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Issue Date: 05 August 2004

BALCA Case No.: 2003-INA-222
ETA Case No.: P2002-MA-01321001

In the Matter of:

LYDIA'S BAKERY,
Employer,

on behalf of

JOSE FELIPE INAHUAZO,
Alien.

Certifying Officer: Raimundo Lopez
Boston, Massachusetts

Appearances: Michael F. Alper, Esquire
Union, New Jersey
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a Bakery for the position of Store Manager. (AF 1-4).² The following decision is based on the record upon which the Certifying Officer ("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).

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."

STATEMENT OF THE CASE

On April 24, 2001, the Employer, Lydia's Bakery, filed an application for alien employment certification on behalf of the Alien, Jose Inahuazo, to fill the position of Store Manager. Minimum requirements for the position were listed as three years experience in the job offered. The job duties included buying bakery supplies, fixing retail prices, supervising personnel, and checking cash receipts. (AF 1).

The Employer received four applicant referrals in response to its recruitment efforts; three of the applicants were rejected as unqualified for the position, and the fourth applicant was not interested in the position. (AF 24).

A Notice of Findings ("NOF") was issued by the CO on January 21, 2003, proposing to deny labor certification based upon a finding that the Employer had rejected three qualified U.S. workers for other than lawful, job-related reasons. (AF 31-33). Noting that the Employer had rejected three of the four applicants because they had "no knowledge of bakery work and ha[d] never bought bakery supplies nor fixed retail prices," the CO observed that the Alien lacked this experience as well. The CO found that the three workers were qualified and that the Employer unlawfully rejected each of these applicants, as they either met or exceeded the Employer's stated minimum requirements of three years experience as a Store Manager.

In Rebuttal, the Employer submitted a letter from the Alien's former employer, stating that the Alien had been the Store Manager at his "small supermarket" where the Alien's duties included purchasing "bakery goods and supplies, groceries, as well as fruit, vegetables, deli and dairy products" and supervising employees, balancing cash registers and fixing retail sale prices. The Employer also further reiterated his basis for rejection of each of the cited applicants for lack of Store Manager/bakery supplies purchasing experience. (AF 34-37).

A Final Determination (“FD”) denying labor certification was issued by the CO on April 14, 2003, based upon a finding that the Employer had failed to adequately document lawful rejection of Applicant #1. (AF 39-40). The CO found this applicant highly qualified. The Employer’s basis for rejection was unsubstantiated because the applicant’s resume indicated that his professional experience encompassed over fifteen years of experience as a General Manager, Commissary Supervisor, Baker and Bakery Supervisor, performing many of the duties and responsibilities of the job.

The Employer filed a Request for Review by letter dated May 15, 2003, and the matter was docketed in this Office on July 14, 2003.

DISCUSSION

Twenty C.F.R. § 656.24(b)(2)(ii) states in part, that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed. Twenty C.F.R. § 656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job related reasons. Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

In the instant case, the Employer seeks to hire a Store Manager with three years of experience. The Employer rejected Applicant #1 based upon his resume, because Employer concluded “[h]e does not offer 3 years experience as a Store Manager with bakery experience. He has never fixed retail prices nor checked cash receipts.” Applicant #1’s resume, however, reflects in excess of thirteen years as a General Manager, plus specific experience in a bakery environment, including planning production, purchasing and baking. (AF 30). While a U.S. applicant who only has general or related experience in the field of the position offered has been lawfully found to be not qualified where an employer has stated an unchallenged requirement of more

specific experience, the burden of proof in the labor certification process is on the employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b). Hence, where an applicant's resume 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 he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. *Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993)(*en banc*); *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*).

Given this burden, and in light of the significant experience reflected in the applicant's resume, the Employer was obligated to attempt to contact and further investigate the applicant's qualifications for the position. The Employer failed to adequately document that Applicant #1 is not qualified, and accordingly, 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 of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.