U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 11 August 2004

BALCA Case No.: 2003-INA-169
ETA Case No.: P2000-CA-09497586/AT

In the Matter of:

WOODLAND HILLS FIREPLACE SHOP,
Employer,

on behalf of

JOSE CONTRERAS,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Gabriela Kruetzer, Esquire
Los Angeles, California
For the Employer and the Alien

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 its application for alien labor certification. 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 January 2, 1998, the Employer filed an application for labor certification on behalf of the Alien to fill the full-time position of Sales Manager. (AF 174). The job requirements called for managing all sales activities of the firm, including establishing sales territories and quotas, and four years of prior experience as a sales representative.

The CO issued a Notice of Findings ("NOF") on October 17, 2002, proposing to deny certification pursuant to 20 C.F.R. §§ 656.21(b)(6) and 656.21(j)(1)(iii) and (iv). (AF 120). The CO found that the recruitment report "provided unsubstantiated reasons" for rejecting qualified U.S. applicants. (AF 120-121). In a rebuttal dated November 14, 2002, the Employer correctly noted that the NOF referred to applicants whose names were provided in an earlier set of applicants rather than to the most current set of applicants that were considered in the Employer's recruitment report dated July 15, 2002. (AF 94).

On November 26, 2002, the CO issued another NOF, again stating an intent to deny certification pursuant to 20 C.F.R. §§ 656.21(b)(6) and 656.21(j)(1)(iii) and (iv). (AF 90-92). The CO characterized the Employer's explanation for the rejection of Applicant #1, who could not move barbeques or fireplaces weighing 300 to 400 pounds, as "totally fallacious and discriminatory." (AF 91). The CO described this as "a completely unfair requirement upon this woman setting her up for failure and then reporting it as though it is routine for salespersons to move these items without assistance from another employee or a forklift truck." (AF 92).

The Employer's rebuttal to the second NOF was filed on December 11, 2002. (AF 82-89). The Employer argued that its products "are heavy items" that "come in boxes which weigh at least 100 to 120 lbs" and that the "applicant needs to perform the

job as required." (AF 86). The Employer commented on the rejection of Applicant #1 as follows:

> Applicant was asked to test her physical work, in the event no other sales person was available to help her.
>
> THIS IS A STANDARD PROCEDURE IN OUR BUSINESS, NOT AN UNREASONABLE REQUIREMENT.
>
> The[n] we asked the applicant to move a small box in order to show its contents. She said and I quote: "I am not ABLE to move it."
>
> If a person cannot perform the duties of the job as needed, then the applicant is not suitable for the position.

(AF 87). This account of the applicant being asked to move "a small box" is inconsistent with the Employer's earlier statement dated July 15, 2002 that "the barbeques and fireplaces weigh 300 to 400 lbs, and she could not move even one." (AF 64).

The CO issued a Final Determination ("FD") denying labor certification on December 30, 2002, citing the November 26, 2002 NOF as raising "a single issue of rejection of U.S. workers for lack of specificity in violation of 20 C.F.R. §§ 656.21(g)(6) and/or 656.21(j)(1)(iii) and (iv)."[1] (AF 81). Although the CO noted that Applicant #1's rejection "may have been based on her inability to move a heavy item," the CO based his denial on the fact that the applicant "was not made aware in the advertisement of the specifics of the job offer" and was "rejected due to undisclosed requirements." (AF 81).

[1] The FD references the November 26, 2002 NOF as citing 20 C.F.R. § 656.20(g)(6), which states that that the advertisement placed by an employer must "[s]tate the employer's minimum job requirements." (AF 81). However, the November 26, 2002 NOF actually cited 20 C.F.R. § 656.20(b)(6), which requires an employer to document that applicants were "rejected solely for lawful job-related reasons." (AF 91). The earlier NOF dated October 17, 2002 also references 20 C.F.R. § 656.20(b)(6). (AF 120). In addition, we note that the FD discusses only Applicant #1, who was interviewed and whose rejection is therefore covered by the requirement stated in 20 C.F.R. § 656.20(j)(1)(iv), referenced in both NOFs and in the FD. We will therefore assume that the incorrect reference to 20 C.F.R. § 656.20(g)(6) was a clerical error, and construe the FD as raising a single issue covered by 20 C.F.R. §§ 656.20(b)(6) and (j)(1)(iv); specifically whether the Employer's report articulated with specificity a lawful job-related reason for not hiring Applicant #1.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). An employer cannot reject a qualified applicant on the basis of a job requirement not listed on ETA 750A. *See Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991) (*en banc*); *Chromatochem, Inc.*, 1988-INA-8 (Jan. 12, 1989) (*en banc*).

The Employer admitted that Applicant #1, who was interviewed but rejected, appeared to meet the job requirements listed on the ETA 750A and stated in the advertisement. (AF 125). The CO's directive in the December 26, 2001 NOF to include notice of potential physical work in the advertisement was given in response to the Employer having presented the possibility of physical work to applicants only when speaking with them directly on the telephone, then claiming they immediately lost interest in the position and declined further interest. (AF 167-170). In the rebuttal dated December 4, 2002, the Employer argued that the "potential to perform physical work" statement in the modified advertisement of April 28, 2002 established a job duty required of the successful applicant: "[i]f a person cannot perform the duties of the job as needed, then the applicant is not suitable for the position." (AF 87). The Employer also stated in the request for review that the ETA 750A was amended. (AF 2). However, by merely requiring disclosure that "physical work" could be required in the job advertisement does not constitute recognition on the CO's part of an otherwise additional job requirement. The general statement that physical work may be required is too vague to provide a specific, lawful job-related reason for the Employer to reject an otherwise qualified applicant who has been interviewed, as required by 20 C.F.R. § 656.21(j)(1)(iv). As the applicant responded to an advertisement giving notice of the potential for physical work, the applicant was certainly willing to consider such a position.

Neither the ETA 750A nor the April 28, 2002 advertisement disclosed that the job required moving or lifting equipment weighing 300 to 400 pounds or moving boxes weighing 100 to 120 pounds without assistance. The Employer, therefore, may not use

these requirements to justify rejecting an otherwise qualified candidate. It is unlikely that many applicants would be able to qualify for the position if moving 300 to 400 pounds without assistance was required. Consequently, the Employer has not offered a lawful job-related reason for rejecting Applicant #1.

The Employer argues in his December 11, 2002 rebuttal that the "physical work" language included in the April 28, 2002 advertisement, along with knowledge that the Employer's business sold barbeques and cast iron stoves, amounted to adequate disclosure that the job required lifting weights of 100 to 120 pounds and that this was "standard procedure" in that business. (AF 86-87). The Employer repeated this argument in the request for review. (AF 4). Even granting, *arguendo,* that the actual requirement was adequately disclosed, the additional job requirement would still be subject to the 20 C.F.R. § 656.21(b)(2) limitation that it not be an unduly restrictive requirement. Apart from the Employer's own statements in the December 11, 2002 rebuttal, there is no evidence to show that these physical capabilities are normally required for sales manager jobs in that industry in the United States, nor is there any documentation purporting to show that this requirement, if not normally required in the industry, nevertheless arises from business necessity in this particular instance. *See* 20 C.F.R. § 656.21(b)(2)(i). Although in the request for review the Employer does state that all managers and employees "must be able to move these heavy items and show them to potential customers," he did not assert that the existing or prior sales managers hired by the Employer were required to successfully perform these physical tests prior to being hired. (AF 2). Thus, even if this alleged requirement had been disclosed, it is likely that it would have been considered unduly restrictive.

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 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.