U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 January 2004

BALCA Case No.: **2002-INA-303**
ETA Case No.: P1999-CA-09440637/ML

In the Matter of:

DISCPAK,

Employer,

on behalf of

IN SUNG KIM,

Alien.

Appearances: Frank F. Chuman, Esquire
Westlake Village, 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 Discpak ("Employer") on behalf of In Sung Kim ("the Alien") for the position of Wholesaler II.[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 20, 1997, Employer filed an application for labor certification on behalf of the Alien for the position of Wholesaler II. (AF 103). The requirements for the position were three years of high school and three years of experience in the job offered. The job duties included reviewing purchase orders from Korea and communicating orders in Korean.

The CO issued three Notices of Findings ("NOF"), dated May 25, 2001, September 20, 2001 and May 2, 2002.[2] (AF 98, 69, 31). In the third NOF, dated May 2, 2002, the CO determined that two U.S. workers were rejected because of undisclosed requirements. (AF 31-33). The CO found that U.S. applicant Lee had a combination of education, training and/or experience that enabled him to perform the usual requirements of the occupation. Employer was advised that it could rebut this finding by showing with specificity that Lee was rejected for job-related reasons. U.S. applicant Hong[3] was found not qualified because he did not possess the requirement of experience with Korean customs, government agencies, rules and regulations. The CO found that this requirement was not shown on the ETA 750A and therefore, Employer could not cite Hong's failure to meet this requirement as justification for finding him not qualified. Employer was directed to show that the U.S. workers who applied were not qualified based on their failure to possess the requirements set forth in the ETA 750A. (AF 32).

Employer submitted rebuttal on May 11, 2002. (AF 21-30). Employer stated that it had listed the requirement of familiarity with Korean government customs, laws and regulations in the ETA 750A, in the posting of employment on its bulletin board at the office and in the newspaper advertisements. Employer also questioned why this was being raised more than six years after the case began and argued that there did not appear

[2]Employer filed timely rebuttals to all NOFs. Given that the issues raised in the third NOF are the only ones at issue herein, they will be the only ones detailed herein.

[3]The applicant's name was Wan Hong. The NOF contained a typographical error, referring to Hong as Wong.

to be any qualified U.S. workers for this opportunity. (AF 21-23). With regard to U.S. applicant Lee, Employer contended that his resume did not fill the job description for the employment opportunity because his experience was in an entirely different industry. Applicant Lee was a financial analyst with experience in semi-conductors and he did not have experience with Korean government customs law and regulations. (AF 24). Employer argued that Lee did not possess the requirements of the position, particularly familiarity with the Korean government customs law and regulations and three years of experience. Regarding Hong, Employer stated that this applicant lacked familiarity with Korean customs laws and regulations. Employer stated that should corrective action be necessary, it requested the requirement of experience with Korean customs, laws and regulations be added as an amendment to the ETA 750A and Employer be allowed to test the market again. (AF 24-25). Attached was an amended ETA 750A, listing in box 13, the requirement of "Familiar with Korean government customs laws and regulations for contents, invoicing, packaging and labeling." (AF 29).

The CO issued a Final Determination ("FD") denying certification on June 11, 2002. (AF 19-20). The CO rejected Employer's rebuttal that Lee obtained his experience in a different industry, holding that Employer had failed to explain why semi-conductors and CD ROMS were in entirely different industries, as both are classified in the electronics industry by the Occupation Outlook Handbook. The CO found that the customs law requirement was not shown on the ETA 750A. (AF 103). While it was placed in the advertisement and posting, no amendment was made to the ETA 750A. Because it was not disclosed as a requirement on the ETA 750A, this requirement was not considered to be the actual minimum requirement and was not a valid, job-related basis for rejecting these otherwise qualified applicants. (AF 19).

On June 20, 2002, Employer filed a Request for Review and the matter was docketed in this Office on September 17, 2002. (AF 3).

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 the applicant 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*).

Both the applicants at issue, Hong and Lee, were fluent in Korean, according to their resumes. (AF 120, 118). In his cover letter, Lee indicated that he was a senior operations specialist for Hynix Semiconductor America, where his primary job responsibilities were focused on procurement and involved import/export with Korea. (AF 117). Employer indicated that after reviewing Lee's resume, it found that he did not have enough experience in the job position, as his experience was in the wrong industry and field. (AF 114). As the CO noted in the FD, semi-conductors and CD ROMs are both classified in the electronics industry in the Occupation Outlook Handbook. (AF 19). Employer gave no explanation as to how these industries were so different that Applicant Lee's experience would not translate. Although general experience in a field does not equate to specific experience, the issue must be decided on a case-by-case basis. *See, e.g., Harris Corp.*, 1988-INA-293 (Jan. 5, 1989). There is no evidence that an applicant with experience with semi-conductors would not be able to perform the duties required with CD ROMs. Employer, at a minimum, had the duty to contact Applicant Lee for an interview to further investigate his credentials. Labor certification was properly denied based on Employer's failure to establish that it had rejected U.S. applicants only for

lawful, job-related reasons. As labor certification was properly denied, it is unnecessary to address the remaining issues.[4]

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

[4] The CO also determined that Employer had rejected applicant Hong for the failure to meet an undisclosed requirement, the familiarity with Korean customs, laws and regulations. Hong's resume indicated that he had several years of experience in all aspects of importing and exporting. Employer interviewed Hong, but determined that he did not have experience with Korean customs, laws and regulations. This requirement was not listed on the ETA 750A and the CO found that as an undisclosed requirement, otherwise qualified U.S. applicants could not be lawfully rejected for their failure to meet this requirement. *See, e.g., Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991) (*en banc*). Employer argued that the requirement was listed in the advertisements for the position. However, the fact that the applicant does not meet the requirements for the position as advertised has been found not determinative because the actual minimum requirements must be those that appear on the ETA 750A, in order that the CO can review and challenge them if unduly restrictive. *Lakeview Food Store*, 1992-INA-258 (Dec. 22, 1993). Therefore, the minimum requirements are those listed on the ETA 750A, which does not contain the requirement of familiarity with Korean customs, laws and regulations. Employer's offer to amend the ETA 750A and re-advertise would not cure the deficiency in recruitment, as it was already determined that Applicant Lee was rejected for other than lawful, job-related reasons.

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.