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: 08 June 2004

BALCA Case No.: 2003-INA-123
ETA Case No.: P2000-CA-09508668/ML

In the Matter of:

BEST WESTERN (SUTTER HOUSE),
Employer,

on behalf of

LEE-ANNA POSTNIKOFF,
Alien.

Appearance: Allen Gray, Immigration Consultant
Castlegar, British Columbia
For the 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 arose from an application for labor certification on behalf of Lee-Anna Postnikoff ("the Alien") filed by Best Western (Sutter House) ("the 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") of the United States Department of Labor denied the application, and the 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 the 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 August 11, 1999, the Employer filed an application for labor certification on behalf of the Alien for the position of Hotel Clerk. (AF 89-90).

On October 21, 2002, the CO issued a Notice of Findings ("NOF") indicating intent to deny the application on the grounds that the Employer made inadequate recruitment efforts and that it appeared that the Employer hired the Alien without the required experience. (AF 84-87). The CO noted that the job opportunity was unionized, but the Employer did not provide any evidence that the pertinent union was contacted about the position. To cure the deficiency, the Employer was advised to contact the appropriate union representative and inform him of the opening, request that potential applicants be contacted and interview those individuals. (AF 85).

The CO also noted that when the Employer hired the Alien in 1998, she did not have experience with the *Nova* reservation system. Because knowledge of the *Nova* reservation system was a requirement and the Employer could not have stricter requirements for the U.S. applicants than for the Alien, the Employer was advised either to amend the ETA 750B to show the Alien's experience with the *Nova* system, to delete the requirement, or to document how it was no longer feasible to hire someone with less experience. (AF 85-86).

The Employer submitted its Rebuttal on November 1, 2002. (AF 62-83). In its Rebuttal, the Employer submitted a letter from the Alien, who indicated that she had prior experience with the *Nova* system by working at another Best Western property. The Alien also described different aspects of the *Nova* system and noted that she trained other employees to use the system. (AF 62). The Employer stated that the *Nova* system is a requirement and added that the Alien already had working knowledge of the *Nova* system

before she was hired by the Employer. (AF 63). The Rebuttal included a letter from the Union, in which it indicated that it was aware of the job opportunity and noted that it did not operate a hiring hall. (AF 64). Therefore, the hiring decision was ultimately left to the Employer, not to the Union. The Collective Bargaining Agreement and two letters of reference were also enclosed. (AF 66-83).

On December 18, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 60-61). The CO noted that only applicants who had previously worked for the Best Western chain would qualify for the position, as the *Nova* system was exclusively used by the chain. The CO added that the Employer had agreed with the NOF's finding that the Employer's application did not state the true minimum requirements for the position. The CO found that because the Alien did not meet the requirement at the time she was hired by the Employer and the Employer is now requiring knowledge of the *Nova* system, the position was not truly open to any qualified U.S. applicant. (AF 61).

On December 27, 2002, the Employer filed its Request for Review. (AF 1-59). The Employer alleged that the Alien had the required experience in the *Nova* reservation system at the time she was hired, as she was required to train new employees to use the system. The Employer attached a letter from her former supervisor indicating her prior experience with the *Nova* system and her experience as assistant manager, along with an employment contract reflecting the job requirements. The Employer further asserted that it had previously hired individuals with experience in other hotel reservation systems because of the similarities between the Best Western reservation system and that of other hotel chains. The Employer added that even novice clerks have learned the system in a short time; a letter from another employee confirming this statement was attached. The Employer concluded that the CO's finding should be reversed because the Alien had the required experience at the time she was hired and the position was clearly open to any U.S. applicant.

On March 31, 2003 the Employer submitted a legal brief. The Employer alleged that the Alien had several years of experience in the *Nova* reservation system at the time she was hired; consequently, the CO was incorrect in asserting that the Alien was hired without the experience in the *Nova* system. The Employer also asserted that it had previously hired and trained front desk clerks with experience from other hotel chains. As the *Nova* system is similar to those of other chains and training was offered, the job was clearly open to any qualified U.S. worker. In support of its brief, the Employer submitted letters from other hotel chains, noting that their reservation system was similar to that of the Employer and that learning the system would take only a short period of time. The Employer also submitted other documents in support of its brief, including a copy of the BALCA decision in *Steel Tool and Engineering Co*, 1994-INA-45 (Nov 16, 1994). The Employer concluded that the CO's decision should be reversed because it had previously hired inexperienced individuals in the *Nova* system and had trained them in a short time. Additionally, the Alien had experience with the *Nova* system at the time she was hired.

DISCUSSION

Twenty C.F.R. § 656.21 (b)(5) provides

> [t]he employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

Thus, the employer is not allowed to treat the alien more favorably than it would a U.S. applicant. *ERF Inc., d/b/a Bayside Motor Inn,* 1989-INA-105 (Feb. 14, 1990).

The CO noted that in 1998, the Alien was hired by the Best Western without any experience in the *Nova* reservation system. On part B of the ETA 750, the only employment listed by the Alien before being hired by Best Western was with a supermarket chain. (AF 170). Additionally, there is no indication that the Alien acquired

training in the *Nova* system in an academic setting. Therefore, the CO was correct in determining that when the Alien was hired by Best Western, she did not have knowledge or experience with the *Nova* system.

The Employer alleged that the Alien had acquired her experience with the *Nova* reservation system with another hotel within the Best Western chain. In this instance, we construe the Employer to be Best Western. In essence, the Alien is working in a different profit center within the same organization. Therefore, we find that the Alien acquired her experience and knowledge of the *Nova* system with the same Employer. The experience the alien acquired on-the-job cannot be counted as required experience. *Iwasaki Images of America,* 1987-INA-656 (May 11, 1988). Because the Employer cannot require more experience from U.S. applicants than what it required from the Alien, the Employer's stated minimum requirements are not the true minimum requirements, as they exceed the Alien's experience at the time she was hired, in violation of 20 C.F.R. § 656.21(b)(5).

In the NOF, the Employer was provided the opportunity to remove the knowledge requirement of the *Nova* system, which the Employer declined to do. In its Rebuttal, the Employer reaffirmed that knowledge of *Nova* was a requirement. However, in its Request for Review and in its legal brief, the Employer provided documents indicating that the *Nova* system was similar to other hotel reservation systems and that it was a system that could be learned in a short time. The ease in learning the system, as asserted by the Employer, calls into question the Employer's refusal to remove the requirement in its Rebuttal. An employer's last opportunity to supplement the factual issues of the case is in the Rebuttal. 20 C.F.R. § 656.24. Therefore, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

Another issue is the implication that the only individuals who could be hired by the Employer were individuals who had previously worked for the Best Western chain. In the ETA 750A, section 13, the Employer indicated that the applicant must have experience with all aspects of Best Western operations and must have experience in the

Best Western computerized accounting systems. Additionally, in the ETA 750A, section 15, the Employer required experience in accounting and night shift operation at Best Western. (AF 89). Therefore, no individual could qualify for the position unless that individual is a current or former employee of the Best Western chain, as it is impossible to acquire this specific experience without working for Best Western.

The Employer's requirements and hiring philosophy do not permit us to characterize the Employer's recruitment as a good faith effort, as it, by its nature, excluded all U.S. applicants except those already employed by the Employer or former employees of the Employer. Consequently, the job opportunity was not truly open to any U.S. applicants in violation of 20 C.F.R. § 656.20(c)(8). The employer's effort must show that it seriously wants to consider U.S. applicants for the job, not merely go through the motions of a recruiting effort without serious intent. *Dove Homes, Inc.*, 1987-INA-680 (May 25, 1988)(*en banc*); *Suniland Music Shoppes*, 1988-INA-93 (Mar. 20, 1989)(*en banc*).

The Employer's alternative remedy to the CO's finding was to demonstrate that the Employer's current circumstances prevented it from training new employees. The CO advised the Employer that it could document that it was no longer able to train new employees. However, the Employer did not provide a single document in support of that position. Instead, the Employer limited itself to citing *Steel Tool & Engineering Co.*, 1994-INA-45 (Nov. 16, 1994), in its Request for Review. The Employer failed to establish that it was unable to train new employees, as the Employer's citation of *Steel Tool & Engineering Co.*, standing alone, is insufficient to carry the burden.[1]

[1] Denial of certification has been affirmed where the employer has made only generalized assertions. *Winner Team Construction, Inc.*, 1989-INA-172 (Feb. 1, 1990). Although a written assertion constitutes a documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988).

Accordingly, the CO properly denied certification and the following order will issue[2]:

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.

[2] The Employer submitted additional documents with the Request for Review; however, those documents could not be considered by this Panel because our review must be based on the record upon which the CO reached his decision. Evidence first submitted with the Request for Review can not be weighed. *Memorial Granite,* 1994-INA-66 (Dec. 23, 1994).