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Issue Date: 18 August 2004

BALCA Case No.: 2003-INA-245
ETA Case No.: P2001-CA-09508883/JS

In the Matter of:

MAJESTIC WOOD WORKS,
Employer,

on behalf of

MARIO RODRIGUEZ,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Luis Franco, Esquire
Torrance, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Majestic Wood Works (“the Employer”) filed an application for labor certification¹ on behalf of Mario Rodriguez (“the Alien”) on September 3, 1997. (AF 13).² The Employer seeks to employ the Alien as a constructor. This 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. 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as finishing carpentry works, including staircases, wood banisters, curved and straight railings, and working with wood saws, planers, moulders, sanders, and drills. The Employer did not require any education or any experience in the job offered. (AF 13).

In the Notice of Findings (“NOF”), issued July 31, 2002, the CO rejected the application because the Employer failed to provide job-related reasons for the rejection of U.S. applicants. The CO noted that the job did not require any experience or education. Therefore, all applicants were considered qualified. Applicant #1 was rejected by the Employer because he was not qualified; however, his resume showed nineteen years of experience as a carpenter. In addition, the Employer stated that three applicants were rejected because they did not return phone calls from messages left on September 19, 2000. The CO noted that the Employer had waited almost six weeks after receipt of the resumes to contact the applicants. The CO found that the attempted contact was untimely. On rebuttal, the CO instructed the Employer to document in detail how each US worker was rejected solely for lawful, job-related reasons. (AF 9).

The Employer submitted rebuttal on August 13, 2002. The Employer reiterated his statement that the possible workers were contacted and messages left specifying that “we were calling from Majestic Wood Works about the resumes that they submitted to the Department of Labor.” The Employer also stated that Applicant #1 never stated that he had experience on staircases, wood banisters, curve and straight railings. The Employer stated that his resume demonstrated that he had never done this kind of work. (AF 7).

The CO issued a Final Determination (“FD”) on September 9, 2002, denying certification. (AF 4-5). The CO noted that the Employer had not demonstrated that Applicant #1 was unqualified because the job description included no experience

requirements. In addition, the CO stated that the Employer had not demonstrated that the other applicants were contacted in a timely manner.

On September 20, 2002, the Employer filed a Request for Review. (AF 1). The Employer argued that the Alien is the most qualified for the job and the other applicants were not qualified “to cover the necessity of this company.” In a denial of Request for Reconsideration, the CO stated on November 29, 2002 that since the job required no education or experience, it was not allowable to reject US workers for lacking the same experience as the Alien. (AF 3).

The case was docketed by the Board on July 29, 2003. The Employer did not file an additional brief in support of its appeal.

DISCUSSION

Twenty C.F.R. § 656.25(e) provides that the employer’s rebuttal evidence must rebut all of the findings of the NOF, and that all findings not rebutted shall be deemed admitted. On this basis, the Board has repeatedly held that a CO’s finding which is not addressed in rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). The employer must provide directly relevant and reasonably obtainable documentation that is requested by the CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

The Employer argues that Applicant #1 did not have experience in particular duties associated with this job. The Employer’s rejection of Applicant #1, who had worked as a carpenter for nineteen years, on the basis that he did not have experience is contrary to the requirements of the job listed on the application. On the application, the Employer stated that the job did not require any experience or any education. Although an employer may contemplate that certain duties specified in the job description may require certain education and/or experience, those requirements must be specified by the employer; they will not be implied. *Universal Energy Systems*, 1988-INA-5 (Jan. 4,

1989) (*en banc*). Furthermore, an employer may not reject a U.S. worker because the alien is more qualified. *Paperlera Del Plata, Inc.*, 1990-INA-53 (Jan. 31, 1992) (*en banc*). Thus, while the Employer may feel that the Alien is more qualified in the particular job duties, he has not shown a lawful job-related reason for rejecting Applicant #1 because the applicant clearly met the job requirements.

In addition, the Employer did not contact the other applicants in a timely manner. An employer must contact potentially qualified U.S. applicants as soon as possible after it receives resumes or applications so that the applicants will know that the job is clearly open to them. *Loma Linda Food, Inc.*, 1989-INA-289 (Nov. 26, 1991) (*en banc*). The Employer was directed to contact the U.S. applicants within fourteen days of receipt of their resumes. The Employer provided no reason for his failure to contact these U.S. applicants until six weeks after receiving their resumes. The Employer has not established that the U.S. applicants named above were contacted in a timely manner.

Thus, the Employer has not documented that U.S. applicants were rejected for lawful job-related reasons and the Employer did not contact U.S. applicants in a timely manner. Therefore, 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.