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Issue Date: 28 April 2004

BALCA Case No.: 2003-INA-124
ETA Case No.: P2002-WA-09523238/ET

In the Matter of:

GLOBAL VENTURE,
Employer,

on behalf of

KHATIDJA RAMZAN,
Alien.

Appearances: M. Ali Zakaria, Esquire
Houston, Texas
For the 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 Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Accountant.¹ The CO denied the application and the 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 the 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 April 19, 2001, Global Venture (“the Employer”) filed an application for labor certification on behalf of Khatidja Ramzan (“the Alien”) for the position of accountant. (AF 40). Two years of experience in the job offered were required and the salary offered was \$34,580.00 per year.

On November 18, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification based on the unlawful rejection of U.S. workers. (AF 32-34). Specifically, the CO noted that the invitation letters the Employer sent to Applicants #1-3 arrived after the dates of these applicants’ scheduled interviews. The Employer did not follow-up or offer to reschedule. Additionally, Applicants #4 and #5 were rejected for not having two years of experience in the job offered, although their resumes clearly indicated that they possessed the required experience. The Employer was directed to submit rebuttal documenting how each applicant was rejected solely for lawful, job-related reasons. (AF 34).

By cover letter dated December 20, 2002, the Employer's counsel submitted rebuttal. (AF 21-31). Included were a supplementary summary of applicants and copies of letters sent to Applicants #1-3 subsequent to the issuance of the NOF. In those letters, the three applicants were invited to interviews scheduled for December 2002. (AF 25-30).

The Employer claimed that Applicant #5 was interviewed and found to have experience in the accounting field; however, she did not have accounting experience with a printing company. (AF 22). Additionally, according to the Employer, Applicant #5 was not willing to accept a salary of less than \$40,000.00. Applicant #4 was interviewed and rejected on the same basis.

A Final Determination (“FD”) was issued on January 3, 2003. (AF 19-20). The CO pointed out that the Employer's attempts to contact applicants six months after the

recruitment period was not part of the recommended corrective action. Furthermore, Applicants #4 and #5 were initially rejected for not having the two years of experience in the job offered. In its rebuttal, the Employer conceded that these two applicants had the accounting experience, but claimed they did not have accounting experience with a printing company. The CO noted that no such requirement was listed on the ETA 750A, and there was no evidence that accounting in that field was different from accounting in any other field of industry. (AF 20).

On February 5, 2003, the Employer requested review of the denial of labor certification and included a letter from the Employer's President, dated February 3, 2003. (AF 1-18). The matter was docketed in this Office on March 6, 2003 and Employer filed a Brief on April 14, 2003.

DISCUSSION

In its request for review, the Employer's president claims that Applicants #4 and #5 were not rejected for having less than two years of experience, but for lacking knowledge of certain software. The Employer then proceeds to review the resumes of the remaining applicants, listing new reasons for their rejection. Where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

Counsel for the Employer reiterates the arguments made by the Employer's president with respect to Applicants #4 and #5. Applicant #4 was interviewed and advised by letter dated June 7, 2002 that he was considered no longer interested in the position because he was not willing to undergo the daily commute to work. (AF 70). Applicant #5 was advised by letter dated June 7, 2002 that she did not have the required experience in the accounting field. (AF 76). The Employer has conceded that Applicant #5 did have the requisite experience, a finding which is well supported by her resume. (AF 78).

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). An 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*).

In the instant case, Applicant #5 had the requisite experience but was rejected by the Employer for her lack of experience. The Employer then conceded that the applicant did have the requisite experience, but claimed that she lacked experience in certain software. At one point, the Employer also claimed that Applicant #5 was not willing to accept the stated salary; Employer has not pursued this argument. Given the totality of the evidence herein, the claim regarding Applicant #5's unwillingness to accept the stated salary is found not credible. The newly alleged reason for rejecting this applicant, lack of experience in certain software, was not timely made and is not a valid reason for her rejection, given that it is not a stated requirement for the position.

Labor certification is properly denied where the employer rejects a U.S. worker who meets the minimum stated requirements for the job. *Banque Francaise Du Commerce Exterieur*, 1993-INA-44 (Dec. 7, 1993). If an applicant clearly meets the minimum requirements for the job, they are considered qualified. *UPS*, 1990-INA-90 (Mar. 28, 1991). Such is the case here. The Employer has failed to establish that Applicant #5 was not qualified, available, able or willing to accept the position as advertised. Thus, the Employer has failed to provide a lawful, job-related reason for rejecting this applicant and 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.