U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 September 2004

BALCA Case No.: 2003-INA-293
ETA Case No.: P2003-NY-02489298

In the Matter of:

VINCENT TRIMARCO, JR.,
Employer,

on behalf of

SHEILA BRAITHWAITE,
Alien.

Appearance: Anthony Denaro, Esquire
Hempstead, New York
For the Employer and the Alien

Certifying Officer: Dolores Dehaan
New York, New York

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 April 30, 2001, the Employer filed an application for labor certification to enable the Alien to fill the position of Bookkeeper/Accounts Manager. The job requirements were listed as a Bachelor's degree in accounting and three months of training in bookkeeping. No experience was required. The rate of pay was $350.00 per week. (AF 23). On November 27, 2002, an amended ETA 750A was submitted that changed the job title to Assistant Bookkeeper and reduced the job requirements to a high school diploma and no training or experience. (AF 31).

On May 6, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification pursuant to 20 C.F.R. § 656.21(b)(6). The CO identified two applicants who were qualified for the position. Applicant #1 was not offered the position because the Employer determined that he was overqualified and would be uncomfortable in the position. (AF 63). Applicant #2 was rejected because the Employer opined that he would be an unreliable employee because of his ninety minute commute. The CO instructed the Employer to rebut the finding by documenting specific lawful job-related reasons for rejection of each applicant. (AF 63-64).

On June 6, 2003, the Employer submitted its rebuttal. The Employer pointed out that he has interviewed and hired many employees in thirty years of running his law office, and he considered that his extensive experience qualified him "to claim expertise in that area." (AF 68). The Employer rejected Applicant #1, a computer engineer, out of concern that he would take a more lucrative job in computer engineering if one became available. The Employer claimed that he did not want to waste the time and money to train this applicant when he seemed likely to leave the job. The Employer did not indicate that he had offered the job to the applicant or discussed these apprehensions with him. The Employer rejected Applicant #2 because he lived too far away from the office. The Employer claimed that previous employees with shorter commutes had left the job because the commute was too long and the Employer had never employed anybody who

lived as far away as this applicant. (AF 67-68). The Employer did not indicate that he had offered the job to this applicant or discussed these concerns with him.

On July 3, 2003, a Final Determination ("FD") was issued in which the CO denied certification. The CO denied certification because the Employer's concerns that an applicant is over qualified or lives too far away from the job are not lawful, job-related reasons for rejecting him. Moreover, the CO noted that the Employer did not offer the jobs to the applicants or discuss his reservations with them. (AF 70). On August 4, 2003, the Employer requested review of the denial of labor certification and the matter was docketed by the Board on September 30, 2003. (AF 117).

DISCUSSION

Certification is properly denied where an employer unlawfully rejects workers who meet the stated minimum requirements. *ABC Home Video Corp.*, 1993-INA-480 (Nov. 16 1994). The Employer rejected Applicant #1 because he was over-qualified; this applicant was a computer engineer and the Employer only required minimal education and training for the position offered. An employer may not reject a U.S. worker solely because he or she is overqualified, and the employer fears that the applicant may not stay in the position for long. *World Bazaar*, 1988-INA-54 (June 14, 1989)(*en banc*); *IPF Int'l, Inc.*, 1994-INA-586 (Jul. 24, 1996). Although the applicant did possess a level of education beyond that required for the job opportunity, the Employer cannot reject him on this basis. Accordingly, the Employer failed to prove that he rejected Applicant #1 for a lawful, job-related reason.

An employer must state all the requirements for the petitioned position on the ETA 750A. *Bell Communications Research, Inc.*, 1988-INA-26 (Dec. 22, 1988)(*en banc*). Certification is properly denied when an employer rejects a U.S. worker because he or she does not meet an unstated job requirement. *Young Lite Corporation*, 2002-INA-96 (July 3, 2003). In *Young Lite*, an applicant was rejected because she was not willing to travel outside of New York City, but such travel was not listed as a requirement on the employer's ETA 750A. Accordingly, rejection for that reason was

not deemed a lawful, job-related reason. Here, the Employer rejected Applicant #2 because he lived too far away, but the Employer did not list a requirement to live within a certain distance on the ETA 750A. Moreover, the Employer did not offer the job to Applicant #2 and discuss whether the commute would be too onerous. This applicant was rejected for an unlawful reason, and thus, certification was properly denied.

ORDER

The CO's Final Determination denying 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 twenty 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five doublespaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.