U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 February 2005

BALCA Case No.: 2004-INA-8
ETA Case No.: P2001-CA-09504368/ML

In the Matter of:

SANCHEZ ELVINA INC.,
d/b/a ELY-LYN HOUSE OF BEAUTY,
Employer,

on behalf of

REMEDIOS SOTTO ALMAZAN,
Alien.

Appearance: Dan E. Korenberg, Esquire
Korenberg, Abramowitz & Feldun
Sherman Oaks, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification[1] filed by a beauty salon for the position of Beauty Salon Manager. (AF 28-29).[2] The following decision is based

[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File".

on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File.

STATEMENT OF THE CASE

On April 20, 2001, the Employer, Sanchez Elvina Inc. d/b/a Ely-Lyn, filed an application for alien employment certification on behalf of the Alien, Remedios Sotto Almazan, to fill the position of Beauty Salon Manager. Minimum requirements for the position were listed as two years of experience in the job offered or in the related occupation of Hair Stylist/Beautician. (AF 28).

The Employer filed a Request for Reduction in Recruitment ("RIR") on April 12, 2001 that was denied on October 19, 2001. (AF 75-84). The Employer filed a second RIR request on April 8, 2002, wherein the Employer reported having received three resumes, two from applicants who did not possess any experience in the beauty salon field and a third who the Employer reported had only one year of experience. (AF 33-35).

A Notice of Findings (NOF) was issued by the Certifying Officer on May 23, 2003, proposing to deny labor certification based upon a finding that the Employer's stated two years of experience requirement did not appear to be its actual minimum requirement as the Alien was hired by the Employer with no experience at all. Citing this fact, the CO also questioned the Employer's rejection of the unnamed worker in its RIR and instructed the Employer to explain with specificity the lawful job-related reasons for not hiring each U.S. worker referred. (AF 24-26).

In Rebuttal, the Employer submitted lease agreements dating back to 1994 to document that the Alien had obtained independent work experience while renting a booth at the Employer's salon. In addition, the Employer contrasted the position held by the Alien with that petitioned for, asserting that the Alien's work experience with the Employer was in a position sufficiently dissimilar than the one petitioned for to permit it

to count as qualifying experience. With respect to the rejection of U.S. worker issue, the Employer stated that all applicants had been rejected for lawful, job-related reasons, as none of the applicants met the stated two years' experience requirement. (AF 7-23).

A Final Determination denying labor certification was issued by the CO on July 15, 2003, based upon a finding that the Employer's application did not offer its true minimum requirements as the Employer was willing to hire the Alien at a lesser amount of experience than it now requires of U.S. workers. The CO further advised that since the Occupational Employment Services ("OES") Zone for the occupation is one to two years, the applicant with one year of experience should have been considered minimally qualified and interviewed for the position. (AF 5-6).

The Employer filed a Request for Administrative Review by letter dated August 13, 2003, and the matter was referred to this Office and docketed on October 18, 2003. (AF 1-2).

DISCUSSION

Pursuant to 20 C.F.R. § 656.21(b)(5), an employer is required to document that its requirements for the job opportunity are the minimum necessary for performance of the job and that it has not hired or that it is not feasible for employer to hire workers with less training and/or experience. Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990).

In the instant case, the Employer set its requirements for the job at two years of experience in the petitioned position of Beauty Salon Manager or in the related occupation of beautician/hairstylist. The evidence of record reflects that the Alien was hired by the Employer in 1992 for the position of hairdresser/beautician and that the Alien had no experience at the time of hire. Thus, the experience the Employer is

requiring for the petitioned position was gained by the Alien while working for the Employer. The Board held in *Delitizer Corp. of Newton,* 1988-INA-482 (May 9, 1990) (*en banc*):

> "[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries."(footnotes omitted).

The duties of the hairdresser/beautician position for which the Alien was originally hired were described in the ETA 750B form as follows:

> Provide beauty services for customers. Cut hair using scissors, razor or clippers. Suggest style to fit customers features or current fashion trends including European cuts. Set hair using roller or blow dryer. Performs weaving and braiding. Analyzes condition of hair and recommends treatment. Applies bleach, tints or permanent waves at customer's request. Recommends treatments for dry or oily skin. Shapes and color[s] eyebrows and eyelashes. Remove unwanted hair from eyebrows. Performs facial, manicure and pedicure.

(AF 99).

The duties of the petitioned position of Beauty Salon Manager were described in the ETA 750A form as follows:

> Supervise overall operations of beauty salon. Maintains daily operations and transaction records. Reconciles cash with sales receipts. Schedules appointments and assigns customers to cosmetologist to maintain uniform employee schedules. Makes sure that customers receive quality services for shampoos, haircuts, hairstyling, waxing and manicures. Is in charge of keeping payroll. Hires, fires and trains new

> employees. Outlines plans for promotions and advertising. Requisitions and purchases supplies. Responsible for security and sanitary maintenance of shop as per health regulations. Handles customer complaints.

The Employer detailed the many dissimilarities of the two positions in its rebuttal, specifically citing the significant differences in the level of responsibility and salary. The Employer stressed that the primary duty of a beautician is only to provide beauty services to clients, whereas the manager supervises the overall operation of the beauty salon. On this basis, we find that the Employer has established that the positions of beautician/hairstylist and Beauty Salon Manager are sufficiently dissimilar to avoid the proscriptions of 20 C.F.R. § 656.21(b)(5). *See E & C Precision Fabricating, Inc.*, 1989-INA-249 (Feb. 15, 1991) (*en banc*) (machine operator trainee and machine operator positions found to have been shown to be sufficiently dissimilar). Accordingly, the CO's finding of failure to offer minimum requirements is not a valid basis for denial of the RIR request.

The CO's additional basis for denial is unfounded as well. Referring to an applicant with one year of experience, the CO incorrectly concluded that "since the OES Zone for the occupation is one to two years, that applicant should have been considered minimally qualified or at least more qualified than the alien was at the time of hire." Putting aside the fact that the OES zones are not referred to in the labor certification regulations as they existed at the time that this application was processed, the Board has previously held that where the *Dictionary of Occupational Titles* (DOT) states a specific vocational preparation (SVP) range of experience, an employer's election to require the maximum amount provided is not unduly restrictive. *Se, Lebanese Arak Corp.,* 1987-INA-683 (Apr. 24, 1989)(*en banc*). Hence, the Employer's rejection of this worker on the basis that he did not meet the stated minimum requirements was a valid basis for rejection.

Based upon the foregoing, under the facts of this case, it is determined that the RIR was improperly denied on the grounds cited by the CO.

Accordingly, this matter is remanded to the CO to determine whether the RIR should be granted[3] or whether this application needs to be remanded to a State Workforce Agency or Backlog Reduction Center for supervised recruitment. *See Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003) (when the CO denies an RIR, such denial should result in the remand of the application to the local job service for regular processing).

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further consideration consistent with the above.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor 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:

[3] The CO's decision whether to grant an RIR is a matter for the CO's sound discretion. *See Solectron Corp.*, 2003-INA-144 (Aug. 12, 2004) (abuse of discretion standard for review of CO's decision to deny an RIR). We observe that the pre-application newspaper clippings show that the advertisement in this case was run under the heading "Manager. Beauty Salon." (AF 39-43). It is not clear to us that a U.S. worker with two years of experience as a beautician would necessarily think to look under the "Managers" section of the classified when reviewing job opportunities. *See Wailua Associates*, 1988-INA-533 (June 14, 1989) (goal is to place the ad where it is "most likely to bring responses"). In comparison, the Employer ran the www.freejobs.com advertisement under the heading "Beauty Salon Manager," which seems better calculated to test the labor market for qualified U.S. workers. This Internet advertisement was run for 120 days. (AF 52-72). Whether, on balance, the Employer's overall effort was adequate to grant an RIR is a matter for the CO to consider on remand.

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
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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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.