

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 July 2004

BALCA Case No.: 2003-INA-170
ETA Case No.: P2002-CA-09509616/GH

In the Matter of:

JANE DOE INTERNATIONAL,
Employer,

on behalf of

LETICIA ANGUIANO,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: W. Kenneth Teebken, Esquire
La Mirada, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by § 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO

denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On December 14, 2000, the Employer filed an application for labor certification on behalf of the Alien to fill the position of "Shipping Clerk." (AF 43). The only job requirements listed were two years of prior experience in the same position.

The California Alien Labor Certification Office ("state office") sent twenty-nine applicant responses to the advertisements to the Employer, listed by name in the Final Documentation Notice of October 16, 2000. (AF 145-147). The state office advised the Employer that job applicants who provided resumes must be contacted within fourteen days of the receipt of the Final Documentation Notice. The state office directed the Employer to keep copies of correspondence with the applicants, including mail returned as undeliverable.

The Employer submitted a recruitment report to the state office dated November 24, 2000. (AF 52-144). A three-page summary listed all twenty-nine applicants with brief comments on why each was not hired. (AF 52-54). For example, the Employer noted that ten of the applicants did not show up or call to reschedule their appointment time, six applicants had started a different job already, four applicants were interested in supervisory work or a job offering higher pay, and four applicants were either in the process of relocating or simply wanted a job located closer to their present residence. Apart from the three-page summary, no additional comment or explanatory documentation was provided by the Employer.

The state office transmitted the application to the CO, who issued a Notice of Findings ("NOF") on November 8, 2002, proposing to deny certification pursuant to 20 C.F.R. §§ 656.21(b)(2)(i)(A), 656.21(b)(6), and 656.21(j)(1)(iii) and (iv). (AF 37-41). The CO found that the job requirement of two years of experience was unduly restrictive,

as no “supervisory, administrative, or managerial duties” were identified in the job description submitted to the state office. (AF 38). Furthermore, the documentation submitted by the Employer was insufficient to establish lawful job-related reasons for rejecting the twenty-nine applicants. For example, it appears from the documentation that many of the twenty-nine applicants received only one telephone message. The CO specifically noted nine qualified applicants with at least one year of experience as a shipping clerk. (AF 40). The CO stated that the fact that applicants expressed a desire for higher pay or better benefits does not provide a lawful job-related reason for rejection unless the Employer actually offered the job to the applicant under those terms and conditions and the applicant declined it. (AF 40). Proper documentation should identify by name the individual who contacted the applicant, how they were contacted, and explain with specificity the lawful job-related reason for rejecting him or her.

The Employer’s signed rebuttal was filed on November 22, 2002. (AF 16-36). First, the rebuttal indicated the Employer’s willingness to modify the experience requirement and retest the labor market. At the same time, the Employer defended the two-year requirement as justified by business necessity. (AF 19). The Employer noted that customer satisfaction with the final product depends critically on the quality of the shipping clerk’s review of the goods shipped against the submitted order and the associated billing invoice. The Employer argued that two years of experience was required for the shipping clerk to properly discharge these important functions and retain the goodwill and continued patronage of the Employer’s customers. Second, the Employer repeated its original listing of the twenty-nine job applicants and the proffered reason for rejecting each, and also indicated the name of the employee who made contact with the job applicants and, when applicable, interviewed them. (AF 19-23).

The CO issued a Final Determination (“FD”) denying labor certification on January 2, 2003, finding that violations of 20 C.F.R. §§ 656.21(b)(2)(i)(A), 656.21(b)(6), and 656.21(j)(1)(iii) and (iv) had not been rebutted. (AF 12-15). The CO noted that the Employer provided no documentation to support its assertion that a two-year experience requirement was common for the level of responsibility described for this position. In

addition, the CO identified nine job applicants who were qualified but unlawfully rejected by the Employer, who failed to provide adequate documentation regarding contacts with these and other candidates and the basis for rejecting them. The CO noted that the Employer responded to almost none of the specific deficiencies identified in the NOF, such as providing the date when the job applicants were contacted, stating whether job applicants were contacted directly by telephone or merely by leaving a telephone message, and responding to the observation that a job applicant's desire for higher wages or better benefits is not a sufficient basis for lawfully rejecting that applicant. The CO also commented that the Employer's willingness to re-advertise the position with different requirements does not cure any of the noted deficiencies regarding the pending labor certification application.

DISCUSSION

An employer advertising a job opportunity must not impose unduly restrictive job requirements. 20 C.F.R. § 656.21(b)(2); *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). Job requirements must be only those normally required for such a job in the United States unless "adequately documented as arising from business necessity." 20 C.F.R. § 656.21(b)(2)(i); see *Lucky Horse Fashion, Inc.*, 1997-INA-182 (Aug. 22, 2000) (*en banc*). Specifically, the years of experience or combination of experience and education listed in the job advertisement must not exceed those normally required for such a job and must not exclude job applicants whose mix of experience and education normally render them qualified for such a job in the United States, again subject to a documented business necessity exception. *Fischer Imaging Corp.*, 1988-INA-43 (May 23, 1989) (*en banc*).

The Employer imposed unduly restrictive job requirements on the advertised shipping clerk position by requiring two years of experience. (AF 153, AF 57-60). The CO noted in the NOF that the *Dictionary of Occupational Titles* listed six months to one year as the normal amount of training and experience for a shipping and receiving clerk. (AF 38). In its rebuttal, the Employer suggested the two-year requirement was justified

by business necessity, but offered no documentation to support that claim. (AF 19). In its request for review, the Employer did not raise a business necessity claim, but simply agreed to reduce the experience requirement to one year and retest the labor market. (AF 4, 10). However, that action does not cure the unduly restrictive requirements associated with the present application, which the CO properly denied.

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.