U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue Date: 06 July 2004

BALCA Case No.: 2003-INA-141
ETA Case No.: P2000-CA-09508957/ML

In the Matter of:

BARKAT ENTERPRISES,
Employer,

on behalf of

MOHAMMED JAVEED MOULVI,
Alien.

Appearance: Hari S. Lal, Esquire
Anaheim, 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 arose from an application for labor certification on behalf of Mohamed Javeed Moulvi ("the Alien") filed by Barkat Enterprises ("the Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based 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 of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 9, 1998, the Employer filed an application for labor certification on behalf of the Alien for the position of Office Manager. (AF 76-77).

On November 1, 2002, the CO issued a Notice of Findings ("NOF") indicating intent to deny the application on the grounds that the Employer appeared to have rejected eight qualified U.S. applicants for other than valid, job-related reasons. (AF 71-74). Additionally, the CO found that the Employer's assertions that fourteen other candidates were not qualified were unfounded, as the candidates' combination of experience and education qualified them for the position. The CO also found that the Employer's determination that another U.S. applicant was not qualified because he did not have experience with payroll and bookkeeping was unlawful, as those requirements were not shown on the ETA 750A. The CO additionally found that the Employer had not demonstrated that it had made a good faith recruitment effort. To cure these deficiencies, the Employer was advised to specify the lawful, job-related reasons for rejecting these applicants. (AF 32-34).

In Rebuttal dated December 5, 2002, the Employer disagreed with the NOF. (AF 23-70). The Employer asserted that because it had not indicated that it was willing to accept years of experience as an equivalent to education, the Employer was not required, as the CO asserted, to accept those applicants who would qualify under the equivalency of education method. The Employer also noted that it did not limit its recruitment determination to the required experience and education, but also included an individual's sense of professionalism, positive attitude, timeliness and other interpersonal skills. The Employer noted that it could not document all the calls to the applicants because some of those calls were local calls, which were not reflected in telephone bills. The Employer stated that other calls were not yet reflected because the corresponding telephone bill had

not yet been received by the Employer. However, the Employer noted that it was aware that the Department of Labor issued questionnaires to all the applicants who submitted their resumes and therefore, could confirm that the Employer's assertions were accurate by matching the responses of the applicants with the assertions made by the Employer.

The Employer indicated that there were thirty-seven applicants. Fourteen of those applicants were summarily dismissed, as the Employer found them to be unqualified. The remainder of the applicants were called for an interview, but were rejected for various reasons. Six applicants were found to be unqualified for failure to meet the requirements; four applicants canceled their appointments and did not call back; four other applicants returned the calls, but indicated they were not interested because the commute was too long; six applicants were disqualified because they did not return the telephone call; three applicants were not qualified, as their experience was in the financial area and not in management. For those reasons, the Employer asserted that it had successfully rebutted the CO's findings. (AF 23-31).

On January 10, 2003, the CO issued a Final Determination ("FD") denying certification. (AF 21-22). The CO noted that although the NOF requested specific reasons for the Employer's rejection of eight U.S. applicants, the Rebuttal provided no more information than the Recruitment Report. Therefore, the CO found that the Employer did not provide lawful, job-related reasons for rejecting those applicants. Further, one applicant ("Applicant #1") was unlawfully rejected because he did not have experience in payroll and bookkeeping, which were undisclosed requirements. As such, the CO concluded that the Employer did not demonstrate that it engaged in good faith recruitment efforts.

On February 13, 2003, the Employer filed its Request for Review. (AF 1-16). The Employer disagreed that it failed to provide sufficient details regarding its grounds for rejecting the U.S. applicants. The Employer asserted that it conducted its recruitment efforts in good faith and that all of the resumes were properly reviewed, and a determination was made as to whether to call the applicant, depending on their

qualifications. The Employer noted that the majority of the applicants were rejected for failure to have a Bachelor's Degree in Business Administration. The Employer cited *Community Hospital of Monterey Peninsula*, 1997-INA-331 (June 30, 1998) in support of the position that if the applicant does not meet one of the job requirements, the burden of proof shifts to the CO to show that the applicant was qualified. The Employer then argued that the CO did not meet his burden to show how the applicant was qualified for the position. The Employer concluded that it made a good faith recruitment effort, but it was simply unable to find a qualified applicant.

The matter was docketed in this Office on April 10, 2003 and the record does not reflect that the Employer filed a brief.

DISCUSSION

A U.S. applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991).

The CO in the NOF found that the Employer's rejection of Applicant #1 was unlawful, as the denial was based on the applicant's failure to meet an undisclosed requirement. The ETA 750A does not list an experience requirement in payroll or bookkeeping. Therefore, this was an undisclosed requirement. It is unlawful for an employer to reject U.S. workers for lack of particular courses or additional training or experience not specifically identified on the ETA 750 as job requirements. *SRS Network, Inc.*, 1990-INA-405 (Sep. 5, 1990). Rejection of U.S. workers for not meeting unspecified requirements constitutes unlawful rejection of qualified U.S. workers pursuant to 20 C.F.R. § 656.21(b)(7). *Photo Network*, 1989-INA-168 (Feb. 7, 1990).

The ETA 750A, box 15, "Other Special Requirements" was created to afford employers the opportunity to list their particular requirements. Those requirements could then be evaluated by the state agency, and potential applicants are forewarned that such

requirements exist. The Employer could have indicated the need for experience with payroll and bookkeeping, however the Employer listed no additional requirements. By failing to specify these additional requirements, the Employer did not put the local job-service personnel and/or the CO on notice, and they were unable to determine whether such a requirement is proper. *Bell Communications Research, Inc.*, 1988-INA-26 (Dec. 22, 1988) (*en banc*).

Because the Employer's application is devoid of any reference to a requirement of experience working with payroll and bookkeeping, the Employer's rejection of Applicant #1 because he lacked experience in these areas was unlawful and labor certification was properly denied[1].

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

[1] Since our decision to affirm the CO's denial is based on the above noted grounds and those grounds are sufficient to reach our decision, we will not review the other issues raised by the CO.

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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.