U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Date issued: May 20, 2003

BALCA Case No.: 2002-INA-118
ETA Case No.: P1999-CA-09479411/JS

In the Matter of:

ABLE IRON WORKS, INC.,
Employer,

on behalf of

SAUL BANUELOS,
Alien.

Appearance: Felipe Insalata, Unicenter
Santa Ana, California

Certifying Officer: Martin Rios
San Francisco, California

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 welder, combination.[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 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."). 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 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 October 24, 1997, Able Iron Works, Inc. ("Employer") filed an application for labor certification to enable Saul Banuelos ("Alien") to fill the position of "Welder, Combination." (AF 28). Eight years of grade school and two years of experience in the job offered were required. The job was described as follows:

> Weld metal parts together to assemble or repair components in accordance with blueprints, work orders, and layouts. Prior to welding place and clamp jointly fabricated metal products. Enlarge size of metal parts, fill holes, and repair cracked or broken parts. Use gas, brazing, and arc welding equipment. Do grinding and thermal cutting.

After the recruitment process was completed, Employer submitted its recruitment results, listing U.S. applicant Garcia as one who responded, was interviewed and found to be unqualified because he did not have two years of experience in work orders, layouts and blueprints. (AF 36).

The CO issued a Notice of Findings ("NOF") on August 31, 2001, proposing to deny certification on the grounds that Employer had failed to document that U.S. workers were lawfully rejected, as required by 20 C.F.R. §656.21(b)(6). (AF 25-27). Specifically, U.S. worker Garcia was considered qualified because his resume showed about twenty years of experience in the occupation. The CO rejected Employer's basis for finding this applicant not qualified, pointing out his years of experience, and further stating that the interview was inadequately documented to determine what deficiencies the Employer found. The CO also pointed out that the applicant's resume referenced blueprint reading in his educational training. It was the CO's position that (1) against the resume, the statement that the applicant lacked two years of experience in work orders, layouts, and blueprints appeared "unrationalized;" and (2) if the applicant had spent less than two years working with blueprints, he still clearly met or exceeded the requirements for the job. Employer was directed to

submit rebuttal documenting how the U.S. worker was rejected solely for lawful, job-related reasons.

Employer submitted rebuttal on September 10, 2001. (AF 21). Therein, Employer contended that U.S. applicant Garcia appeared for his interview on August 27, 1999, and indicated that he expected to earn more than the $18.70 being offered for the position, and therefore, he would not take the job for the money offered.

A Final Determination was issued on October 29, 2001, denying certification. (AF 17). Therein, the CO pointed out that the Employer provided no rebuttal to the NOF finding that the U.S. worker was qualified. Instead, Employer claimed that the applicant rejected the position because he wanted a higher wage. The CO rejected this statement, when weighed against Employer's previous statement that the applicant was rejected because he was not qualified. The CO pointed out that Employer's previous statement was submitted contemporaneously to the interview. Employer's current statement, written in response to the NOF, was found non-persuasive, the CO pointing out that "if the employer remembers now that [Garcia] desired a higher wage, we are not persuaded that he actually turned the job down after having been offered it while being deemed not qualified." (AF 18).

Employer filed a Request for Review by the Board or Alien Labor Certification Appeals ("BALCA" or "Board") on November 26, 2001. (AF 1).

DISCUSSION

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.,* 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§656.1, 656.2(b). Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*). In the instant case, U.S. applicant Garcia appears to have been fully

qualified for the position at issue. Employer initially claimed that Garcia was not qualified, and subsequently contended that Garcia was offered and rejected the position.

In its Request for Review, Employer argues that it did not dispute the finding in the NOF that the U.S. worker was qualified because it had already disputed that finding in its response to the Final Documentation Notice detailing its recruitment efforts. Employer then proceeded to provide new information regarding the interview with the U.S. worker, and claimed that "simultaneously" with being found not qualified, the applicant rejected the position because of the wage being offered. Similarly, in its Statement of Position submitted before the Board, Employer contends that the applicant rejected the wage offered, and that the applicant was not qualified because the resume could not be verified.

Initially, it must be noted that in its Request for Review, Employer has attempted to submit additional facts and legal argument since the Final Determination was issued. Section 656.26(b)(4) provides that the request for administrative-judicial review "shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." This Board is strictly an appellate body; our decision must be based only on the record on which the CO reached a decision, and on arguments submitted in any brief or position statement by the parties. Evidence first submitted before the Board may not be considered. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Therefore, the additional evidence submitted by Employer after the Final Determination was issued shall not be considered herein.

This Board has consistently held that labor certification is properly denied where an employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Banque Francaise Du Commerce Exterieur*, 1993-INA-44 (Dec. 7, 1993). If an applicant clearly meets the minimum qualifications for the job he is considered qualified. *UPS*, 1990-INA-90 (Mar. 28, 1991). Such is the case here. Garcia's resume revealed an applicant who met the minimum requirements for the job offered. Employer was notified of this finding in the NOF, and failed to rebut same. Instead, it offered an entirely new reason for rejecting this applicant. While Employer argues that it did not need

to provide rebuttal to the NOF finding that the applicant was qualified, because it had already disputed that finding in its response to the Final Documentation Notice, this argument cannot withstand scrutiny. The California Employment Development Department ("EDD") mailed Employer its Final Documentation Notice on August 30, 1999, and Employer responded to it on October 4, 1999, listing its recruitment results. (AF 36, 57). The CO issued his NOF on August 31, 2001, specifically rejecting Employer's reason for rejecting this applicant as unqualified, as asserted by Employer in its October 4, 1999 response to the EDD. The CO directed Employer to provide rebuttal evidence documenting how this worker was rejected solely for lawful, job-related reasons. Employer did not acknowledge the NOF findings, but instead it raised a new reason for rejecting the applicant.

The regulation at 20 C.F.R.656.25(e) provides that the Employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989)(*en banc*); *Richard W. Rucker Design Studio*, 1994-INA-205 (Apr. 26, 1995). As a result of Employer's failure to rebut the finding made in the NOF that Garcia was qualified for the position, it is deemed admitted. Even assuming, arguendo, that Employer had cited to its letter of October 4, 1999 in its rebuttal, in response to the findings made in the NOF, this would clearly have been an inadequate response, given that Employer had already been alerted by the NOF that the assertions made by it in that letter were inadequate.

The failure to provide rebuttal as requested in the NOF renders denial of certification appropriate. *See Ted Tokio Tanaka Architect*, 1988-INA-334 (June 27, 1989). Moreover, we affirm the CO's finding that it was not credible that, if the U.S. applicant had rejected the salary, Employer would have failed to so state in the recruitment report. Since there is no documentation to support this purported rejection of the salary, we affirm the CO's rejection of it as a credible rebuttal.

ORDER

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

Entered at the direction of the panel:

____

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF 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.