

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 May 2004

BALCA Case No.: 2003-INA-91
ETA Case No.: P2001-GU-09499191/ET

In the Matter of:

GUAM T & Y CORP.,
Employer,

on behalf of

YONG CHIN YI,
Alien.

Appearances: Melinda Swavely, Esquire
Tamuning, Guam
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONI
Chief Administrative Law Judge

DECISION AND ORDER

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 assistant quality control manager for construction.¹ The Certifying Officer

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).

("CO") denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

STATEMENT OF THE CASE

On April 13, 2000, Guam T & Y Corporation ("the Employer") filed an application for labor certification to enable Yong Chin Yi ("the Alien") to fill the position of "assistant quality control manager for construction." (AF 41). The Employer required a Bachelor of Science degree in architectural engineering or engineering and two years of experience in the job offered, plus eight years of experience in the related occupation of project manager. Where the form allowed for a listing of years and months of experience required, the Employer put an "and" in the month box, right before the indication that eight years of experience were required in the related occupation of project manager. The Employer also required proficiency in project management software.

The CO issued a Notice of Findings ("NOF") on October 22, 2002, proposing to deny certification on the ground that five U.S. applicants who had applied for the position had been rejected for other than lawful job-related reasons. (AF 38-40). These five applicants were considered qualified based on a review of their resumes, which showed the required amount of experience. The CO pointed out that, pursuant to 20 C.F.R. § 656.24(b)(2)(ii), a U.S. worker shall be considered qualified for the job opportunity if the worker, by education, training, experience or a combination thereof, is able to perform in the normally accepted manner, the duties involved in the occupation as customarily performed by other U.S. workers similarly situated. The Employer was required to document how these U.S. workers were rejected solely for lawful, job-related reasons. (AF 40).

The Employer's "Corporate Officer" submitted rebuttal on November 26, 2002. (AF 31-37).² With regard to its rejection of U.S. applicant #1, the Employer contended

² As the CO only addressed one applicant in the FD, only the rebuttal evidence provided regarding this one applicant will be detailed herein.

that while this applicant had an engineering degree and was a quality control manager from 1989 to 1991, and a project manager from 1992 to 1999, the minimum stated requirement for the job opportunity was at least eight years of experience as a project manager, a qualification which he lacked. The Employer also argued that the applicant lacked the two years of experience as an assistant quality control manager. Therefore, this applicant did not meet the minimum stated requirement for the job. (AF 32).

A Final Determination ("FD") was issued on December 18, 2002, denying certification. (AF 29-30). The CO pointed out that the minimum requirements for the position were a Bachelor's degree plus two years of experience as assistant quality control manager. In the alternative, a Bachelor's degree and eight years of experience as a project manager was required. Applicant #1 met the minimum requirement of a bachelor's degree plus two years of experience. (AF 29).

On January 15, 2003, the Employer requested review of the denial of certification and the matter was docketed in this Office on February 19, 2003. (AF 1).

In its Appeal Brief, filed on April 2, 2003, the Employer reiterated its argument that the applicant did not meet the minimum stated requirement, which it contended was two years of experience as an assistant quality control manager and eight years of experience as a project manager. It is the Employer's contention that because the CO did not allege that the job requirements were "unduly restrictive," the CO could not now object based on the Employer's assertion that the U.S. applicant failed to meet the job requirements.

DISCUSSION

In the advertisement placed in the newspaper, the Employer listed the experience requirement as "two years experience as Assistant Quality Control Manager for Construction and eight (8) years experience as Project Manager." (AF 81). The ETA 750A indicated that same requirement. It is clear that the CO misunderstood the

Employer's experience requirement; the CO believed that the Employer required two years of experience as an assistant quality control manager **or** eight years of experience as a project manager. The Employer actually required a total of ten years of experience. The CO did not challenge this requirement, presumably because he did not understand that the Employer was requiring a total of ten years of experience. As such, the CO should be given the opportunity to question the experience requirement of two years in quality control and eight years in project management as unduly restrictive, if the CO chooses.³

ORDER

We **REVERSE** and **REMAND** the Certifying Officer's Final Determination denying labor certification for further proceedings consistent with the foregoing.

For the Panel:

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JOHN M. VITTON
Chief Administrative Law Judge

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**

³ Where an applicant shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that the applicant meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. *Nancy, Ltd.*, 1988-INA-358 (Apr. 27, 1989)(*en banc*), *rev'd on other grounds, Nancy Ltd. v. Dole*, Case No. 89-2257-CIV-Scott (S.D. Fla. Aug. 8, 1990); *Gorchev & Gorchev Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*). It should be noted that Applicant #1 had two years of experience as a quality control manager, seven years and three months of experience as a project manager, two months of experience as a project engineer, and other significant experience. The applicant appeared qualified, even though he did not meet the specific requirement.

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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.