U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 10 February 2004

BALCA Case No. **2002-INA-302**
ETA Case No. P2000-CA-09495087/LA

In the Matter of:

ADVANCE BLINDS CORP.,
Employer,

on behalf of

HELEN CHAN ONG,
Alien.

Appearance: Daniel T. Huang, Esquire
Pasadena, California
For Employer and 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 on behalf of Helen Chan Ong ("the Alien") filed by Advance Blinds Corporation ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based 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 of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On December 22, 1997, Employer filed an application for labor certification on behalf of the Alien for the position of Quality Control Supervisor. (AF 104-105).

On January 23, 2002, the CO issued a Notice of Findings ("NOF") indicating the intent to deny the application on the grounds that Employer rejected U.S. workers for not having experience in the production of venetian blinds, although Employer employed the Alien without experience in that field. (AF 100-103). The CO found eight applicants qualified for the position, as they possessed the requisite experience in the position of quality control supervisor. Employer was advised that to remedy the deficiency, it must document that each of the qualified U.S. workers was rejected for lawful, job-related reasons. (AF 101-102).

In its Rebuttal dated February 25, 2002, Employer asserted that prior to being hired, the Alien had six years of experience as a quality control supervisor for a venetian blinds manufacturer. Employer also asserted that all of the U.S. applicants performed poorly on a performance test. The U.S. applicants' scores ranged from two to seven, out of eighteen possible points, whereas the Alien scored seventeen points. Employer argued that the advertisement clearly required experience with venetian blinds and in addition to the Alien's superior test score, she was the only one with the requisite experience. Employer stated that she was therefore justified in hiring the Alien. (AF 66-69).

On March 25, 2002, the CO issued a Supplemental Notice of Findings ("SNOF"). (AF 60-62). The CO noted that Employer had rejected several of the U.S. applicants because they performed poorly on a performance test. The CO found that the test was not noted as a requirement in the application and if it had been required, it would have been considered a restrictive requirement because performance tests are not normally

required for the job in the United States. *See* 20 C.F.R. § 656.21(b)(2)(i)(A). The CO also noted that it appeared that the test was created specifically for the labor certification application. (AF 62).

To remedy this deficiency, Employer was required to demonstrate that it required the performance test for purposes other than labor certification. Employer needed to document the number of employees that were required to take the test, when and by whom the test was created and how many times it had been administered. Additionally, Employer was required to document when the Alien took the test prior to the filing of the labor certification application. (AF 62).

On April 23, 2002, Employer submitted its Rebuttal to the SNOF. (AF 51-59). Employer indicated that he created the test in 1997 when he first hired a quality control supervisor. Employer argued that the manufacturing of venetian blinds carried with it a high degree of responsibility and risk due to the nature of the materials used. Failure to meet the quality and specifications required could result in serious liability to Employer. Employer claimed that it was imperative that the quality control manager be knowledgeable of the product. To support these assertions, Employer enclosed photographs showing defective blinds. (AF 53-58).

Employer stated that the test had been administered seven times, the first time in 1997. The Alien took the test for the first time on December 16, 1997 and re-took the test in December 1999. (AF 52). In the first rebuttal, Employer enclosed copies of the Alien's test, as well as copies of the U.S. applicants' tests. (AF 77-79, 81-88). Employer also enclosed a statement by the Alien and a statement by a former employer affirming that the Alien had previous experience in venetian blinds. (AF 90-91, 98).

On May 28, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 46-47). The CO noted that Employer did not submit documentation to substantiate the assertion that the Alien took the test prior to being hired in 1997. The CO found that Employer introduced the test as a method to disqualify otherwise qualified

U.S. workers. Although Employer indicated that the test had been a requirement since 1997, the test was not mentioned until after the NOF was issued. The CO found that the test was not an acceptable reason for rejecting qualified U.S. workers and therefore Employer failed to document lawful, job-related reasons for the rejection of the U.S. applicants. On those grounds, the CO denied the application. (AF 47).

On June 26, 2002, Employer filed its Request for Review, asserting that the CO erred in denying the application because none of the U.S. applicants had experience with venetian blinds. (AF 1-45). Employer argued that the U.S. applicants' lack of knowledge of the product was confirmed by the fact that they performed poorly on the performance test. Employer claimed that because the U.S. applicants did not have experience with venetian blinds, they were lawfully rejected. Employer believed that based on the applicants' resumes, Employer was not required to contact the applicants because they lacked the requisite experience. (AF 1-5).

On October 16, 2002, Employer submitted a brief, arguing that Employer had properly documented that the workers were rejected for job-related reasons, experience with venetian blinds was clearly indicated as a requirement and the requirement was based on business necessity.

DISCUSSION

Employer, in its Rebuttal to the SNOF, did not challenge the CO's finding that it appeared that the performance test was created to exclude otherwise qualified U.S. workers. Twenty C.F.R § 656.25(e) provides that an employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. On this basis, the Board has held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Further, failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993). Employer did not rebut the CO's finding that the test was designed to exclude U.S. applicants. In

fact, the Alien's answers to the test were almost identical to Employer's model answers, including grammatical errors and phrasing. (AF 72, 77-79). This supports the CO's finding that the test was created to exclude U.S. applicants.

The CO in the SNOF requested documentation that the Alien took the performance test before being hired. Employer did not provide a single document that showed that the Alien took the performance test before being hired and instead relied on his assertion that the Alien had taken the test twice. If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Denial of certification is proper when the employer fails to provide reasonably requested information. *O.K. Liquor*, 1995-INA-7 (Aug. 22, 1996). Employer failed to produce evidence to substantiate its assertion that the Alien took the test prior to being hired in 1997. Further, Employer did not present any reason why he could not provide the requested evidence.

A job opportunity must offer terms and conditions which are no less favorable than those offered to the alien. 20 C.F.R. § 656.21(g)(8). When an employer tests U.S. applicants for job skills but fails to demonstrate that the alien was tested when hired, a violation of 20 CFR § 656.21(b)(6) has occured. *Sohnen Enterprises*, 1988-INA-582 (Oct. 4, 1989). Such a procedure, requiring U.S. applicants to pass a skills test not required of the alien, constitutes a discriminatory and unlawful recruitment process and supports the denial of certification. *MITCO,* 1990-INA-295 (Sept. 11, 1991).[1]

The SNOF specifically required Employer to document that the performance test was required of the Alien at the time she was hired. The Rebuttal failed to address this issue and warrants a finding that the Alien was not obliged to satisfy the requirement of taking the test prior to being hired by Employer. *See, e.g., In the Matter of Lewis*

[1] We note that Employer did supply a copy of the Alien's test administered in 1999. (AF 77-79). However, this test was taken by the Alien two years after being hired by Employer. As our concern is the equal treatment of U.S. applicants, the test supplied by Employer does not address this concern.

University, 1988-INA-75 (June 20, 1988). Such disparate treatment of U.S. workers violates 20 C.F.R. § 656.21(b)(6). *Brent-Wood Products, Inc.,* 1988-INA-259 (Feb. 28, 1989); *James Northcutt Associates,* 1988-INA-311 (Dec. 22, 1988).

Although an employer may in some circumstances use a test or a questionnaire to ascertain the extent of the applicant's claimed experience, this is not permissible when used as a means of discriminating against U.S. workers. *MITCO,* 1990-INA-295 (Sept. 11, 1991); *South of France Restaurant*, 1989-INA-68 (Mar. 26, 1990). Employer used the test to screen out otherwise qualified U.S. workers by only requiring the test after the Alien had already been hired. Because Employer has not rebutted this finding, it is grounds for denial.[2]

Accordingly, as the record is sufficient to support the CO's denial of alien labor certification and for the above stated reasons, the following order will issue:[3]

ORDER

The CO's denial of labor certification in this matter 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] Employer consistently alleged that passing the performance test was not a requirement. However, it continuously implied that the test results were evidence that the U.S. applicants did not comply with the requirements. In Employer's appellate brief, Employer stated that it was inconceivable that someone would be hired without a performance test being administered.

[3] Because the stated grounds are sufficient to affirm the CO's decision, we will not address the other issues raised by Employer is its brief.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.