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Issue Date: 20 July 2004

BALCA Case No.: 2003-INA-217
ETA Case No.: P2000-CA-09506590/JS

In the Matter of:

EMERALD PAINTING CO.,
Employer,

on behalf of

RAMON RAMIREZ,
Alien.

Appearances: Alexander N. Lopez, Esquire
Glendale, California
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 Supervisor, Painter.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 February 2, 1999, the Employer, Emerald Painting Company, filed an application for labor certification to enable the Alien, Ramon Ramirez, to fill the position of Supervisor, Painter. (AF 28). The position required a high school education and three years of experience in the job offered. On January 24, 2000, the Employer submitted an amended ETA 750B, indicating therein that the Alien had worked as a Supervisor, Painter in Mexico from 1996 to 1999. (AF 35).

On May 20, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification. (AF 22-26). Therein, the CO found that (1) the ETA 750B did not establish that the Alien had three years of experience prior to hire, given that the local office of the California Employment Development Department indicated that the Employer had paid wages to the Alien during the same time period in which the amended ETA 750B indicated that the Alien was obtaining his experience in Mexico; (2) the Employer’s true minimum requirements did not appear to be listed, given that the Alien did not have the requisite three years of experience; and (3) the advertisement for the position was listed under “supervisor” thus placing it in a section of the advertisements where painters were not most likely to look. The Employer was advised to (1) submit an explanation regarding the Alien’s work history and or an amendment if needed; (2) delete the experience requirement and retest the labor market or provide justification for the experience requirement; and (3) readvertise the position, listing the job as “Painter, Supervisor.”

Counsel for the Employer submitted rebuttal on June 10, 2002. (AF 15-21). The Employer stated that that portion of the ETA 750B which listed the Alien’s employment history should be amended. However, the amendment was not included. The wording for re-advertising was also submitted, with the position requiring two instead of three years of experience. (AF 15).

A Final Determination (“FD”) was issued on July 5, 2002. (AF 9-11). The CO

found that the Employer had failed to describe the Alien's previous work experience as required by 20 C.F.R. § 656.21(a)(1). With regard to the issue of the minimum requirements for the position, the CO determined that this issue had not been addressed or resolved by reducing the requirement to two years, as there was no indication that the Alien had two years of experience with a different employer. Despite the Employer's willingness to readvertise, given that the Employer had failed to explain whether the Alien even had two years of experience prior to hire, it could not be found that the Employer had justified either three or two years of experience in the job as a true minimum requirement. (AF 10-11).

On July 22, 2002, the Employer filed a Request for Review of a Denial, which also sought reconsideration by the CO. (AF 1-7). The CO denied the request for reconsideration on April 9, 2003. (AF 8). This matter was docketed in this Office on June 10, 2003.

DISCUSSION

In its request for review, the Employer claimed to correct all deficiencies cited in the NOF. Counsel for the Employer stated that he signed the rebuttal, but the Alien failed to fill in "its portion of the NOF." This, according to counsel, was a slight oversight and does not materially affect the merits of the petition. (AF 1-2). Enclosed with the request for review is a letter of recommendation purporting to verify that the Alien did possess the requirements of the position prior to hire. (AF 5-6).

The Board's review of the denial of certification is based solely on the record upon which the denial was based, the request for review, and legal briefs. The Board does not consider additional evidence submitted in conjunction with a request for review. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989)(*en banc*). In this matter and contrary to the Employer's assertion, the oversight was more than slight and went straight to the merits of the application. The Employer failed to provide the requested documentation and information to the CO despite the clarity of the NOF. Rebuttal failed

to establish that the Alien had the requisite experience prior to hire. The attempt to provide that documentation with the request for review is not timely. *See Apartment Management Company/Southern Diversified Properties, Inc.*, 1988-INA-215 (Feb. 2, 1989)(*en banc*). As such, 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.