 5, 2003. The Employer filed an additional brief in support of its appeal, arguing that the applicant was not available because he demonstrated a lack of willingness and availability to perform the job duties on a permanent, full-time basis. The Employer argued that this was a lawful, job-related reason for rejecting the applicant.

DISCUSSION

Twenty C.F.R. § 656.21(b)(6) requires an employer to document that if any US workers have applied for the job opportunity, they were rejected solely for lawful job-related reasons. In the initial recruitment report, the Employer stated that the applicant was not qualified. A review of his resume indicated over fifteen years of experience in marketing management and administration and finance management, as well as a Bachelor's of Science degree in Business Administration. The applicant is clearly qualified for the job because he has had extensive experience in management, one of the related occupations listed on the application. A U.S. applicant who meets the employer's job requirements may not be rejected as unqualified. *Quality Products of America, Inc,* 1987-INA-703 (Jan. 31, 1989) (*en banc*). Therefore, the Employer did not have a lawful job-related reason for rejecting the applicant because he was not qualified for the job opportunity.

In the rebuttal, the Employer additionally stated that the applicant was not available because he stated that his long-term goal was to obtain a position in marketing services management or other management. The Employer provided no documentation of this statement by the applicant. The burden of proof in establishing lawful job-related

reasons for rejecting US workers is on the employer. *Cathay Carpet Mills, Inc.,*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). In addition, rejection of a US worker who would not commit beyond six months is not a ground, in and of itself, for rejection based on the conclusion that such worker was not interested in a permanent position. *World Bazaar,* 1988-INA-54 (June 14, 1989) (*en banc*). While we recognize that certain jobs may require a lengthy period of on-the-job training such that a commitment of a minimum period of employment is not inherently unlawful, in this matter, the Employer has not established any such facts. Therefore, the Employer's basis for rejecting the applicant because he was not available is not substantiated by the record.

In the light of the foregoing, we find that the CO properly found that the Employer had not established a lawful, job-related reason for rejecting the qualified and available U.S. applicant. Therefore, we find the CO properly denied certification.

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.