



Issue Date: 27 August 2008

BALCA Case No.: 2008-INA-00021
ETA Case No.: P-04253-03433

In the Matter of:

J.E. LIESFIELD CONTRACTOR, INC.,
Employer,

on behalf of

JORGE LUIS LECHUGA FLORES,
Alien.

Appearance: Tommy P. Baer, Esquire
Canfield, Baer, Heller & Johnston, LLP
Richmond, Virginia
For the Employer

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center¹

Before: **Chapman, Wood 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 labor certification. Permanent 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 Title 20, Part 656 of

¹ The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about this application should be directed to the Chicago Processing Center.

the Code of Federal Regulations (“C.F.R.”).² This decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

The Employer – a contractor providing commercial site preparation services – filed an application on April 26, 2001 for labor certification on behalf of the Alien for the position of Heavy Equipment Operator. (AF 302)³. In its application, the Employer described the duties of the position as

Grading of land using heavy grading equipment such as bulldozers, motor graders, excavators, front end loaders, scraper pans, backhoes, and compactors so that the existing land contours are graded to within plus or minus one tenth of a foot of the design elevations. Interpret site plans, reading grade stakes, and operating grading lasers to determine proper elevations.

The Employer required two years of experience in the job offered or two years of experience in operating heavy farm equipment. The Employer also stated that applicants must be knowledgeable in the use and maintenance of heavy commercial grading equipment. (AF 302).

On March 20, 2007, the CO issued a Notice of Findings (NOF) proposing to deny certification. (AF 208-221). The CO concluded that the Employer did not document that its requirements for the job opportunity, as described, represented the Employer’s actual minimum requirements for the job opportunity in violation of Section 656.21(b)(5). The CO noted that, based on the recruitment report, the Employer had screened and rejected

² This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

³ In this decision, AF is an abbreviation for Appeal File.

U.S. workers for the lack of qualifications not stated in the ETA 750A or the advertisements:

- ability to grade within a 1/10 of a foot of design grade
- experience with a grading laser
- ability to grade a surface for a building pad
- ability to read civil engineering drawings
- experience clearing and burning brush
- ability to work overtime
- First Aid certification
- OSHA certification
- ability to lay storm sewer pipe
- ability to use GPS system

(AF 209). Upon review of the ETA Form 750B, the CO concluded that the Alien had been hired without these qualifications and allowed to gain the required experience now required of U.S. applicants while working in the job for which certification was sought. The CO stated that the Employer could rebut this finding by either: A) submitting evidence that clearly establishes that the Alien had the qualifications at the time of hire; or B) submitting evidence that it is not presently feasible due to business necessity to hire a worker with less than the qualifications presently required for the job opportunity and establish that the job as currently described existed before the Alien was hired; or C) deleting the requirements. The CO also found that since the Employer rejected the ten U.S. applicants for lack of experience in items on the list of qualifications which were not required of the Alien at the time of hire, and since the Employer rejected the ten U.S. applicants for lack of knowledge related to the list of qualifications which were not stated in the job requirements on Form ETA 750A or in the advertisements, the Employer had not established lawful job-related reasons for rejecting the otherwise qualified U.S. workers.

The Employer submitted rebuttal on May 23, 2006. (AF 11-206). In its rebuttal, the Employer first stated that there were 7 other heavy grading equipment operators at the time the Alien was hired and that there were currently 29 heavy grading equipment operators. The Employer also stated that since the Alien was hired, there had been 96 new employees hired. The Employer stated that the job as currently described existed before the Alien was hired and that the jobs had been filled with exactly the same job duties and requirements prior to the hiring of the Alien. With respect to the second finding, the Employer asserted that the list of qualifications stated inherent qualifications for the job opportunity. The Employer asserted that every U.S. worker applicant for the position was rejected because they did not meet the minimum requirements for the position. In support of these statements, the Employer submitted payroll records that listed employees and their job titles.

The CO issued a Final Determination on April 18, 2007. (AF 5-8). In the Final Determination the CO found that the Employer's rebuttal was not sufficient to correct the deficiencies noted in the NOF. Specifically, the CO noted that the Employer's submission of payroll records did not provide documentation that the Employer had required all Heavy Grading Equipment Operators to meet all the requirements on the list of qualifications submitted with its recruitment report. More specifically, the CO noted that there was no documentation that the Employer required all Heavy Grading Equipment Operators to have First Aid and OSHA certifications prior to being hired. In addition, the Employer did not establish that the Alien had either First Aid or OSHA certification prior to being hired despite the fact that the Employer had argued that such requirements on the list of qualifications were "inherent" to this position. The CO also concluded that, since the Employer had not documented that the Alien had the minimum job requirements prior to being hired, the rejection of U.S. workers for failing to meet the minimum requirements could not be considered as arising from lawful job-related reasons.

Thus, the CO concluded that the Employer had failed to establish either that the Alien met the minimum job requirements prior to being hired or that there was now a

business necessity for the job requirements. The CO also concluded that the Employer had failed to document lawful job-related reasons for rejecting U.S. applicants. Therefore, the application for labor certification was denied. (AF 5-8).

By letter dated May 21, 2007, the Employer requested BALCA review. The Employer argued that the documentation submitted subsequent to the NOF established that the position and requirements existed before the Alien was hired. The Employer agreed, however, that as to the specific requirements of First Aid Certification and OSHA Certification, two items on the list of qualifications, the alien did not have these requirements prior to being hired. The Employer stated that these requirements were inadvertently cited as pre-hire requirements when these requirements would be quickly achieved upon being hired. The Employer argued, however, that no U.S. applicant was rejected for the lack of these two qualifications alone. Therefore, the Employer requested approval of the application for labor certification.

BALCA docketed the appeal on October 19, 2007, and issued a Notice of Docketing on October 29, 2007. The Employer filed a Statement of Position on November 13, 2007. The Employer argued that the documentation submitted was sufficient to establish that the position and its present requirements existed before the Alien was hired. The Employer also argued that it is self-evident that the Alien possessed the requirements when hired since the job requirements as listed on the specific qualifications list are job requirements in the industry for a heavy equipment operator. Finally, the Employer stated that documentation that the Alien possessed the requirements prior to being hired had been submitted. The Employer attached a narrative statement by the Employer regarding the Alien's previous experience as well as a list of the Alien's previous experience on the Employer's letterhead.

DISCUSSION

Twenty C.F.R. § 656.21 (b)(5) provides: The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual

minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer. Therefore, in accordance with 20 C.F.R. §656.21(b)(5), an employer cannot require more stringent qualifications of a U.S. worker than it requires of the alien. Thus, 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). An employer must establish that the alien possesses the stated minimum requirements for the position that is being offered. *Charley Brown's*, 1990-INA-345 (Sept. 17, 1991).

The CO noted that the record did not establish that the Alien had the qualifications on the list accompanying the Employer's recruitment report prior to being hired. Subsequent to the Final Determination, the Employer asserted that the Alien obviously had these qualifications or he would not have been hired. An employer's unsupported statement that the alien meets its minimum requirements does not constitute adequate documentation that the alien meets those requirements. *Wings Wildlife Production, Inc.*, 1990-INA-69 (Apr. 23, 1991); *Weaver Properties, LLC*, 2003-INA-103 (Mar. 19, 2004).

The ETA 750B lists the Alien's previous experience. (AF 305). That experience included driving trucks and maintaining trucks for a firm in Mexico from February, 1998 to August, 1999; operating a concrete finishing machine for a firm in Richmond, Virginia for an unstated length of time; and working with the Employer beginning in April, 1998 to the present (signed in 2001) in Rockville, Virginia. These statements are contradictory, however, since the Alien lists employment with the firm in Mexico during the same time period that he lists employment with the petitioning Employer in Rockville, Virginia.

With the request for review, the Employer submitted two documents which list different dates for the Alien's experience with these three employers. Despite the Employer's assertion that the documents regarding the Alien's previous experience had

been submitted earlier, it provided no evidence to show that these documents were submitted to the CO prior to the Final Determination. The Board's review of the denial of labor certification will be based solely on the record upon which the denial was based, the request for review, and legal briefs and, therefore, the Board does not consider additional evidence submitted in conjunction with a request for review. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Thus, the additional contradictory statements regarding the Alien's previous work experience submitted with the request for review will not be considered.

The only information, therefore, regarding the Alien's previous work experience is that listed on the application for labor certification. (AF 305). This listing does not indicate that the Alien had any experience in any of the qualifications on the list which the Employer relied upon in reviewing the resumes of the U.S. applicants and in discussing their experience during telephone interviews with the U.S. applicants. As noted by the CO, that list included certification in First Aid and OSHA. The Employer now argues that these two requirements were erroneously included, and furthermore, that none of the U.S. applicants were rejected solely for lacking these qualifications.

The list of qualifications, however, included other requirements. There is no documentation in the record that the Alien had experience in requirements such as ability to grade surface for a building pad, experience clearing and burning brush, and ability to lay storm sewer pipe. In addition, there is no documentation that the Alien had experience in the requirements which were included in both the job description on Form 750A as well as on the list relied upon by the Employer such as ability to grade within a 1/10 of a foot of design grade and experience with a grading laser. Rather, the documentation in the record suggests that the Alien had only the alternative experience of "operation of heavy farm equipment" during his years of employment with the firm in Mexico.

Since the Alien's prior experience is not documented, we agree with the CO that the record does not establish that the Alien was hired with the experience now being

required of U.S. applicants. Therefore, we agree with the CO that the U.S. applicants who were rejected for their lack of an experience, which was not required of the Alien, were not rejected for lawful job related reasons.

In conclusion, we find that Employer has not fulfilled its burden to provide evidence that the Alien had the requisite experience required for the position at the time he was hired by the Employer. The regulation at 20 C.F.R. § 656.21(b)(5) provides that when an alien does not meet the employer's stated job requirements, certification is properly denied. Furthermore, because U.S. applicants were rejected for failure to meet experience requirements which were not required of the Alien, the Employer is also in violation of 20 C.F.R. § 656.21(b)(6) since Employer did not establish lawful job-related reasons for rejecting the U.S. applicants.

Therefore, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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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. 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, NW Suite 400
Washington, DC 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.