



Issue Date: 02 September 2009

BALCA Case No.: 2009-TLN-00078
ETA Case No.: C-09197-45688

In the Matter of:

COLLIER'S RESERVE COUNTRY CLUB, INC.
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **JOHN M. VITTON**
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from a request for review of a United States Department of Labor Certifying Officer's denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2009).

Statement of the Case

On June 15, 2008, the Employment and Training Administration ("ETA") received an application from Collier's Reserve Country Club, Inc., ("the Employer") requesting temporary labor certification for seven servers from October 15, 2009, through May 15, 2010. *See* AF 443-448.¹ The Employer described the job's duties as "[t]o serve/deliver food and beverage products to club guests; assist with opening/closing of restaurant/food and beverage area; prepare sidework; take guest order, advise kitchen of items ordered, serve/deliver requested items and present check to guest; and clear table." AF 445. The Employer also required that workers have two months of experience in the job offered. AF 506. The Employer included with the application, *inter alia*, its statement of temporary

¹ Citations to the Appeal File will be abbreviated "AF" followed by the page number.

need. AF 449. According to the Employer's statement, it has a peakload need during the requested period. In particular, from mid-October through mid-May, the Employer experiences an increase in occupancy of between thirty and forty percent.

On July 22, 2009, the CO issued a *Request for Information* ("the RFI"), and identified two deficiencies requiring remedial action, only one of which is relevant to this appeal. AF 439-442. The CO found that the Employer failed to submit a complete and accurate recruitment report. The CO noted that "an employer must file a complete recruitment report that explains the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position." The CO directed that the Employer provide a recruitment report that: identifies each recruitment source by name; states the name and contact information of each U.S. worker who applied or was referred to the job and the disposition of each worker; and explains the lawful job-related reason(s) for not hiring each U.S. worker. The CO also requested that the Employer provide all recruitment evidence, including, but not limited to: evidence of the job order; evidence of all newspaper advertisements and invoices; and resumes, applications, and any evidence of contact with U.S. applicants and referrals or an attestation regarding such contact.

In response to the RFI, the Employer submitted evidence of its job order with the State of Florida Agency for Workforce Innovation; tear sheets for two advertisements published in the Naples newspaper on June 27, 2009, and June 28, 2009; as well as several resumes and evidence of communication with several applicants. AF 436-438, 433-434, 39-432. The Employer also submitted a recruitment report, which stated that seventy-four U.S. workers responded to either the job order or the advertisement and that there were twelve applicants considered for the position. AF 38. The Employer indicated that it would hire two applicants to start on October 15, 2009, and gave reasons for its rejection of the other seventy-two workers. Its reasons were stated as follows:

- 62 – Applicant did not respond to request to complete an employment application/ interview
- 1 – Applicant stated in interview that she is looking for a bartender position, not a server position
- 1 – Applicant stated in interview that she is not sure she would be able to work the required shifts and days and applicant has no fine dining or country club server experience
- 2 – Unable to verify applicant's previous employment references and applicant does not have 2 months experience in the job offered, applicant has no fine dining or country club server experience
- 4 – Applicant did not meet the minimum experience requirements of the position; applicant does not have 2 months experience in the job offered
- 2 – Applicant did not meet the minimum experience requirements of the position; applicant does not have 2 months of experience in the job offered, has no fine dining or country club server experience

AF 38.

On July 31, 2009, the CO issued a Final Determination granting partial certification. AF 30-32. The CO certified the application for only one Waiter/Waitress rather than the requested seven positions. The CO stated that the number of workers certified was reduced because the Employer's recruitment report indicated that it successfully recruited two U.S. workers for the position, and the Employer inappropriately rejected four U.S. workers for unlawful reasons. Regarding the rejected workers, the

CO explained that four applicants were rejected because they did not have “2 months of experience in the job offered and they had no fine dining or country club server experience.” However, the CO observed that the Employer’s application only stated that it was requiring two months of experience as a “server,” and did not indicate that the experience requirement extended to fine dining or country club server experience. The CO noted that he had reviewed the applications and found that four U.S. applicants had two months of experience as servers and were thus unlawfully rejected.

The Employer requested administrative review on August 5, 2009. AF 1-29. In this request, the Employer stated, “Our hiring practice has always been to hire servers with fine dining experience from a country club, luxury resort or five star restaurant. . . . Since we are only seeking applicants for a temporary peakload time, we do not have time to train workers how to properly interact in this atmosphere.” AF 1. The Employer further argued that it listed only the primary lawful reason for not hiring each of the four applicants and stated, “We were unaware you wanted a full detailed explanation behind the lawful reasons as this report is a summary of recruit [sic] activities and result.” *Id.* The Employer then provided a detailed explanation as to why each applicant was not hired. *See* AF 2.²

BALCA issued a Notice of Docketing on August 12, 2009. On August 21, 2009, the CO filed a brief, arguing that the Employer failed to offer lawful reasons for not hiring the four applicants referenced in the Final Determination. The CO contended that, since the Employer did not specifically require fine dining or country club server experience in its application, the Employer could not lawfully reject applicants for lacking such experience.

On August 24, 2009, the Employer filed a brief, asserting that it agreed with the CO’s decision to reduce its certification by two servers, but not with the reduction of the additional four servers. The Employer also reemphasized its points from its request for review, contending that the four candidates referenced in the Final Determination were lawfully rejected.³

Discussion

The CO found that the Employer did not provide lawful reasons for rejecting four qualified applicants in its initial recruitment report. An applicant generally qualifies for a job if she meets the minimum requirements specified in the labor certification application. *See Bel Air Country Club*, 1988-INA-223, slip op. at 4 (BALCA Dec. 23, 1988) (en banc) (interpreting similar permanent labor certification regulations). An employer may not reject an applicant who meets the minimum requirements listed in the application only because she lacks experience in the duties the employer listed in the job description. *Id.* (citing *Microbilt Corp.*, 1987-INA-635 (BALCA Jan. 12, 1988)). However, by requiring experience in the job offered, an employer may incorporate as a job requirement experience in the job duties described in the application. *Latin American Enterprises, Inc.*, 2008-INA-82, slip op. at 5 (BALCA Mar. 3, 2008); *see also Tampa Ship LLC*, 2009-TLN-44, slip op. at 7 (BALCA May 8, 2009).

² Since my review is limited to the record under 20 C.F.R. § 655.33(a)(5), I am unable to consider the Employer’s additional explanations for not hiring the U.S. applicants and will not recite them here.

³ The Employer also argued that, since its name was clearly listed in its advertisement, by requiring two months of experience in the job offered, it was therefore clear that the person must know how to “interact in [the country club] atmosphere.”

In the instant case, the Employer only required applicants to have a minimum of two months of experience in the job offered, “server,” and described the position’s duties as “[t]o serve/deliver food and beverage products to club guests; assist with opening/closing of restaurant/food and beverage area; prepare sidework; take guest order, advise kitchen of items ordered, serve/deliver requested items and present check to guest; and clear table.” The Employer therefore required only two months of experience in the job duties described on the ETA Form 750. The Employer did not list duties that are unique to a country club or fine dining setting.⁴ Accordingly, without more, the Employer could not have lawfully rejected those domestic applicants who possessed two months of experience in the duties described but did not gain their experience at a country club or fine-dining establishment. Since all four rejected candidates possessed at least two months of experience in the duties described, the CO properly determined that the Employer unlawfully rejected them for lacking required experience. *See* AF 57-80.

The Employer also rejected two of these applicants because it was unable to verify previous employment references. AF 38. The CO’s Final Determination did not address this separate rejection ground, and therefore it is not properly before me. Accordingly, I will remand this matter to the CO under 20 C.F.R. § 655.33(e)(3) so that he can determine whether the Employer lawfully rejected these two applicants on this alternative ground.

Order

For the foregoing reasons, it is hereby **ORDERED** that this matter is remanded for further proceedings consistent with this decision.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge

⁴ The Employer’s passing reference to *servicing* “club guests” is insufficient to permit the Employer to reject domestic applicants based on a lack of server experience at a country club, much less a fine-dining establishment.