



Issue Date: 16 June 2004

BALCA Case No.: 2003-INA-151
ETA Case No.: P2001-CA-09510264/VA

In the Matter of:

WALKER MATTHIESSEN BUILDERS,
Employer,

on behalf of

ROBERTO RUIZ-REYES,
Alien.

Appearances: Leonard W. Stitz, Esquire
Santa Ana, 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 an application for labor certification¹ filed by a building and project management company for the position of Carpenter. (AF 26-27).² The following decision is based on the record upon which the Certifying Officer (“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).

¹ 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 20 C.F.R. Part 656.

²“AF” is an abbreviation for “Appeal File.”

STATEMENT OF THE CASE

On August 11, 2000, the Employer, Walker Matthiessen Builders, filed an application for alien employment certification on behalf of the Alien, Roberto Ruiz-Reyes, to fill the position of Carpenter. The minimum requirement for the position was listed as two years experience in the job offered. (AF 26-27).

The Employer received nineteen applicant referrals in response to its recruitment efforts, sixteen of whom the Employer deemed unavailable based upon their failure to return a completed employment application, which was enclosed with a letter of contact. The remaining three applicants were deemed unavailable because the letters sent to these applicants were returned marked “unclaimed.” (AF 47-53).

A Notice of Findings (“NOF”) was issued by the CO on November 18, 2002, proposing to deny labor certification based upon a finding that U.S. workers were rejected for other than lawful, job-related reasons in violation of 20 C.F.R. §§ 656.21(b)(6) and/or 656.21(j)(1)(iv). (AF 22-24). The CO noted that based on their resumes, the nineteen applicants showed relevant experience and several showed extensive experience, raising a reasonable possibility that the applicants were qualified for the job. The CO found that the extra step in recruitment imposed by the Employer, to fill out and return an application, indicated a lack of good-faith effort to find a qualified U.S. worker. In addition, the CO questioned the Employer’s good faith effort in failing to show other attempts to contact the three U.S. workers who did not receive the letters. The Employer was instructed to provide a copy of both the employment application form and the cover letter, and to further to explain “exactly why you sent out an application form when the resumes already showed relevant work experience.”

In Rebuttal, the Employer justified its sending of the employment application as a way to ascertain who was genuinely interested in the job, and detailed specific grounds for rejecting all nineteen U.S. applicants based upon review of each applicant’s resume. (AF 7-21).

A Final Determination (“FD”) denying labor certification was issued by the CO on January 3, 2003, based upon a finding that the Employer had failed to adequately document lawful rejection of the U.S. applicants. (AF 5-6). In denying certification, the CO noted that each resume showed relevant experience, yet the Employer did not contact any of the workers to determine their qualifications, and attempted to reject the applicants as not qualified. The CO also noted that the Employer had not provided copies of the cover letter and had not documented that other attempts were made to contact the three applicants whose certified mail was returned to the Employer.

The Employer filed a Request for Review by letter dated January 10, 2003, and the matter was referred to this Office and docketed on April 10, 2003. (AF 1). The Employer submitted a Statement of Position dated May 28, 2003.

DISCUSSION

Twenty C.F.R. § 656.24(b)(2)(ii) states that the Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed. Twenty C.F.R. § 656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

In the instant case, the Employer wanted to hire a Carpenter with two years experience in the job offered. The Employer received nineteen applicant referrals and initially reported it was rejecting all nineteen applicants for failure to respond to a letter requesting submission of a completed employment application. The Employer also reported that one of the workers was rejected because he lacked qualifications for the

position. (AF 51). The Employer thereafter reported that all nineteen were also rejected because they were not qualified for the position.

While a U.S. applicant who only has general or related experience in the field of the position offered has been lawfully found to be not qualified where an employer has stated an unchallenged requirement of more specific experience, the burden of proof in the labor certification process is on the employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b). Hence, where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. *Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993)(*en banc*); *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*). Given this burden, and in light of the significant carpentry experience reflected in each of the applicants' resumes, the Employer was obligated to attempt to contact and further investigate the applicants' qualifications for the position. Summary rejection on the basis of the resumes alone was not appropriate in this case.

The Employer had documented that it attempted to contact each of the nineteen U.S. workers by certified mail, and that it was successful in contacting sixteen of the nineteen applicants. However, the nature of the Employer's contact was discouraging and unnecessarily onerous. The Employer has submitted a copy of the employment application; it required no more specific information than what was already apparent upon review of the applicants' resumes. All of the applicants appear qualified, yet none was offered an interview. It appears that the Employer improperly placed the burden of follow-up on the applicants instead of "intensively" recruiting as required by the regulations. *See, e.g., Viva of California*, 1987-INA-583 (Nov. 20, 1987)(*en banc*).

Moreover, the Employer reported no effort at follow-up for the three U.S. workers whose letters were returned "unclaimed." Presumably, an employer who has a *bona fide*

opening it desires to fill would, in exercise of good faith, make additional efforts to contact these applicants by the telephone number provided on each of the applicants' resume. The Employer reported no such efforts.

Based upon the foregoing, the Employer has not met its burden to show that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work, in violation of 20 C.F.R. § 656.1, and accordingly, 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.