

U.S. Department of Labor



Board of Alien Labor Certification Appeals
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Issue Date: 18 October 2004

BALCA Case No.: 2003-INA-297
ETA Case No.: P2002-NY-02487162

In the Matter of:

BHUIYAN, INC.,
Employer,

on behalf of

KAWSHAR MOHAMMED,
Alien.

Appearance: Srinivasa Jonnalagadda, Esquire
New York, 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 16, 2001, the Employer filed an application for labor certification to enable the Alien to fill the position of Bookkeeper. The Employer required two years of experience. (AF 12).

On February 12, 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 eight qualified U.S. workers who were rejected because they did not pass a practical test administered during the interview. (AF 77-78). The CO also identified two U.S. workers who had the requisite experience but were rejected because they lacked experience in the day-to-day matters of a trading business. (AF 77). The CO noted that the ETA 750A did not include taking a practical test as one of the job requirements. The CO advised that if the Employer took the position that all Bookkeepers are required to take and pass practical tests as part of the hiring process, then the Employer had to document by independent evidence that the common practice in its industry is to administer practical tests to prospective employees. In addition, the Employer had to document that the same or similar test was administered to the Alien or to the Employer’s former Bookkeepers. Further, the Employer was instructed to provide a copy of the test, all applicants’ test materials, the correct answers and the “passing” score, and evidence that the Alien had taken the test and received a passing score. If the Employer had not previously administered the test, it was instructed to explain why it now did so. If the Employer provided this information, it was also instructed to amend the ETA 750A to include the test as a requirement and state its willingness to re-advertise for the position.

On March 19, 2003, the Employer submitted its rebuttal. The Employer denied that the applicants were rejected on account of the test. Although the Employer acknowledged that each of the applicants had several years of experience, it claimed that none of the applicants possessed experience in preparing invoices, working in the wholesale industry, or both. (AF 94-96). The Employer also provided a review of the resumes from Mohammad A. Mahmood, CPA. Mr. Mahmood’s review determined that the ten applicants were unsuitable because they did not have experience in the wholesale

industry. (AF 82-85). The Employer did not provide the documentation requested in the NOF regarding the practical test.

On April 21, 2003, the CO issued a Final Determination (“FD”) that denied certification on the ground that the Employer had not provided lawful, job-related reasons for rejecting the U.S. applicants. The CO noted that the Employer contradicted its recruitment report in stating that none of the workers were disqualified on the basis of the practical test. (AF 58-68, 103). The CO opined that preparation of invoices is generally the same in all industries and that the U.S. workers should not have been rejected because they did not have experience in the wholesale industry. The CO also noted that Mr. Mahmood merely evaluated the applicants based on their resumes, but the NOF requested independent evidence that practical tests were common in the bookkeeping industry. (AF 103).

On May 25, 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). The Employer’s brief states that the NOF was misleading. It argues that the NOF required it to address the practical test only if it did not establish lawful, job-related reasons for rejecting the applicants. (AF 113). The Employer contends that the applicants were not denied on the basis of the practical test; rather, it claims that the applicants were rejected because they do not have experience in preparing invoices. Finally, the Employer argues that the CO failed to consider Mr. Mahmood’s evaluation of the resumes. (AF 112). On October 28, 2003, the Employer submitted a supplemental brief that restates the arguments in its original brief.

DISCUSSION

An employer must state all the requirements for the petitioned position on the ETA 750A. *See 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). The employer’s minimum requirements are found in Items 14

and 15 on the ETA 750A. One purpose of these items is to notify the CO of an employer's minimum requirements so that these requirements may, if necessary, be challenged as unduly restrictive. *Bell Communications Research, Inc.*, 1988-INA-26 (Dec 22, 1988)(*en banc*). The employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). If an applicant's resume indicates that he or she is qualified for the position, the employer must demonstrate by convincing evidence that the applicant is not qualified. *Fritz Garage*, 1988-INA-98 (Aug. 17, 1988).

The resumes of Applicants #1 through #6 explicitly state that they have more than the required two years of experience as Bookkeepers. Although the resumes of Applicants #7 and #8 do not use the term "Bookkeeper," they nevertheless indicate that they have more than two years of experience performing the job duties listed in the ETA 750A Item 13. (AF 12).

The Employer's assertion that the NOF was misleading is not supported by any quotes from the NOF or an argument regarding its ambiguity. The NOF informed the Employer that the practical test was a requirement "not indicated on the ETA 750A form, posting or in the advertisement. Therefore, employer's rejection of these US workers for not passing the practical test[,] *or components of it*, can not [sic] be considered valid reasons for rejection." (AF 77 (emphasis added)). The Employer clearly listed the results of the practical test as a factor in rejecting eight of the ten applicants named in the NOF.

The Employer's statements indicate that not only were the applicants rejected because of the test, but they also indicate that invoice preparation was a component of the practical test. Questionnaires and practical tests are unstated requirements when they do not ask questions that would usually be asked in a routine job interview. *Vintage V-12*, 2003-INA-89 (June 8, 2004).

The Employer's rebuttal contradicted its recruitment report by stating that none of the applicants were disqualified based on their performance on the practical test. (AF 96). Instead, the Employer asserted that the applicants were rejected because of their inability to prepare invoices and their unfamiliarity with the wholesale industry. (AF 94-96). These factors were not listed as job requirements in Items 14 and 15 of the ETA 750A. Experience in the wholesale industry was not mentioned on ETA 750A.

The Employer failed to provide the independent evidence requested in the NOF to document that practical tests are commonly used in hiring bookkeepers. The Employer neither documented that the Alien had taken and passed a similar test nor provided copies of the applicants' tests and the Employer's model answers. When a CO requests a document that can directly resolve an issue and is reasonably obtainable, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). The Employer should have at least produced the materials requested by the CO to support its bare assertions about the applicants' inability to prepare invoices. Mr. Mahmood's assertions that a bookkeeper in the industry must have experience in that industry is unpersuasive. If this experience were so crucial, the Employer should have listed it as a special requirement in Item 15.

In light of the discrepancies between the Employer's recruitment report and its failure to provide the documentation requested by the CO in the NOF, the Employer has not convincingly established that the applicants were rejected for lawful, job-related reasons. Accordingly, labor certification was properly denied.

ORDER

The CO's final determination denying labor certification is 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 double-spaced 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.