



**Issue Date: 19 March 2004**

**BALCA Case No.: 2003-INA-114**  
ETA Case No.: P2001-CA-09511210/ML

*In the Matter of:*

**HEINTZ CONSTRUCTION, INC.,**  
*Employer,*

*on behalf of*

**JOSE LUIS MENDEZ-PALACIOS,**  
*Alien.*

Appearances: Leonard W. Stitz, Esquire  
Santa Ana, California  
For 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 an application for labor certification filed by Heintz Construction, Inc. (“Employer”) on behalf of Jose Luis Mendez-Palacios (“the Alien”) for the position of “Painter.”<sup>1</sup> The Certifying Officer (“CO”) denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

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<sup>1</sup> 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 February 5, 2001, Employer filed an application for labor certification on behalf of the Alien for the position of Painter. (AF 11-12). Eight years of schooling and two years of experience in the job offered were required. The job description included the application of coats of paint, varnish, stain or lacquer to decorate or maintain the interior/exterior surfaces of buildings and other structures, by using brushes, spray, or paint rollers. (AF 11).

The CO issued a Notice of Findings (“NOF”) on October 7, 2002, proposing to deny certification on the ground that Employer had failed to document that U.S. workers were lawfully rejected as required by 20 C.F.R. §§ 656.21(b)(6), 656.21(j)(1)(iii) and (iv). (AF 7-9). Specifically, the CO found that Employer had failed to submit a copy of the letter supposedly sent to the applicant with an application. The CO also questioned why the reply card was not addressed to Employer, but to an entity called “ALC Processing,” with no explanation being provided to the applicant. The CO found that the applicant’s resume revealed more than enough qualifications to perform the job, and Employer provided no justification for requiring further information in order to schedule an interview. Employer was directed to provide rebuttal evidence documenting with specificity the lawful, job-related reasons for rejecting the U.S. applicant, as well as to provide the job title of the person who considered the applicants for employment. (AF 8).

Employer submitted rebuttal on October 14, 2002. (AF 4-6). Therein, Employer contended that the U.S. applicant lacked the requisite experience. Employer noted that the job advertisement required two years of experience applying coats of varnish, stain and lacquer, and it was not clear from this applicant’s resume that he had the required experience. According to Employer, the applicant listed “some experience with stains and varnishes,” which did not equate to two years of experience. Therefore, this applicant was not qualified. Employer stated that in order to further investigate this applicant’s qualifications, Employer sent him an application, requesting that he complete

and return it. The applicant chose not to return the application, and thus he was rejected as unavailable. Employer also provided the name of the person responsible for interviewing the applicants and reviewing the applications. (AF 4-6).

A Final Determination (“FD”) was issued on December 5, 2002. (AF 2). Therein, the CO denied certification, finding that on the ETA 750A, Employer had required experience with “paint, varnish, stain *or* lacquer.” (*emphasis added*). The requirement of two years of experience with stains and varnishes changed the terms and conditions of employment. This applicant indicated he had some experience with stains and lacquers, which was close enough to the stated job requirements for him to be granted an interview. The CO found that no valid, job-related reason for rejecting this qualified applicant had been established and denied certification. (AF 3).

On December 31, 2002, Employer requested review of the denial of certification and the matter was docketed in this Office on February 20, 2003. (AF 1).

## **DISCUSSION**

Employer filed a Statement of Position on April 16, 2003. Therein, Employer argued that it made a good faith recruitment effort and that sending the applicant an application was a part of the traditional recruitment process. Employer cited *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*) in support of its argument that because Employer received no response from the applicant upon contacting him and attempting to investigate his credentials, the applicant was rightly rejected as unavailable. Employer claimed that sending correspondence via certified mail is sufficient evidence of a good faith recruitment effort, and that an employer has the right and obligation to verify the experience of each applicant, which is what it attempted to do in this case.

Employer also contended that this particular applicant lacked the experience required for the job, reiterating its argument that some experience with stains and

lacquers does not equate to two years of experience in such duties. Employer disputed the CO's finding that the experience listed by the applicant was close enough to the requirements for the job to expect that this applicant would be granted an interview, contending that it rightfully decided to further investigate the credentials of the applicant first. The applicant's failure to respond rendered Employer unable to determine if the applicant was in fact qualified for the job, and therefore, he was rejected. Employer also claimed that this applicant lacked experience in preparing paint to match specified colors, an argument not previously raised. Employer stated that this was why the applicant was sent an application to further investigate his credentials. Finally, Employer argued that this applicant's failure to respond indicated that he was unavailable or uninterested in the position and thus was lawfully rejected on this ground.

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). Actions by an employer that 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 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*). Furthermore, an employer has an obligation to investigate the qualifications of apparently qualified U.S. applicants and must attempt to contact potentially qualified applicants as soon as possible after receiving job applicant referrals from the state job service. *Gorchev and Gorchev Design, supra*; *Loma Lind Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991)(*en banc*).

A review of the applicant's resume reveals that he has been a painter/general repairman from 1997 to the present. (AF 18). His position included performance of "prep work," and painting, staining or varnishing as required. On its face, his resume revealed a potentially qualified applicant. Instead of scheduling an interview with this applicant,

Employer chose to send a letter, ostensibly to request further information regarding the applicant's qualifications. Contrary to Employer's assertion, the fact that this particular letter was sent by certified mail does not, in and of itself, indicate good faith recruitment.

An employer may reject an applicant without an interview where his resume reveals that he clearly lacks the minimum requirements for the position. *Anonymous Management*, 1987-INA-672 (Sept. 8, 1988)(*en banc*). However, when the applicant appears to have the experience required, he should be contacted for an interview instead of required to fill out additional paperwork. *Active Electronics, Inc.*, 1995-INA-160 (Dec. 23, 1996). Employer's conduct leads to the conclusion that its design was to deter further interest by this U.S. applicant. Rather than contact the applicant for an interview, Employer sent the applicant an application, after having already received his resume. Indeed, given that only one U.S. applicant responded to the job advertisement, it would not have been unduly burdensome to schedule an interview. Requiring an extra step is "given strict scrutiny because of the chilling effect on U.S. applicants interested in the position." *Therapy Connection*, 1993-INA-129 (Jun. 30, 1994). Employer's conduct herein cannot withstand that scrutiny, as the applicant's resume showed experience enough to warrant an interview. 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.