

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 28 September 2004**

**BALCA Case No.: 2003-INA-260**  
ETA Case No.: P2001-CA-09510689/LA

*In the Matter of:*

**PALOS VERDES LIBRARY DISTRICT,**  
*Employer,*

*on behalf of*

**MARIAN HESLENFELD,**  
*Alien.*

Certifying Officer: Martin Rios  
San Francisco, California

Appearances: Marc A. Mazorow, Esquire  
Torrance, 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 November 15, 2000, the Employer filed an application for labor certification on behalf of the Alien to fill the position of Librarian. (AF 44). The job requirements included a Master's degree in Information Science, two years of library training, and one year of experience in the job offered.

On January 6, 2003, the CO issued a Notice of Findings ("NOF") with an intent to deny certification pursuant to 20 C.F.R. §§ 656.21(a)(2), 656.40(a)(2)(ii), and 656.21(b)(5). (AF 38-41). Regarding the actual minimum requirements, the CO observed that "at the time the alien was hired she did not meet the one year experience requirement and was trained or provided the necessary learning opportunities by the employer after being hired." (AF 40). Thus, the CO found that a Master's degree plus one year of experience did not represent the Employer's actual minimum requirements for the position offered.

The Employer's rebuttal was dated February 5, 2003. (AF 26-37). The rebuttal identified the applicable bargaining unit as Local 347 of the Service Employees International Union, gave the job titles and duties for the two positions that the Librarian would supervise, stated the percentage annual wage increases provided for in the union contract, stated that the Master's degree is the recognized professional degree for librarians, and provided documents confirming the Alien's college degrees and certificates.

On April 14, 2003, the CO issued a second Notice of Findings ("SNOF"), again stating an intent to deny certification. (AF 22-25). The CO noted that the Employer remained in violation of 20 C.F.R. § 656.40(a)(2)(ii) for failing to clearly state a wage offer for the position in relation to the union contract, and 20 C.F.R. §§ 656.21(b)(5) and

656.21(g)(7) and (8) for incorrectly stating the actual minimum requirements. The Employer also failed to submit documentation that constituted an amendment to the ETA 750B concerning the Alien's educational history. (AF 23-25).

On May 16, 2003, the Employer submitted a rebuttal to the SNOF. (AF 10-21). The cover letter amended the wage offer to \$23.85 per hour based on an attached copy of the new Memorandum of Understanding. (AF 11). In response to the actual minimum requirements issue, the Employer explained that "qualification for this position depends on experience and then the District continues to provide on-the-job training through the District and outside agencies seminars and workshops. Ms. Marian Hesenfeld did not require any training." *Id.*

The CO issued a Final Determination ("FD") denying labor certification on June 6, 2003. (AF 89). The CO found that the Employer had failed to state its actual minimum requirements for the position offered as required by 20 C.F.R. §§ 656.21(b)(5) and 656.21(g)(8). The Alien did not have the required one year of experience when hired, but the Employer did not amend the ETA 750A to delete this requirement. (AF 9). The CO determined that the terms and conditions offered to U.S. workers are less favorable than those offered to the Alien, and the Employer has submitted no additional documentation or explanation that might justify such a change in the requirements. *Id.* In view of this deficiency, the CO denied the application.

## **DISCUSSION**

The employer's job requirements must be the actual minimum requirements for the position advertised. 20 C.F.R. § 656.21(b)(5). Thus, the employer violates 20 C.F.R. § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring, unless the employer has documented it is not now feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Brent-Wood Products, Inc.*, 1988-INA-259 (Feb. 28, 1989) (*en banc*); *MM Mats, Inc.*, 1987-INA-540 (Nov. 24, 1987) (*en banc*). More generally, an employer must show

that it has not previously hired personnel for the position who do not possess the requirements specified in the application. *Texas State Technical Institute*, 1989-INA-207 (Apr. 17, 1990); *Construction Quality Consultants*, 1990-INA-517 (Jan 17, 1992). However, failure to state actual minimum requirements may in some cases be considered harmless error if the misstatement cannot reasonably be seen to have reduced the applicant pool applying for the position. *Hough International*, 1991-INA-24 (Mar. 18, 1991); *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991).

A similar requirement emerges from 20 C.F.R. § 656.21(g)(8), which states that the employer's job advertisement shall offer wages and terms of employment "no less favorable than those offered to the alien." Any requirements violating this provision will almost certainly be considered unduly restrictive under 20 C.F.R. § 656.21(b)(2) as well. *Michael and Miriam Lehrer*, 1988-INA-485 (Dec. 12, 1989); *Montana State University*, 1987-INA-743 (May 9, 1988).

In the FD, the CO stated that the Alien did not have one year of experience in the job duties described when hired. (AF 9). The Alien's work history on ETA 750B showed experience as a "Library Circulation Assistant" and a "Student Library Intern," but no prior experience as a Librarian. (AF 44, 97). Subsequent work history information submitted as amendments to the ETA 750B showed that the Alien was unemployed from April 1998 to June 1999 and that she had been employed as a Librarian by the Employer from June 1999 to March 2001. (AF 98, 99). Neither the Employer nor the Alien has documented any work experience by the Alien as a Librarian prior to her being hired by the Employer.

The ETA 750A required a Master's degree in Information Science and one year of experience. (AF 44). In its rebuttal to the SNOF, the Employer stated that "[t]he qualification for this position depends on the experience and then the District continues to provide on-the-job-training through the District and outside agencies seminars and workshops." (AF 11). While that response is somewhat unclear as to the Employer's expectations, it is clear from the evidence submitted that the Alien had no experience as a

Librarian when hired. The requirements call for one year of experience. In the SNOF, the CO provided detailed instructions concerning corrective actions to cure this deficiency or exceptions that, if documented, might justify the experience requirement, but the Employer pursued neither course. (AF 24-25). The CO therefore properly denied certification.

## **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.