



Issue Date: 11 August 2004

BALCA Case No.: 2003-INA-218
ETA Case No.: P2002-CA-09519716/LA

In the Matter of:

TOWN AND COUNTRY ESCROW,
Employer,

on behalf of

SWE ZIN THET,
Alien.

Appearances: Alexandru A. Cristea, Esquire
Downey, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

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 alien labor certification for the position of Administrative Assistant.¹ The CO denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

¹ 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 March 15, 2001, the Employer, Town and Country Escrow, filed an application for labor certification to enable the Alien, Swe Zin Thet, to fill the position of Administrative Assistant. (AF 36). A Bachelor's degree and two years of experience in the job offered or in the related occupation of Office Administrative Assistant were required. The job duties included preparing operating reports on budget expenditures, time and attendance records, new hires, termination and transfers, as well as directing mail, files, supplies, repair, and maintenance.

The Employer received responses from ten U.S. applicants.² U.S. Applicant #1 submitted a resume and cover letter dated December 28, 2001, which revealed that she had a Bachelor's degree and had been an administrative manager from 1992 to 1994 and a coordinator/administrative assistant from 1989 to 1992. (AF 50). An Evaluation Sheet indicated that the applicant was interviewed in February 2002. (AF 47-48). The Evaluation Sheet indicated that the applicant had the legal right to work in the U.S., she was interested in performing the job duties, found the salary acceptable and possessed the required education. There was a notation by the Employer that the applicant was currently working as a receptionist, her experience as an administrative assistant was ten years ago and "it was in Russia," and the only experience she had in the United States was "teaching Russian language & receptionist."

In its March 3, 2002 letter to the Employment Development Department, the Employer stated that Applicant #1 was rejected because her experience was in a neo-communist system that had nothing in common with the office administrative procedures in the United States. (AF 41). According to the Employer, such work was performed ten years ago and the changes in office equipment and skills made such experience, "if any was actually gained," obsolete.

² As the CO questioned the rejection of only one applicant, only that applicant will be discussed herein.

On November 27, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification. (AF 32-34). Therein, the CO found that the Employer had rejected Applicant #1 for other than lawful, job-related reasons. The CO found that she was rejected by the Employer because the only experience she had as an administrative assistant was as an administrative manager ten years ago in Russia. The CO determined that the applicant appeared to meet the Employer’s minimum requirements for the job, and thus, she was not rejected for lawful, job-related reasons.

The Employer submitted rebuttal on December 27, 2002. (AF 19-31). The Employer stated that Applicant #1’s employment application was included. The Employer argued that this applicant only had experience as an administrative manager, which did not constitute experience in the job offered or in the office administrative assistant position, as set forth on the ETA 750A. The Employer stated that it was apparent that this applicant’s experience was limited to the receptionist job she currently held, her prior experience being obsolete. Relying on the Occupational Outlook Handbook, the Employer argued that this applicant lacked current knowledge of software applications and would require extensive retraining. The Employer pointed out that subsequent to the interview, it requested verification of references. References were provided, but when the Employer attempted to contact the references, none responded to voicemail messages. The Employer also contended that it was not possible to verify her job experience in Russia because the applicant did not include addresses or telephone numbers. (AF 26). The Employer argued that the applicant was not qualified for the job due to her lack of current knowledge or experience and for failing to provide verification of her experience. Included with the rebuttal were letters from other administrative assistants/managers noting the requirements for similar positions. (AF 22-25).

A supplemental NOF (“SNOF”) was issued on January 29, 2003, the purpose of which was to allow the Employer the opportunity to forward the employment application which it claimed had been attached to its rebuttal, but was not. (AF 17-18). The Employer provided it by letter dated February 1, 2003. (AF 9-16).

A Final Determination (“FD”) was issued on March 31, 2003. (AF 7-8). The CO did not accept the Employer’s argument that the applicant was not qualified because her qualifications were not kept current and she was unfamiliar with standard skills for an administrative assistant, including knowledge of software applications. The CO pointed out that the position at issue did not require or list duties to be performed that would require the knowledge and skills that the Employer claimed this applicant was lacking. According to the Employer’s interview notes, no mention of technology was made. The CO also found it to be irregular that the Employer attempted to contact the applicant’s references nearly ten months after the applicant’s initial interview in February 2002. The CO concluded that this applicant was available and met the stated minimum requirements at the time of her initial interview. The Employer failed to show that she was rejected for lawful, job-related reasons and certification was denied. (AF 8).

On April 28, 2003, the Employer filed a Request for Reconsideration or alternatively, Request for Review. (AF 1-7). In its Request for Review, the Employer claimed that the CO failed to consider the Employer’s arguments and evidence, erred in finding that the Employer’s preference for current knowledge or experience was not a requirement of the job, and failed to consider the arguments about the applicant’s lack of experience. The Employer also argued that the CO failed to address the affidavits submitted in rebuttal as evidence of the requirement of current experience for the position. (AF 1-2).

DISCUSSION

On her resume, Applicant #1 listed knowledge of Microsoft Word and Microsoft Excel. (AF 50). She performed data entry in her position as an administrative manager and worked with a variety of computer systems and office equipment as an administrative assistant. When requested to submit references, she promptly forwarded the names, addresses and telephone numbers of three references on February 24, 2002, indicating that if anything further was needed, the Employer should not hesitate to contact her. (AF 27).

The evidence herein does not establish that this applicant is not familiar with office technology. More significantly, however, the evidence does not establish that she does not have the qualifications sought on the ETA 750A. While an employer may request employment certification and may properly reject an applicant for failure to provide such verification, these are not the facts in this case. *See, e.g., Al-Ghazali School*, 1988-INA-347 (May 31, 1989) (*en banc*). This U.S. applicant promptly produced references when requested. It was the Employer who delayed ten months in attempting to contact these references. This does not equate to good faith recruitment.

Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Exxon Chemical Co.*, 1987-INA-615 (July 18, 1988) (*en banc*). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). In the instant case, Applicant #1 clearly met the minimum stated requirements of the position. The Employer's initial explanation for her rejection was the fact that her experience was ten years ago in a neo-communist country. Given this applicant's resume and the job position at issue, this argument is without merit and unsupported by the facts. Thus, even assuming the unstated requirements were valid ones, there is no indication that this applicant does not possess the skills at issue or could not learn them with minimal training.

The Employer failed to establish that the applicant was not qualified, available, and able or willing to accept the position as advertised, and the Employer has failed to provide a lawful job-related reason for rejecting this applicant. Based upon the facts herein, labor certification was 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.