U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: May 20, 2003

BALCA Case No.: 2002-INA-128
ETA Case No.: P1999-CA-0947302/LC

In the Matter of:

LITTLE BRITTANY,
Employer,

on behalf of

RAYMUNDO ALFONSO SANCHEZ,
Alien.

Appearance: Rudy S. Griego, President
Americo International Immigration, Inc.
Huntington Park, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Raymundo Alfonso Sanchez ("Alien") filed by Little Brittany ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26.

Under section 212(a)(5), an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has

determined and certified to the Secretary of State and Attorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based 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 of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On December 22, 1997, Employer, Little Brittany, filed an application for labor certification to enable the Alien, Raymundo Alfonso Sanchez, to fill the position of "Manager," which was classified by the Job Service as "Sewing Supervisor'" (AF 32). The job duties for the position, as stated on the application, are as follows:

> Operates sewing machine to join, gather, hem, reinforce, or decorate articles. Perform duties such as using sewing machines to join parts of clothing for children. Responsible for maintaining the equipment to perform their job in the proper manner. Revises and reports all the work done. Checks the machines and reports any problems to the maintenance department. Responsible for training new employees and supervision of employees. He will help find solutions when work related

problems occur, also help maintain production at a good level.

(AF 32, Item 13). The stated experience requirement for the position is two years in the job offered (AF 17, Item 14).[1]

In a Notice of Findings ("NOF") issued on August 10, 2001, the CO proposed to deny certification on the following grounds: (1) the Employer failed to document that the two-year experience requirement represents its actual minimum requirements as set forth in 20 C.F.R. §656.21(b)(5), since the Alien did not meet this requirement when he was hired, and was trained or provided the necessary learning opportunities by the Employer thereafter; and, (2) the Employer improperly rejected four seemingly qualified U.S. workers (AF 100-102). The Employer submitted its rebuttal on or about September 10, 2001 (AF 17-26). The CO found the rebuttal unpersuasive and issued a Final Determination, dated October 30, 2001, denying certification on the above grounds (AF 14-16). Under cover letter, dated December 4, 2001, the Employer filed a Request for Review (AF 1-13). On March 28, 2002, the Board issued a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief." Although the parties did not respond thereto, we find that the Employer specified the grounds for appeal in its request for review (AF 2-3). Therefore, this case will be considered on the merits, as set forth below.

DISCUSSION

Section 656.21(b)(5) provides that an "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

[1]The ETA 750 A form, and the Employer's supplemental letter thereto, dated June 29, 1998, indicate that significant changes were made since the application was initially filed. For example, the Employer substantially modified the wage offer from $6.50/hour-basic rate and $9.75/hour-overtime to $22.75/hour and $34.13/hour, respectively. Furthermore, the Employer reduced the experience requirement from 3 years; and, Employer also provided more detailed information regarding the supervisory component of the job duties (AF 32-35).

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 offer. 20 C.F.R. §656.21(b)(5).

In the NOF, the CO found that the Employer had violated the provisions of §656.21(b)(5), stating, in pertinent part:

> As shown on the ETA 750, Part B, Item 15 a, the alien's experience and/or training as a sewing supervisor was gained with the petitioning employer beginning in 1991. Prior to that, ETA 750, Part B, Item b, the alien had 5 years of experience as a manager in a clothing store. The alien's work experience as a manager of a clothing store would not qualify him for the sewing supervisor position.
>
> Since the alien did not have any experience to qualify him at the employer's 2 years' experience requirement as a sewing supervisor, the required experience should be zero (0).

(AF 29).

The Employer's "rebuttal" confirms the CO's finding that the Alien gained the stated experience requirement after he was hired by the Employer. In a letter dated September 10, 2001, the Employer's owner, Brittany Shin, stated in pertinent part:

> Raymundo Sanchez was originally hired in 1991 as a sewing machine operator in the Manufacture of children's clothing. He worked for four years in this position where he learned the operation of all machines, production standards and requirements. He had five years prior experience as a manager in the retail clothing business where he was well experienced in the knowledge of the training and managing of employees.
>
> Because of his knowledge of the clothing manufacturing business which he learned

> as a sewing machine operator for four years and his managerial skills he was promoted to the position manager or supervisor where he could oversee the training and managing of employees.
>
> It is the policy of our company to promote to the position of manager an employee who through years of training has a thorough knowledge of the operation of our business as well as the skills as a manager.
>
> Mr. Sanchez prior position as sewing machine operator had different duties than that of a manager-supervisor. As a supervisor, he is responsible for the training and supervision of employees, maintenance of the machines, maintaining production, and solving work related problems. Matter of Cosmetic Specialties, In. 93-INA-161 (1994).

(AF 18-19).

In the Final Determination, the CO rejected the Employer's rebuttal, stating, in pertinent part: "As stated on the ETA 750 A, the employer required two (2) years in the job offered (sewing machine supervisor); not a combination of sewing machine operator and manager of a clothing store." (AF 16).

Upon review, we fully agree with the CO that the Alien did *not* have the two years of experience in the job offered, as sewing supervisor, when the Alien was hired by the Employer. However, in the NOF, the CO only offered the Employer two options to cure the deficiency: "1) delete these requirements and retest the labor market, or 2) document that the alien obtained the required experience or training elsewhere." (AF 29). The CO did not specify a third option, namely, that the Employer document that it is not feasible to hire workers with less training or experience than that required by the Employer's job offer. *See* 20 C.F.R. §656.21(b)(5). This omission may have contributed to the Employer's failure to provide adequate rebuttal regarding this issue. Therefore,

if this were the only basis for denying certification, we may have considered remanding this case. We note, however, that the CO also denied certification based upon the Employer's rejection of seemingly qualified U.S. workers.

Section 656.21(b)(6) provides that "[i]f U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons."[2] Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the report of recruitment results, dated September 17, 1999, the Employer stated that she had rejected four U.S. applicants based exclusively on their resumes: namely, Gloria Horvath, Steven D. Steffes, Delia Sasson, and Shane Bateman (AF 49-51). For the purpose of rendering a decision herein, we will focus on the Employer's rejection of Ms. Sasson. The purported basis for rejecting Ms. Sasson is as follows:

> She was a supervisor of a Jeans manufacturing, not children's clothing. Her previous employment was owner of a swapmeet Booths vending women's clothing. Her resume does not state she has had any experience as manager, manufacturer of children's clothing.

[2]Although the CO cited a related section of the regulations [*i.e.*, 20 C.F.R. §656.24(b)(2)(ii) rather than §656.21(b)(6)], the Employer was clearly placed on notice that the issue involved the rejection of qualified U.S. workers (AF 30).

(AF 50).

In the NOF, the CO cited the above-named applicants, including Delia Sasson, as qualified U.S. workers and instructed the employer to rebut this finding "by showing with specificity why each U.S. worker is being rejected for job related reasons." (AF 30). The Employer's rebuttal focused almost entirely upon the two-year experience requirement issue. However, at the conclusion of the rebuttal, the Employer added the following sentence: "Qualified workers were therefore not rejected, as they had no experience in the garment manufacturing business." (AF 19). The CO did not find the Employer's rebuttal persuasive (AF 16). We agree.

It is well settled that seemingly qualified applicants' credentials must be fully investigated to determine whether the applicants meet the requirements. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*); *Nationwide Baby Shops, Inc.*, 1990-INA-286)Oct. 31, 1999); *Pico Investment Company*, 1994-INA-249 (Oct. 4, 1995). In the present case, Ms. Sasson's resume sets forth the following: (1) Two years training at West Valley Occupational Center, where she acquired skills of patterning, grading, and sewing; (2) Ten years of experience designing, manufacturing, and selling women's clothes at four booths, which she owned, at Woodland Hills Indoor Swapmeet; (3) Three years as owner of "Delia's Alteration and Dress Making Shop;" and (4) Three years as "Floor Sewing Supervisor" at Shi-lon Jeans Manufacturing. In addition, Ms. Sasson noted the following skills: "Running single needle power machines, blindstitch, overlock three and five threads, and coverstitch. Professional experience in cutting, and sewing samples, designing merchandise, and patternmaking. (AF 60).

Given such an extensive background, the Employer should not have summarily rejected Ms. Sasson. To the contrary, Ms. Sasson's three years experience as a floor sewing supervisor, on its face, appears to exceed the stated job requirements, even assuming that it is not unduly restrictive. At the very minimum, Ms. Sasson's experience, as outlined in her resume, warranted further investigation, such as an interview. Furthermore, the Employer never explained the purported significance between a sewing supervisor for a Jeans manufacturer versus a sewing supervisor for a

children's clothing manufacturer (AF 50). In fact, the Employer's rebuttal inaccurately states that none of the U.S. applicants had experience in the garment manufacturing business (AF 19).

As stated by the CO, and illustrated above, the Employer failed to adequately address the "Qualified U.S. workers" issue (AF 16). Accordingly, we find that labor certification was properly denied.

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 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.