



Issue Date: 19 March 2004

BALCA Case No.: 2003-INA-121
ETA Case No.: P2000-CA-09505895/AT

In the Matter of:

MOSHAY, INC.,
Employer,

on behalf of

JORGE PEREZ,
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 an application for labor certification filed by Moshay, Inc. (“Employer”) on behalf of Jorge Perez (“the Alien”) for the position of “clothcutting,” classified as “Patternmaker.”¹ The CO denied the application and 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 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 August 16, 1999, Employer filed an application for labor certification on behalf of the Alien for the position of Patternmaker, described by Employer as “clothcutting.” (AF 17). Two years of experience in the job offered were required. The application indicated that the rate of pay was \$20.36 per hour for forty hours per week with no overtime rate; the work schedule was 7:30 a.m. to 5:30 p.m. The job duties included cutting fabric according to patterns and maintaining and caring for blades and equipment.

On October 7, 2002, the CO issued a Notice of Findings (“NOF”), proposing to deny certification due to Employer’s failure to guarantee overtime pay and the unlawful rejection of a U.S. applicant. (AF 13-15).² The CO found that Employer’s stated reason for rejecting the U.S. applicant was not a valid, lawful reason for rejection, in violation of 20 C.F.R. §§ 656.21(b)(6), 656.21(j)(1)(iii) and (iv). Upon reviewing the applicant’s resume, the CO found that she showed qualifying experience as a patternmaker and in cutter production, and that she had much more than two years of experience in the clothcutting and pattern maker industry. Therefore, the CO found that Employer had failed to show that she was not qualified, able, available or willing to fill the job vacancy. Employer was directed to explain the lawful, job-related reasons for rejecting this applicant. (AF 15).

Employer submitted rebuttal on October 28, 2002. (AF 9-12). Therein, Employer stated that the U.S. applicant could be qualified to work as a pattern maker, but not as a cloth cutter, “which is rather a heavy duty job comparing to that of pattern makers.” Employer asserted that there was no prejudice or unfair hiring practices in making decisions; however, Employer already had secured qualified pattern makers and needed a “best clothcutter.” (AF 9).

A Final Determination (“FD”) was issued on December 17, 2002. (AF 7-8). The

² As the issue of overtime pay was successfully rebutted, it will not be detailed herein.

CO indicated that he had reviewed Employer's rebuttal, as well as the applicant's resume. The CO noted that the applicant had experience in "cutter sample production" from October 1984 to May 1989 and "cutter production sample and assistant pattern maker" from May 1989 to February 2000. The CO found that Employer had unlawfully rejected the qualified U.S. worker and denied certification. (AF 8).

On January 7, 2003, Employer requested review of the denial of certification. (AF 1). On January 23, 2003, the CO indicated that Employer's Request for Reconsideration was denied. (AF 6). The matter was docketed in this Office on March 6, 2003.

DISCUSSION

In its Request for Review of Denial, Employer raised new arguments regarding the physical requirements for the position at hand, and submitted new documentation. (AF 1-5).³ This Board will not consider this material, as our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. §§ 656.27(c), 656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988); *Aquatec Water Systems*, 2000-INA-150 (Sept. 21, 2000). Actions by an employer which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§ 656.1, 656.2(b). Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). Moreover, the

³ In Employer's Request for Review, Employer stated that the machine on which the worker was to work was designed "preferably for men." (AF 1). Employer included a copy of the cover page to the instruction manual for the machine. (AF 4).

employer must establish by convincing evidence that an applicant whose resume indicates he or she is qualified is not qualified; the employer cannot shift the burden to the CO to show that the U.S. worker is qualified. *Fritz Garage*, 1988-INA-98 (Aug. 17, 1988)(*en banc*).

As the CO points out, the U.S. applicant had more than two years of experience in position offered. Her resume listed experience as a cutter sample production (1984-1989), pattern maker (1997-1999) and cutter production sample and assistant pattern maker (1989-2000). (AF 26). She clearly met the minimum requirements of the position.

Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Banque Francaise Du Commerce Exterieur*, 1993-INA-44 (Dec. 7, 1993). If an applicant clearly meets the minimum qualifications for the job they are considered qualified. *UPS*, 1990-INA-90 (Mar. 28, 1991). In the instant case, Employer has failed to provide a lawful, job-related reason for the rejection of the U.S. applicant. Indeed, Employer's sole basis for rejection of this applicant was because she was not qualified as a clothcutter, an inaccurate statement that is clearly contradicted by the applicant's resume. *See, e.g., U.S.A. Manufacturing, Inc.*, 1988-INA-373 (May 1, 1989) (*en banc*). As such, 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.