

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 20 May 2004

BALCA Case No.: 2003-INA-120
ETA Case No.: P1999-CA-09447067/ML

In the Matter of:

STATEWIDE WOODFINISHING INC.,
Employer,

on behalf of

FRANCISCO PALOMAR,
Alien.

Appearances: Gregory J. Boulton, Esquire
Los Angeles, California
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 an application for labor certification¹ filed by a furniture woodfinishing company for the position of Woodfinisher Supervisor. (AF 18-19).² The following decision is based on the record upon which the Certifying Officer (“CO”)

¹ 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 20 C.F.R. Part 656.

²“AF” is an abbreviation for “Appeal File.”

denied certification and the Employer's request for review, as contained in the Appeal File ("AF").

STATEMENT OF THE CASE

On December 15, 1997, the Employer, Statewide Woodfinishing Inc, filed an application for alien employment certification on behalf of the Alien, Francisco Palomar, to fill the position of Woodfinisher Supervisor. The job to be performed was described as training and supervising workers engaged in finishing and refinish of damaged or used furniture. Minimum requirements for the position were listed as two years experience in the job offered or four years experience as a Woodfinisher. (AF 18).

An Assessment Notice was issued by the Local Job Service Office on May 21, 1998, questioning the supervisory nature of the Employer's job opportunity and advising the Employer that the wage offer was below prevailing wage. In response, the Employer amended the wage offer and further stated that the job description on the ETA 750A included supervision and instruction of workers. The Employer noted that the ideal candidate would be a wood finisher with four years of experience because the candidate "would be able to manage the shop using his long term familiarity with the duties performed." However, the Employer stated that he would be willing to hire a candidate with two years experience as a wood finisher supervisor. (AF 36-39).

The Employer received no applicant referrals in response to its recruitment efforts for the position. (AF 22, 24).

A Notice of Findings ("NOF") was issued by the CO on June 29, 2001, proposing to deny labor certification based upon a finding that the Employer's requirement of four years experience in the "related occupation" was unduly restrictive. This requirement was in violation of 20 C.F.R. § 656.21(b)(i)(A) in that it is not normally required for the successful performance of the job in the United States. The CO noted that the Specific Vocational Preparation ("SVP") time for the occupation of Quality Control Supervisor

(DOT Code 763.134-010) was one to two years.³ The Employer was instructed to rebut the findings by either deleting the restrictive requirement and retesting the labor market or justifying the restrictive requirement on the basis of business necessity. (AF 15-17).

In Rebuttal, the Employer asserted that its requirement was actually within the SVP preparative time for the position because it would only require two years experience as a supervisor, and that the four years of alternative experience as a woodfinisher opened up the job opportunity to more individuals. The Employer further asserted that four years is required because all of the work is custom-work and the applicant must be able to demonstrate a thorough knowledge of all facets of finishing, as well as being able to hire, train and supervise employees. (AF 12-14).

A Final Determination (“FD”) denying labor certification was issued on July 1, 2002,⁴ based upon a finding that the Employer had failed to provide documentation justifying its restrictive requirement as based on business necessity. In denying certification, the CO stated that the SVP is preparative to the job of Supervisor. The CO disagreed with the Employer’s requirement of two years of supervisory experience. The CO also noted that the alternative requirement of four years of non-supervisory work experience exceeded the DOT amount. (AF 7).

The Employer filed a second Request for Reconsideration on May 21, 2002 and a Request for Review by letter dated July 11, 2002. (AF 2-6). The matter was docketed in this Office on February 28, 2003 and the Employer filed Statement of Position on April 22, 2003.

³ SVP is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. It includes vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

⁴ The Employer was notified by letter dated September 10, 2002 that the NOF was going to automatically become the final decision of the Secretary of Labor denying labor certification because the “employer-of-record” had failed to sign the Rebuttal to the NOF. (AF 9). The Employer filed a Request for Reconsideration stating that his Vice President had full authority to sign on the Employer’s behalf, whereupon, the Employer’s Rebuttal was accepted and considered on its merits. (AF 7-8).

DISCUSSION

Twenty C.F.R. § 656.21(b)(2) requires an employer to document that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the successful performance of the job in the United States. Abnormal requirements would preclude the referral of otherwise qualified U.S. workers. One of the measures by which a job requirement is tested to determine whether it is unduly restrictive is inclusion of the requirement in the definition of the job in the *Dictionary of Occupational Titles* (“DOT”). To determine whether a particular job requirement falls within the applicable DOT code, the CO must determine the job title which best describes the job and determine whether the job requirements specified by the employer fall within those defined in the DOT. *LDS Hospital*, 1987-INA-558 (Apr. 11, 1989)(*en banc*). Where the employer cannot document that the job requirement is normal for the occupation or that it is included in the DOT, the employer must establish business necessity for the requirement. 20 C.F.R. § 656.21(b)(2).

In the instant case, we conclude that the CO has chosen an improper job title within the DOT. The Employer petitioned for labor certification for the job of Woodfinisher Supervisor. The CO assigned the Employer’s job opportunity the DOT title of Supervisor, Quality Control (furniture), DOT Code 763.134-01, which specifies an SVP of six (one to two years experience). The duties of that job as described in the DOT are:

Supervises and coordinates activities of workers engaged in inspecting and repairing finished and unfinished wooden furniture to ensure conformance of furniture to company and customer specifications. Confers with supervisory personnel concerned with assembly of furniture to determine type and quantity of furniture to be processed. Measures wooden parts and assembled furniture articles, using tape measure, ruler and calipers, to ensure conformance with blueprint specifications. Scans and feels surface of furniture for construction and finishing defects to determine if quality standards are met. Compares color on finished furniture with master color sample to determine if colors match. Records type and quantity of furniture articles processed daily and reports production to office personnel. Performs other duties described under SUPERVISOR (any industry).

DOT Code 763.134-01.

The duties of the job opportunity for which Employer seeks to fill are:

Supervises workers engaged in finishing and refinish of damaged or used furniture to specified color or finish using the knowledge of wood properties, finishes and styling. Train workers to remove old finish from surfaces using sandpaper, steel wool, solvent and putty knife. Will direct workers to remove excess solvent with cloth immersed in paint thinner. Applies wood and plastic putty, using spatula or knife to fill nicks, depressions, holes and cracks. Instruct how to select finish ingredients and mix them using hand or machine to obtain specific color or shade to match existing finish. Direct workers to brushes and spray coats of stain, varnish and lacquer. May hire and terminate workers. Will coordinate activities and work schedules.

(AF 18).

We find the job duties of the position listed as Furniture Finisher (woodworking), (DOT Code 763.381-010), specifying an SVP of seven (two to four years experience), much more closely mirror those of the position. The duties of that job are:

Finishes or refinishes damaged, worn or used furniture or new high-grade furniture to specified color or finish, utilizing knowledge of wood properties, finishes and furniture styling: Disassembles article, masks areas adjacent to areas being finished, or removes accessories such as knobs and hinges, using hand-tools, to prepare article for finishing. Removes old finish from surfaces, using steel wool, sandpaper, or solvent and putty knife. Removes excess solvent with cloth immersed in paint thinner or sal soda. Applies plastic-putty, wood putty or lacquer-stick to surface, using spatula or knife, to fill nicks, depressions, holes and cracks. Smooths surface for finishing using sandpaper or power sander, selects finish ingredients and mixes them by hand or machine to obtain specified color or shade or to match existing finish. Brushes or sprays successive coats of stain, varnish, shellac, lacquer, or paint on work-piece. Grains wood or paints wood-trim, using graining roller, comb, sponge, or brush. Polishes and waxes finished surfaces. May restore wood to natural color, using bleaching acid and neutralizer. May spread graining ink over metal portions of surfaces with cheese cloth to simulate wood-grain-like finish.

DOT Code 763.381-010. This position, while not supervisory as described in the DOT, lists the majority of duties the Employer has described as part of the job, whereas the position chosen by the CO shares no duties other than that it is supervisory. In requiring

experience for a supervisory position, the Employer is clearly looking for experience in the work being supervised.

It is clear from the Employer's job description that the prospective Woodfinisher Supervisor will require the knowledge and experience of the position described as Furniture Finisher (woodworking), as the Employer's job duties specifically state that the Supervisor will have to train, direct, and instruct workers in the various duties described under the Furniture Finisher position. The Employer has stressed that it does custom-work and that the prospective applicant "must be able to demonstrate a thorough knowledge of all facets of finishing." As previously noted, Furniture Finisher (woodworking) without the added supervisory experience provides for a SVP of over two years up to and including four years. An employer may require the top end of an SVP range. *Transgroup Services, Inc.*, 1988-INA-428 (Feb. 21, 1990); *Rak and Rak, Inc.*, 1994-INA-269 (Jul. 26, 1995). If the employer's experience or educational requirement falls within the SVP, it is not unduly restrictive and business necessity for the requirement does not need to be established. *Manuel Reyes*, 1989-INA-22 (Nov. 28, 1989); *Kamal Farah*, 1989-INA-5 (Oct. 13, 1989). This seems particularly appropriate in this case, as the Employer is requiring the added supervisory responsibility.

Based upon the foregoing, the Employer's minimum requirement of two years experience in the job offered or four years experience as a Woodfinisher is not unduly restrictive, but is within the prescribed SVP for the petitioned position. On this basis, labor certification was improperly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and labor certification is **GRANTED**.

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
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.