U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 September 2008

BALCA Case No.: 2008-INA-00059
ETA Case No.: P-05024-40462

In the Matter of:

THIRD AVENUE VIDEO CORP.,
Employer,

on behalf of

HEMANTHA KURUPPU NANAYAKKARA,
Alien.

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center[1]

Appearance: Joseph M. Palmiotto, Esquire
New York, New York
For the Employer and the Alien

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

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.

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

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 the Code of Federal Regulations ("C.F.R.").[2]

STATEMENT OF THE CASE

On April 30, 2001, the Employer – a video parlor and equipment retailer – filed an application for labor certification to enable the Alien to fill the position of Manager/Video Technician. (AF 103). The job required a high school education and two years of experience in the job offered.

On January 2, 2007, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 80). Citing 20 C.F.R. §656.21(b)(5), the CO noted that the ETA 750 Part A indicated that the Employer was requiring two years of experience in the job offered; however, the Alien did not appear to possess the requisite experience prior to his hire. Therefore, the actual minimum requirements in this case were excessive. The NOF stated that the Employer could rebut this finding by showing that the Alien had the qualifications now required at the time of his hire, or by submitting evidence that the Alien obtained the required experience working for the Employer in jobs which were not similar to the job for which labor certification was being sought, or by documenting that it was not feasible to hire a worker with less than the qualifications presently being required for the job opportunity, or by deleting the requirement.

The Employer submitted rebuttal on February 6, 2007. (AF 28). The Employer's owner contended that it was not presently feasible to hire an employee with less than the qualifications presently required because of business necessity. According to the Employer's owner, at the time the Alien was trained, the owner was the only person who

[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.

was acting as the manager/video technician. The owner stated that he trained the Alien, who had knowledge of mechanical repairs from his prior education and work experience. Currently, there was one manager/video technician aside from the Employer at the Third Avenue location.

The Employer's owner also argued that there had been a change in the workforce since the Alien was hired in that Employer had opened a second establishment and it was not now possible to provide the same type of training for a new employee based on this expansion. The expansion and increased expense of expanding made it impossible to divert the time, attention and resources to training a new employee.

A Final Determination was issued on September 14, 2007. (AF 24). The Final Determination is a bit confusing as it seems to jumble unduly restrictive job requirement analysis with actual minimum requirements analysis. Essentially, the CO found that the Employer's infeasibility to train argument was not persuasive because (1) it was unclear how much training was actually required prior to achieving competency, (2) the Employer was arguing that it could not train because of business expansion made possible by the fact that the Alien had been trained,[3] and (3) the Employer failed to document that the business expansion made it impossible to divert time, attention and resources to training a new employee for the position offered to the Alien.

On October 15, 2007, the Employer filed a Request for Review of the Denial of Labor Certification. (AF 1). In its Request for Review, the Employer reiterated the argument that it is not presently feasible to hire an employee with less than the qualifications presently required for the job opportunity, and that the Alien had prior knowledge of mechanical technical repair. The Employer pointed to a certificate from the Sri Lankan Army indicating that the Alien had completed a course at the Sri Lankan Army Electrical and Mechanical Engineering School, and documentation that the Alien

[3] The CO stated: "This argument amounts to [an] assertion that it is not possible to provide U.S. applicants with the sort of training the alien received, because the alien already received the training," Because we affirm the other reasoning of the CO in the Discussion below, we do not reach the question of whether this is a valid ground for rejecting an infeasibility rebuttal.

had prior work experience for Rowlands Ltd., a company that manufactures compressors, refrigerators and deep freezers. The Employer observed that these documents were submitted with the original labor certification.[4] The Employer reiterated that due to business expansion, it is now not possible to provide the same type of training to a new employee as was provided to the Alien. The Employer contended that it demonstrated that it did not have the resources to set up a training program for new employees while the business was operating.[5]

This matter was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). Neither the Employer nor the CO filed an appellate brief.

DISCUSSION

Under the regulations at 20 C.F.R. § 656.21(b)(5), an employer must demonstrate that the requirements it specifies for the job are its actual minimum requirements and that it has not hired the alien or other workers with less training or experience for jobs similar to the one offered. One way in which an employer can avoid a denial under section 656.21(b)(5) is by showing that it is not now feasible to hire workers with less training or experience than that required by the employer's job offer. *Brent-Wood Products, Inc.*

[4] The documentation from Rowlands Ltd indicated that the Alien joined its factory, manufacturers of compressor model refrigerators, deep freezers and bottle coolers, in July of 1985 as a worker, and that he was an unskilled grade worker attached to the cabinet section of the factory. (AF 100). The Certificate of Achievement from the Sri Lanka Army Electrical and Mechanical Engineering School indicated that the Alien had completed a course which lasted one year and rendered him skilled in the use of the basic tools used in refrigeration work and gave him a knowledge of the materials used in refrigeration work, refrigeration systems, their mechanism and operation, the principles of refrigeration, and safety regulations. (AF 101). The Alien could trouble shoot and repair conventional refrigerators and air conditioners and work under direct supervision in any refrigeration workshop.

[5] The Employer devoted part of its request for review to an argument that it established business necessity for the two year experience requirement. However, the CO did not raise in the NOF the issue of whether the requirement was an unduly restrictive job requirement. Rather, the NOF raised the issue of whether the two year experience requirement was the Employer's actual minimum requirement because it had appeared to hire the Alien without such experience. Although the issues are similar insofar as they both question the validity of an employer's stated job requirements, business necessity analysis applies to unduly restrictive job requirement analysis, and not actual minimum requirements analysis. Even if relevant to an actual minimum requirement analysis, the Employer only made a convincing argument that experience in video repair was reasonably related to the occupation in the context of the Employer's business. The record contains no documentation to show that it actually takes two years to train a worker to make such repairs.

1988-INA-259 (Feb. 28, 1989) (*en banc*). Where the alien gained the required experience with the employer, infeasibility must be documented – a mere statement that it is now not feasible to train workers because of the growth, development and expansion efforts of the employer is insufficient to supply the required documentation. *MMMats, Inc.*, 1987-INA-540 (Nov. 24, 1987).

In the instant case, the only documentation of infeasibility to hire workers with less training or experience than that required by the employer's job offer was the Employer's owner's rebuttal statement in which he asserted that he was the trainer, but that with an expansion into a new store, he was required to be in the new location to maintain the equipment there, and that the business had not proportionally developed the ability to train new employees for "this technical requirement"[6] because the expansion was relatively recent and because it would increase expense and overhead to divert attention to training.

Written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. But merely making an assertion does not compel a CO or this Board to accept such assertions as credible or true; the CO and this Board are to consider a written assertion and give it the weight that they rationally deserve. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc). A bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc).

In addition, the CO questioned the credibility of the Employer's infeasibility to train argument because there were a number of uncertainties about the length of training that was actually necessary and what kind of prior education and training might permit a person to do the job. We concur with the CO that two years seems like a very long training period for the job offered.[7] Above we noted that "business necessity" analysis is

[6] The technical requirement was not identified, but was apparently the maintenance of arcade machines.

[7] The ETA 750B does not state when the Alien began work for the Employer. (AF 106). Nor does the Appeal File contain any other documentation of how much training the Alien received when he was put

not part of the actual minimum requirements analysis. However, even where the CO did not raise, or failed to preserve, an actual minimum requirements citation under section 656.21(b)(2), the Board's caselaw still permits the question of the appropriateness of the job requirement to be analyzed under § 656.21(b)(5). *See, e.g.*, *Loews Anatole Hotel*, 1989-INA-230 (Apr. 26, 1991) (*en banc*); *Duval-Bibb Co.*, 1988-INA-280 (Apr. 19, 1989).[8] Thus, the implausibility of the Employer actually needing to train a worker for two years is a relevant consideration where the Employer asserted in rebuttal that it is now infeasible to provide the same training to U.S. workers that was provided to the Alien.

In sum, although the Alien had prior experience in working with things of a mechanical nature, the Employer clearly hired the Alien without any experience in video arcades or retailing. It attempted to justify its requiring U.S. applicants to possess two years of experience even though it hired with the Alien without such experience based on the contention that it had opened a new store, which made it infeasible to now train a new Manager/Video Technician. But the Board's caselaw makes it clear that merely claiming that business expansion renders an employer unable to provide training is not sufficient to establish infeasibility under section 656.21(b)(5). An employer must provide documentation to collaborate such assertions. The Employer in the instant case provided no collaborating documentation. Moreover, the record leaves doubt as to whether a two year training period is credible as a requirement for competency in the job. Thus, the CO properly denied certification.

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into the position. Thus, in addition to the Alien's lack of prior experience as a video arcade manager/technician when hired, it is not even clear that the Alien had been working for the Employer for at least two years when the application was filed.

[8] These decisions cite § 656.21(b)(6), which was where the actual minimum qualifications section was located prior to a recodification on November 22, 1991.

ORDER

The Certifying Officer's Final Determination denying labor certification is **AFFIRMED**.

For the panel:

A

JOHN M. VITTONE
Chief Administrative Law Judge

Judge Pamela Lakes Wood, dissenting.

Because the Employer was not provided adequate notice of what was required of it in the Notice of Findings, I would remand this case for the issuance of a Supplemental Notice of Findings. Although I agree that the CO could have reasonably questioned the Employer's infeasibility to train argument and requested additional documentation, the CO failed to do so. In the Notice of Findings, the CO listed questions that needed to be answered for the Employer to establish infeasibility to train. Notably, the CO did not request any documentation on that issue. The Employer answered each question in its rebuttal. While the Employer did not provide corroborative documentation, none was requested. Here, as in *Miaofu Cao*, l994-INA-53 (March 14, 1996) (en banc), the Employer was misled "into believing that the only information necessary to rebut the NOF was answers to the. . . specific questions." As the Board noted in *Miaofu Cao:*

> Once the CO provides specific guides, he/she must be careful not to mislead the employer into believing that the specific evidence requested is all that is needed to rebut the NOF and for the application for labor certification to be granted. Often it is necessary for the CO to request specific information that he/she has a particular interest in obtaining in

> light of the deficiencies of the application. However, when the CO requires more than the specific information requested to find that the deficiency has been remedied, he/she must clearly state this fact in the Notice of Findings to avoid ambiguity.

Id. Thus, in *Miaofu Cao,* the en banc Board remanded for issuance of another NOF. Here, while I agree with the panel that the CO did not need to believe the Employer, the CO clearly misled the Employer by asking only that specific questions be answered. I would remand for issuance of a Supplemental NOF requesting corroborative documentation and addressing any new concerns by the CO. Accordingly, I respectfully dissent.

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, N.W.
Suite 400 North
Washington, D.C., 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.