U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 November 2004

BALCA Case No.: 2004-INA-20
ETA Case No.: P2001-TX-06337397

In the Matter of:

METRO BANK, N.A.,
Employer,

on behalf of

FIONA KAM MAN CHEUNG,
Alien.

Appearances: Nestor A. Rosin, Esquire
Houston, Texas
For the Employer and the Alien

Certifying Officer: John W. Bartlett
Dallas, Texas

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 alien labor certification for the position of Credit Analyst.[1] The CO denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

[1] 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 3, 2001, the Employer, Metro Bank, N.A., filed an application for labor certification to enable the Alien, Fiona Kam Man Cheung, to fill the position of Credit Analyst. (AF 87). The position required a Bachelor's degree in finance or economics, and no prior experience.

On June 12, 2003, the CO issued a Notice of Findings ("NOF"), proposing to deny certification. (AF 30). The CO found that out of the fourteen U.S. applicants for the position, two were rejected for lacking work experience. Because no experience was required, the CO found that the Employer's actual minimum requirements could not be determined. The Employer was advised that it needed to documents its actual minimum requirements. If it chose to revise the job requirements, it would need to amend the application, place a new job order, and re-advertise.

The Employer's counsel submitted rebuttal by letter dated July 17, 2003. (AF 20). Included were a decision by the United States Court of Appeals and a letter dated July 15, 2003, from the Employer's Vice-President for Human Resources. In the letter, the Vice-President explained that the two applicants in question did have the minimum requirements of the position; however, when interviewed, it was found that they lacked knowledge and ability to process loans and closing documents, as well as generate various banking reports, and thus were unable to perform essential job duties. (AF 29). It was the Employer's contention that the two applicants were rejected due to their inability to perform the job duties listed.

A Final Determination ("FD") was issued on October 6, 2003. (AF 17). The CO found that the facts of the case cited by the Employer, *Ashbrook-Simon-Hartley, et al. v. McLaughlin et al.*, 863 F.2d 410 (5th Cir. 1989), differed from the instant case because in *Ashbrook*, the application submitted by the employer included specific experience

requirements which would infer a specific skill set. In this case, the only requirement was a degree. Although the Employer was afforded the opportunity to revise the requirements and re-advertise, the Employer chose not to do so. Accordingly, it was held that the Employer had provided the Alien a more favorable opportunity than that being offered to U.S. applicants. The Employer failed to document the minimum job requirements and failed to hire qualified and available U.S. applicants for the job opportunity and the application was denied.

On November 7, 2003, the Employer filed a Request for Review, which also sought reconsideration by the CO. (AF 2). The CO denied the request for reconsideration on December 4, 2003. (AF 1). This matter was docketed by the Board on December 9, 2003 and the Employer filed a position statement on January 6, 2004.

DISCUSSION

In its request for review, the Employer cites *Golden Bell USA Co., Inc.*, 1993-INA-564 (Nov. 6,1995) to argue that the job duties as listed should be considered when determining if a U.S. applicant is unlawfully rejected. In that case, the CO denied certification because U.S. applicants were rejected for their lack of knowledge of a certain computer language, even though that knowledge had not been listed as an experience requirement. The Board remanded the case, noting that knowledge of that language had been listed in the job duties, and directed that job duties could not be ignored when determining whether an employer has a job-related reason for rejecting a U.S. applicant. Similarly, in *Ashbrook-Simon-Hartley*, a case also cited by the Employer, the Court held that experience in wastewater treatment and working with plastic and resins was clearly incorporated into the job duties and that those duties should have been taken into account when determining whether a U.S. applicant was qualified. In the instant case, however, there is no requirement of knowledge or experience in any particular field listed anywhere in the ETA 750A; the only requirement is a degree.

One qualified U.S. applicant had a Bachelor's degree in finance and past experience as a credit counselor, credit specialist and credit manager. (AF 57). He listed experience with Microsoft Works Word, Excel and Lotus. Another applicant had a Bachelor's degree in finance, with computer skills in Microsoft Word and Excel. (AF 55). The position at issue required the entering of data and code, maintaining customer relations in Windows programs, processing loans and closing documents in Excel, and generating reports. (AF 87). Unlike the cases cited by the Employer, the instant application did not require experience or knowledge in any of these job duties, and it is presumed that the minimum requirement listed is that which was needed to perform the job.

Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Exxon Chemical Company*, 1987-INA-615 (July 18, 1988) (*en banc*). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*). In the instant case, the two U.S. applicants met the minimum stated requirements of the position and the Employer's rejection of those applicants was in violation of 20 C.F.R. § 656.21(b)(6).

It must also be noted that the Employer's argument, as made in its request for review, that the NOF was limited in its scope and the FD went beyond the scope of the NOF is not supported by the facts herein. The Employer was fully advised of the basis for the issuance of the NOF and the means to rebut same. The FD did not raise any new issues as grounds for denial. As such, 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.