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Issue Date: 31 March 2004

BALCA Case No.: 2003-INA-88
ETA Case No.: P2001-CA-09512159/ML

In the Matter of:

ABS ELECTRIC, INC.,
Employer,

on behalf of

MOHAMMAD TAGHI SHABABZADEH ,
Alien.

Appearances: Sanford B. Reback, Esquire
Los Angeles, 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 an application for labor certification filed by ABS Electric, Inc. (“Employer”) on behalf of Mohammad Taghi Shababzadeh (“the Alien”) for the position of Electrician Supervisor.¹ The Certifying Officer (“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 February 8, 2001, Employer filed an application for labor certification on behalf of the Alien for position of “Electrician Supervisor.” The position required three years of experience in the job offered or six years in the related occupation of electrician. Job duties of the position included supervision and coordination of the “activities of electricians and electrical maintenance persons to maintain, install and repair according to blueprints and specifications.” (AF 14).

The Employment Development Department (“EDD”) provided Employer with an Applicant Referral Notice by letter dated July 19, 2001. (AF 37-38). Employer was advised to contact six applicants within fourteen calendar days. Employer wrote to two of the applicants (Applicants #5 and #6) on August 1, 2001, notifying them that they did not have the required experience. (AF 33, 35). By letter dated September 20, 2001, Employer advised EDD that the four remaining applicants were contacted by certified mail. (AF 20-21). Of those four, Applicant #1 made an appointment for an interview, rescheduled that interview and then failed to appear. (AF 20). Applicant #2 made an appointment, called back to cancel the appointment, declining because no fringe benefits were offered. Applicant #3 was interviewed and declined the position for the same reason. Applicant #4 was interviewed and stated that Employer was too small a firm, did not offer career objectives, opportunities or fringe benefits and declined the position. (AF 21).

The CO issued a Notice of Findings (“NOF”) on October 11, 2002, proposing to deny certification because Applicant #5 showed a combination of education, training, and/or experience enabling him to perform the usual requirements of the occupation. (AF 10-12). Furthermore, the CO noted that the experience zone for the occupation in the Specific Occupational Code was two to ten years, meaning that any U.S. applicant showing a two year background in the occupation would be considered basically qualified for the position. (AF 11). Employer was directed to show with specificity why each U.S. worker was rejected for job-related reasons. The CO also found that while the

resumes of U.S. applicants were sent to Employer on July 19, 2001, Employer did not make timely efforts to contact Applicants #1-4. Furthermore, Employer's letterhead provided a different telephone number than that which was provided on the ETA 750A. Finding Employer's recruitment to have been tardy and incomplete, Employer was directed to submit rebuttal which addressed these issues and detailed attempts to interview these U.S. applicants. (AF 11-12).

Employer submitted rebuttal on November 6, 2002. (AF 4-9). Therein, Employer stated that Applicant #5 was rejected based on his resume because he did not have the electrical skills required and no electrician supervisory experience. (AF 4). With regard to timely contact of applicants, Employer contended that it did not receive the EDD applicant referral notice until July 23, 2001. (AF 5). It then sent letters to the four qualified applicants on August 1, 2001, and thus the applicants were contacted within the fourteen day time period. Employer provided copies of the certified mail receipts for letters sent to Applicants #1-4. (AF 6). Employer stated that all four applicants responded by telephone. The telephone number listed on Employer's letterhead was a new number, however, both numbers were valid. Employer stated that it found two of the six applicants (Applicants #5 and #6) not to be qualified.

The CO issued a Final Determination ("FD") on December 12, 2002, denying certification. (AF 2-3). The CO determined that Employer had failed to establish that Applicant #5 was rejected for valid, job-related reasons. While the CO found that some detail was provided in rebuttal, as Employer explained that this applicant "did not have the electrical skill required...and no electrician supervisory experience," this did not explain what electrical skills were required since Box 15 of the ETA 750A indicated that there were no special requirements. Additionally, the CO found that the copies of the return receipts submitted by Employer with regard to its attempt to contact Applicants #1-4 were illegible and Employer had not established that it made timely contact of these qualified applicants. The CO found that there was also no evidence that any attempt was made to contact these applicants by telephone. (AF 3).

Employer filed a Request for Review on January 6, 2003 and the matter was docketed in this Office on February 14, 2003. (AF 1).

In its brief dated March 27, 2003, Employer contended that it was looking for an employee with two years of supervisory experience, which Applicant #5 did not have. Employer further argued that the requirement that the applicant have electrical skills was not a special requirement but an integral part of the job. With regard to the return receipts, Employer reasserted that the letters were sent on August 1, 2002, received by the applicants on August 2, 2002, and therefore were timely. Since these four applicants contacted Employer, there was no need for Employer to contact them by telephone. Given that the applicants were the ones who contacted Employer, Employer noted that it could not produce telephone records.

DISCUSSION

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 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 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*).

Applicant #5’s resume indicates that he worked for one year for Helix Electric, doing rough to finish electrical work, for six months for Cal-State Electric, performing rough electrical, reading blueprints, layout and installation for lighting, receptacles, data and fire alarm branch circuits, and for one year with Vector Resources, Inc., performing rough to finish electrical work and reading blueprints. (AF 34). He also graduated from

a four year apprenticeship program in Queens, New York with Teamsters #363. While he may not have the three years of supervisory experience, he does appear to have a combination of education, training and experience sufficient to meet the alternate requirement of six years of experience as an electrician.

It is well settled that a seemingly qualified applicant's credentials must be fully investigated to determine whether the applicant meets the requirements of the position, and the applicant may not be rejected out-of-hand. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*). In the instant case, Applicant #5 had a combination of education, training and experience which raised a reasonable possibility that he was qualified, thus shifting the burden onto Employer to further investigate his credentials. *See, e.g., Nancy, Ltd.*, 1988-INA-358 (Apr. 27, 1989)(*en banc*), *rev'd Nancy Ltd. v. Dole*, Case No. 89-2257-CIV-Scott (S.D. Fla. Aug. 8, 1990). Employer failed to do so, choosing instead to summarily reject him. As such, labor certification was properly denied.²

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

² Because we affirm the CO's denial on this ground, it is not necessary to address the CO's denial on the other ground, the failure to timely contact Applicants #1-4.

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.