



Issue Date: 07 July 2004

BALCA Case No.: 2003-INA-212
ETA Case No.: P2000-CA-09498900/ML

In the Matter of:

EXCEL VOCATIONAL CENTER,
Employer,

on behalf of

ROLANDO ARAGON,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Edwin I. Aimufua, Esquire
Pasadena, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Excel Vocational Center (“the Employer”) filed an application for labor certification¹ on behalf of Rolando Aragon (“the Alien”) on January 13, 1998. (AF 25).² The Employer seeks to employ the Alien as an accountant (DOT Code: 160.162-018).³ This decision is based on the record upon which the Certifying Officer (“CO”) denied

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.

³ In this decision, DOT is an abbreviation for the Dictionary of Occupational Titles.

certification and the Employer's request for review, as contained in the Appeal File and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as preparing profit and loss statements, balance sheets and financial reports, as well as supervising other accountants. The Employer required a B.S./B.A. in accounting, three years of experience and a pre-employment exam. (AF 25, 27).

In the Notice of Findings (“NOF”), issued January 15, 2003, the CO found three deficiencies in the application. (AF 20-23). The CO found that the test given to applicants was an unduly restrictive job requirement in violation of 20 CFR § 656.21(b)(2)(i)(A) because it is not normally required for the successful performance of the job in the United States. The CO noted in that there is no documentation to show a connection between this test and the duties to be performed, that there is no evidence to show that this test is a better indicator of qualification than the applicants’ meeting the qualifications set forth on the ETA 750A, and that the letter to applicants did not inform them of the test. To correct this deficiency, the CO stated that the Employer could either amend the restrictive requirement and re-recruit or justify the requirement based on a business necessity. (AF 21-22).

The CO also found that the Alien was hired without the required experience in One Write Plus and Lotus, as required on the ETA 750A. The Employer was directed to rebut this deficiency by amending the ETA 750B to show the alien’s experience, amending the ETA 750A to delete the requirement and re-recruiting, or documenting how it is not feasible to hire workers with less training or experience than that required by the job offer. (AF 22).

Finally, the CO noted that the documentation did not address all the U.S. applicants. Specifically, the CO noted the documentation established that Applicants #1

and #2 were rejected for failure to pass the test, a requirement deemed restrictive. There was no documentation in the record regarding Applicants #3-#6. The CO stated that the Employer needed to explain with specificity the lawful job-related reason for not hiring each U.S. worker referred and give the job title of the person who considered them for employment. (AF 22-23).

The Employer submitted rebuttal on February 18, 2003. (AF 9-19). The Employer stated the pre-employment test was forwarded to the Employment Development Department (“EDD”) and was approved by them. The Employer stated that the EDD agreed that it is insufficient to rely solely on the information contained in item 14 of the ETA 750A. The Employer also stated that if they had been notified that the requirement was restrictive, they would have amended their employment process accordingly. (AF 9-10). The Employer claimed that Applicants #1 and #2 scored low on the test and were rejected for this reason. The Employer also stated that the Alien has experience with One Write Plus and Lotus.

The Employer noted that none of the other applicants appeared for the interviews scheduled by letters mailed on October 3, 2002. The Employer submitted copies of the receipts for certified mail and return receipt cards for all six applicants. (AF 14-19). The Employer did not submit copies of the letters mailed to the U.S. applicants or copies of envelopes addressed to the other applicants.

The CO issued the Final Determination (“FD”) on March 26, 2003, denying certification. (AF 7-8). The CO found that the Employer’s rebuttal to the NOF did not correct the deficiencies raised in the NOF. Specifically, the CO noted that the Employer did not submit any documentation to show a connection between the pre-employment test and the duties to be performed, that the Employer did not show that the test is a better indicator than the educational and experience requirements listed on the application and that the Employer did not show that the U.S. applicants were given adequate notice to prepare for a test, in addition to the interview. (AF 8).

The CO also found that the Employer failed to document the Alien's experience in the two software packages. While the Employer asserted that the Alien had experience in these two software systems, no documentation of that fact was submitted.

Further, the CO found that the Employer's rejection of Applicants #1 and #2 for their failure to pass the pre-employment test was unlawful because the test itself was unlawful. The CO stated that the Employer had claimed that Applicants #4 and #5 failed to appear for interviews, but the interview letters were sent three weeks late. Finally, the CO stated that by not addressing the findings regarding Applicants #3 and #6, the Employer failed to rebut those findings. (AF 8).

On April 28, 2003, the Employer requested review, arguing that the CO erred in finding that the pre-employment test was restrictive. (AF 1-6). The Employer argued that the nexus between the test and the job was to ensure that applicants had the necessary practical experience to perform the job duties and to avoid the unnecessary expense of training the worker. The Employer again argued that the Alien had experience in One Write One Plus Lotus and Excel.

The Employer also stated that the CO misunderstood the rebuttal response regarding the U.S. applicants. The Employer stated that only Applicants #1 and #2 appeared for their interviews. No other applicants came to the interviews, although the Employer stated that it had proof that the applicants received the letters scheduling the interviews. The Employer then claimed that contrary to the CO's assertion, the notices of interviews were sent out within fourteen days of receipt of the referrals from the EDD. The referrals were mailed out from EDD on September 19, 2002 and the notices of interviews were mailed by certified mail on October 3, 2002. (AF 1-2).

The case was docketed by the Board on June 17, 2003, and the Employer filed an additional brief in support of its appeal. The Employer reiterated many of his arguments, specifically arguing that the pre-employment test was approved by EDD, that it was not a restrictive requirement and the nexus between the test and the position was to ensure that

the applicants had the requisite practical experience for the position. The Employer stated that the Alien did have experience with Lotus 123 and One Write Plus, and that the letters setting up interviews with the U.S. applicants were mailed within fourteen days of the referrals from EDD.

DISCUSSION

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability. It is the employer who bears the burden of proving that all regulatory requirements have been satisfied, and this burden of proof must be met before an application for labor certification can be approved. 20 C.F.R. § 656.2(b).

Initially, we note that the use of a questionnaire to determine an applicant's qualifications is not unlawful when used to determine the applicant's knowledge and when the questionnaire is not a term or condition of employment, but merely asks the same types of questions as would be asked in an interview. *Allied Towing Service*, 1988-INA-46 (Jan. 9, 1989) (*en banc*). Tests given to alien applicants, as well as to U.S. applicants, were valid when the test was designed by an accounting expert with prior experience devising such tests, and the expert indicated the foundation for the test questions and why a 70% score was a reasonable cutoff for minimally qualified applicants. *Commercial Property Management*, 1993-INA-163 (Aug. 25, 1994).

In this case, the CO requested documentation from the Employer regarding the connection between the test and the duties to be performed, and documentation as to why the test is a better indicator than the educational and experience requirements listed on the ETA 750A. The Employer did not submit any documentation or discussion of the person who designed the test, the foundation for the test questions, or why any particular score

was a reasonable cutoff for minimally qualified applicants. Rather, the Employer merely stated that the test was approved by EDD and that the test would determine if the applicants had the experience required by the job. This bare assertion is insufficient to rebut the CO's finding that the test was unduly restrictive.

Twenty C.F.R. § 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings of the NOF, and that all findings not rebutted shall be deemed admitted. The employer must provide directly relevant and reasonably obtainable documentation that is requested by the CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification, especially when the employer does not justify this failure. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 1988-INA-40 (July 5, 1988); *Vernon Taylor*, 1989-INA-258 (Mar. 12, 1991).

The Employer has not offered any justification for its failure to document the connection between the test and the job duties or that the test is a better indicator of the applicant's educational and experience as listed on the resumes. The Employer has submitted a list of three books which were the basis for the test questions, but further documentation as required by the CO in the NOF has not been provided. The Employer instead relies upon its statement that EDD approved the test. The record does not support this assertion. There is no document or communication in the record from the EDD approving this test. Accordingly, because the Employer has not produced the documentation requested in the NOF, rejection of the U.S. applicants on the basis of the test was unlawful.

In addition, in the NOF, the CO required documentation that the Alien had the experience in the two software packages. In response, the Employer merely stated that the Alien had that experience. In the brief submitted on appeal, the Employer noted that the Alien's experience with Los Palos Convalescent Hospital, as listed the ETA 750B, establishes that the alien had experience in Lotus 123 and One Write Plus. Upon review

of this form, we note the Alien worked from August 1996 to December 1997 at Los Palos Convalescent Hospital. The Alien's one and one-half years of experience is less than the required three years of experience listed on the ETA 750A. The Employer has not documented that the Alien had the three years of experience in these software programs, as required by the ETA 750A. Accordingly, the Employer has not documented that the requirements for the job opportunity, as described, represent the Employer's actual minimum requirements for the position. The Employer has not documented that he has not hired workers with less training or experience because he hired the Alien with less experience than was required of the U.S. applicants.

Thus, we find that the CO properly found the pre-employment test was a restrictive requirement because the Employer had not documented the basis for this test, the connection of this test to the job opportunity or that this test is a better indicator than the applicant's education and experience. In addition, we agree with the CO that Employer has not documented that the alien possessed the minimum job requirements.⁴

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

⁴ Because we affirm the CO's decision on these grounds, it is not necessary to address the CO's other grounds for denying certification.

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.