



Date: May 15, 1991

Case No: 89-INA-185

In the Matter of

MAPLE DERBY, INC.,
Employer

on behalf of

YASWIN THAKER,
Alien

Before: Brenner, Glennon, Groner, Guill, Litt, Romano,
Silverman, and Williams
Administrative Law Judges

NAHUM LITT
Chief Judge

DECISION AND ORDER

This matter arises from a request for administrative-judicial review of a United States Department of Labor Certifying Officer's denial of labor certification.¹ Review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the Appeal File (AF) and written arguments of the parties. See §656.27(c).

STATEMENT OF THE CASE

On May 31, 1988, Maple Derby, Inc. (d/b/a Derby House) filed an application for labor certification on behalf of the alien, Yaswin Thaker, for the position of accountant (AF37). The sole requirement for this position was seven years of experience in the job offered. There were no licensing or college degree requirements for this position.

¹ Labor certification is governed by section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14), and Title 20, Part 656, of the Code of Federal Regulations, 20 C.F.R. Part 656. Unless otherwise noted, all regulations cited in this Decision and Order are contained in Title 20, Part 656.

The Employer posted the required notice at its place of business, requiring "seven years experience." The Employer advertised the position from June 29 to July 1, 1988 in the Florida Times-Union Jacksonville Journal, requiring "seven years experience." There were three responses to the advertisement. Employer sent letters to all of the applicants, requesting that they come in for an interview on a certain date. The applicants failed to show up for their interviews or call and reschedule another time (AF17-18, 40-41).

The Certifying Officer (CO) issued his Notice of Findings (NOF) on December 14, 1988, proposing to deny labor certification (AF-13). The CO's only ground for denial was that the alien did not possess seven years of experience in the job offered and thus did not meet Employer's minimum requirements.² Under §656.21(b)(6), the CO thus proposed that the required seven years of experience was not Employer's minimum requirement if Employer was willing to accept the Alien.

The Employer responded, in rebuttal, that the Alien had seven years of experience performing accountant duties. The Employer specifically noted that experience in the job duties, although performed under different titles, should be considered qualifying (AF5).

The CO issued his Final Determination on February 27, 1989, denying labor certification on the same ground (AF3). The CO found that Employer had violated §656.21(b)(6) because the Alien only possessed six months of experience in "the position of an accountant" (AF4). The CO noted that experience gained with Employer could not be used to qualify for the present position. Additionally, the CO found that experience in other positions (such as assistant accountant) would not qualify the Alien.

Employer filed a request for review on March 19, 1989. Employer's brief was filed on June 3, 1989. The Solicitor did not file a brief at that time. On March 21, 1990, a three-judge panel of this Board (one judge dissenting) reversed the CO's denial of labor certification. Specifically, the panel found that the alien had the required experience in the job duties. The Solicitor filed a petition for en banc review, which was granted by an order dated April 25, 1990. Employer's brief for en banc review was received on May 31, 1990.

DISCUSSION AND CONCLUSIONS

The Solicitor's grounds for en banc review include the reasons presented in the dissent to the three-member panel's original Decision and Order in this appeal, and the perceived inconsistency between the panel's decision and decisions concerning evaluations of U.S. applicants' qualifications for job openings. In the dissent, it was argued that Employer discouraged U.S. applicants by requiring seven years of experience in the job offered, because the job offered (accountant) "is a professional designation with well-recognized educational requirements." The dissent noted that the fact that some U.S. applicants applied for the position

² Before the file was transmitted to the CO, the state job service challenged the requirement of seven years of experience as being unduly restrictive (AF19). Apparently, Employer's response to this issue satisfied the CO, who never raised the issue.

anyway did not reduce the problem. As the Alien did not have seven years of experience as an "accountant," the dissent felt the Alien was unqualified for the position, and added that even if the Board looked to the actual job duties for this accountant, the Alien did not have the qualifying experience as his experience included duties "more commonly associated with the position of 'Bookkeeper' or perhaps 'Accounts Clerk', rather than 'Accountant.'" The dissent concluded that Employer was unwilling to accept U.S. workers who did not possess experience performing such job duties.

On several occasions, the Board has considered the qualifications of U.S. applicants and aliens as they relate to an employer's job requirements. When an employer is evaluating U.S. applicants' resumes, if a resume indicates that the applicant has a broad range of experience, education and training, the employer should interview the applicant or otherwise investigate his or her credentials for the position. Failure to further inquire into the applicants' credentials results in an improper rejection of U.S. applicants. Kem Plastics Co., 90-INA-49 (Nov. 13, 1990); Microbilt Corp., 87-INA-635 (Jan. 12, 1988).

Where a U.S. applicant does not meet an employer's job requirements, the U.S. applicant is not qualified for the position. Gennaro's Ristorante, 87-INA-742 (Nov. 23, 1988) (en banc). Failure of a U.S. applicant to possess the required experience leaves the applicant unqualified for the position. Gennaro's Ristorante, *supra*; ENY Textiles, Inc., 87-INA-641 (Jan. 22, 1988); El Carbon Restaurant, 88-INA-329 (June 6, 1989); Southeast Diesel Corp., 89-INA-81 (December 5, 1989).

To consider whether U.S. applicants possess the required experience "in the job offered," the Board looks to the major job duties of the job offered. Southeast Diesel Corp., *supra*. In considering an alien's experience in the job offered, the Board has likewise looked to whether the duties performed were similar in other occupations. Advanced Business Communications, 88-INA-36 (June 30, 1989); Showboat Restaurant, 89-INA-27 (January 31, 1990).

The Board has specifically rejected the notion that, as applied towards a U.S. applicant, years of experience in the general field is equivalent to experience in the job offered, where the applicant's experience did not correlate to the job's duties. Psychiatric Resource Center of Orlando, 88-INA-359 (March 31, 1989) (en banc). The Solicitor is correct that an alien's general experience in the field, if it does not relate to the current job duties, would not qualify an alien for the position either. Pennsylvania Home Health Services, 87-INA-696 (April 7, 1988). Furthermore, where an alien was clearly not qualified by his previous experience for the job opening, the Board has held that the employer's job requirements were not the actual minimal requirements for the position. Pennsylvania Home Health Services, *supra*; 1st and 2nd Mortgage Company of New Jersey, 87-INA-572 (Aug. 4, 1988); Bear Sterns & Co., Inc., 88-INA-427 (July 28, 1989); Enhanced Performance Associates, 87-INA-708 (April 13, 1988). If an alien has fewer years of experience in the position offered, or if the employer fails to document the alleged experience, the alien does not meet the stated requirements. International Scientific Communications, Inc., 89-INA-115 (Nov. 17, 1989); Voi-Shan Manufacturing, 88-INA-470 (July 17, 1989); Keithley Instruments, Inc., 87-INA-717 (December 19, 1988) (en banc); Baytronics Corp., 87-INA-565 (Sept. 14, 1988); Susan Morgan, 88-INA-550 (Oct. 26, 1989).

However, where the duties of the previous positions were, at least in major part, those of the position offered, an alien is considered qualified for the job. Advanced Business Communications, Inc., 88-INA-36 (June 30, 1989).

Where the alien's previous duties were not similar to the available position,³ the alien does not have the required experience for the position. Showboat Restaurant, *supra*. The Board has expressly refused to hold that identical job titles indicates that experience in one job necessarily indicates qualification for the other. Integrated Software Systems, Inc., 88-INA-200 (July 6, 1988); *cf.*, Delitizer Corp. of Newton, 88-INA-482 (May 9, 1990) (en banc).

As the title given a job by an employer may not be determinative of the scope of duties and level of education and experience required, the Board's focus must extend to the underlying job duties for the position. The job title of "accountant" does not necessarily carry with it professional designations or educational requirements if an employer does not require the same. A review of many of this Board's previous cases involving accountants and similar titles reveals that employers do not consistently label such positions, but give various titles and duties depending on factors such as their company size and structure and the services which an employer requires. *See, generally*, Jung Gil Choi, C.P.A., 88-INA-254 (March 27, 1990) ("Accountant" to prepare balance sheets, profit and loss statements, and tax returns, and to analyze accounting records and estimate for budget); Bowery Savings Bank, 89-INA-86 (January 18, 1990) ("Accountant" to process mortgage loans, audit related accounts, and prepare reports for internal/external auditors and government agencies); Daniel Dennis and Company, 80-INA-254 (November 20, 1989) ("Accountant" to advise clients in the use of accounting tools and computer software, assist with financial management issues and to perform general accounting and auditing duties); Yedico International, Inc., 87-INA-740 (Sept. 30, 1988) ("Budget Accountant" to review financial activities, create and maintain budget/inventory control, review schedules of tariffs and capital, and prepare financial statements and reports); Kahan, Dematoff and Fiese, 87-INA-609 (January 27, 1988) ("Accountant" to work with ledgers, accounts receivable and payable, budget reports, tax communications, balance sheets and profit and loss statements); *cf.*, Metroplex Distributors, 88-INA-249 (May 22, 1989) (en banc) ("Bookkeeper" to keep complete set of books, including records of financial transactions, accounts payable and receivable, sales, purchases, disbursements, receipts, and ledger and payroll items).

Moreover, in those cases involving accountants, the employers did not require C.P.A. status, and the degree requirements ranged from two years of college (with three years of experience), to a Bachelor's degree in accounting or business administration, to a Master's

³ An alien encounters another prohibition if his or her only qualifying experience was with the employer in a similar position. In such cases, the similarity of job duties, among other issues, may prove that the employer trained the alien for the position without offering the same opportunity to U.S. applicants. Delitizer Corp. of Newton, 88-INA-482 (May 9, 1990) (en banc); Super Seal Manufacturer, 88-INA-417 (April 12, 1989); LA Rubber Co., 89-INA-58 (Sept. 28, 1989); Duthie Electric Corp., 89-INA-182 (Nov. 30, 1989). As the Alien obtained qualifying experience before his career with Employer, this is not an issue in this case.

degree. It is doubtful, therefore, that the Board would accept an alien's experience as an "accountant" without looking to the underlying job duties. Accordingly, the Board does not confine its review in the present case to those jobs labeled "accountant." While the cases dealing with accountants do not rule upon the issues herein, they do undercut the assumption or argument that all positions titled as an "accountant" designate some sort of professional or educational requirements or that all accountant positions are similar.

In the present case, when the job duties performed by the Alien in his previous employment are compared to the duties for the job offered, the Alien has seven years of qualifying experience in the core job duties. Employer stated in the job application that the following duties would be required of its accountant:

Accountant to prepare financial statements including balance sheets, profit and loss, etc. Review and verify corporate financial records and report to management concerning financial conditions and recommendations. Implement and administer accounting systems to provide management with detailed financial data. Inventory control and purchasing, responsible for administration of personnel including establishing job classification, fringe benefits, entitlements, and other administrative functions of personnel. (AF-37).

First, it is noted that the Alien's experience as an accountant with Employer may not be counted to satisfy the job experience requirement. See note 3, supra. His experience obtained while self-employed from November of 1982 to February of 1985 and while working as a sales representative from March of 1985 to July of 1986 likewise do not contribute to his experience, as the duties therein do not resemble those listed on Employer's application (AF8-9, 55). The Alien's most recent experience, prior to his employment with Employer, was as an accountant for Expo Souvenirs from April of 1986 to October of 1986. The Alien's duties included cash collection, posting transactions on the computer, auditing, preparation of financial statements, balancing and preparing day-to-day cash statements, supervising the night accounting staff, and training cashiers. The CO apparently found that this experience was equivalent to Employer's position, and we agree that the duties are substantially similar to those required by Employer (AF4, 16). Therefore, the Alien has six months of experience in the job offered from this previous employment.

The Alien also gained qualifying experience as an assistant accountant and auditor with Manubhai Teraiya & Co. from January of 1970 to July of 1972 (AF8-9). During this period, the Alien performed the following duties: examining and analyzing accounting records and preparing reports concerning financial status and operating procedures; reviewing data concerning material assets, net worth, liabilities, capital stock, surplus, income and expenditures; inspecting items in books; counting cash on hand; inspecting notes receivable and payable, verifying journal and ledger entries of payments, purchases, expenses; making trial balances by examining and authenticating inventory items; making recommendations concerning improved operations and financial position. The alien received two years and seven months of qualifying experience at this position.

Finally, the alien gained qualifying experience as an assistant accountant for Mulco Textiles Ltd. from June of 1968 to July of 1972 (AF8). His duties at that position included: writing cash checks to customers; writing cash payments for payroll; receiving checks from creditors; reconciling books with individual bank statements and paying creditors accordingly; checking outgoing sales invoices with company records; maintaining payroll cash book, including tax withholdings; balancing ledgers and accounts and preparing company's balance sheet. Accordingly, we find such experience similar to the required job duties, and thus the alien has established an additional four years of qualifying experience.⁴

Totaling these relevant and qualifying positions, the alien has seven years and one month of experience in the job offered. Therefore, we hold that the alien is qualified for the position and that Employer's requirements for the position are its minimum requirements for the position.

The Solicitor is correct that the fact that there were some responses to the application and advertisement does not indicate that problems in recruitment, if any, were insubstantial. O'Malley Glass & Millwork Co., 88-INA-49 (March 13, 1989). The panel's previous statement to the contrary, however, is a harmless error, as the panel did not need to rely on the existence of such responses to find the Alien qualified by virtue of his experience. We affirm the holding of O'Malley Glass & Millwork Co. that the existence of responses to applications or advertisements does not alleviate the potential harm caused by such applications or advertisements.

The Solicitor additionally argues that, if the Board were presented with a U.S. applicant who had the experience of the Alien, the Board might find him or her unqualified for the position. Inherent in the finding that the Alien is qualified is a finding that a U.S. applicant with similar credentials and experience would be considered qualified for this position.⁵ The Solicitor's underlying issue of whether a U.S. applicant's lack of one or more minor job requirements is disqualifying, so that an employer may reject the applicant, is not before the Board within the facts of this case.⁶ The Board has previously rejected an employer's argument

⁴ The alien, who is performing the present job, states in his affidavit that the assistant accountant position (and other positions which the Board accepts as qualifying) are directly related to his current position. While such a statement by itself likely would not prove the issue, there is no reason presented to discredit his opinion that he is performing duties which relate to his previous employment duties.

⁵ The similarity of duties presented herein between the alien's previous experience and the present job opening would, likewise, be considered disqualifying if the alien had only obtained his experience with Employer. See note 3, supra.

⁶ The Board has reached conclusions which indicate that the level of similarity required for U.S. applicants' qualifications has not been completely addressed. Compare, Concurrent Computer Corp., 88-INA-76 (Aug. 19, 1988) (en banc), Technology Dynamics, Inc., 90-INA-10 (November 23, 1990) and Houston Music Institute, Inc., 90-INA-450 (Feb. 21, 1991). See also, Datagate, Inc., 87-INA-582 (February 17, 1989) and Unisys, 87-INA-555 (April (continued...))

that an accountant performs duties so different from a bookkeeper that a U.S. applicant's experience as an accountant would not qualify the applicant for a bookkeeping position. Metroplex Distributors, supra.⁷ The Board will not treat an alien's qualifications with less scrutiny than those of a U.S. applicant. Under the facts of this case, we find that the Alien has the requisite level of experience to meet Employer's requirements.

Therefore, we agree with the panel's initial holding on this issue. As the alien's qualifications for the position were the only ground for the CO's denial of certification, the final determination of the CO must be reversed and certification should be granted.

ORDER

It is hereby ordered that the Certifying Officer's final determination denying labor certification be REVERSED. The Certifying Officer is directed to GRANT certification.

At: Washington, D.C.

For the Board:

NAHUM LITT
Chief Judge

NL/DS

Maple Derby, 89-INA-185
Judge JOEL R. WILLIAMS, concurring:

I concur in the result in this case and the reasons therefore except that I do not consider the facts in O'Malley Glass & Millwork Co. to be analogous to those in the instant case.

Maple Derby, Inc., 89-INA-185
Judge LAWRENCE BRENNER, dissenting:

⁶(...continued)

6, 1988). This issue should only be addressed by the Board en banc when a case presents facts involving the rejection of U.S. applicants.

⁷ In that case, the Board also noted that the Dictionary of Occupational Titles lists similar and overlapping duties for bookkeepers, accountants and auditors. Therefore, experience in performing the duties of one position may often qualify an applicant to perform another job. However, performing duties as accountant will not qualify an alien for a job where similar duties are not required. Western Overseas Trade and Development Corp, 87-INA-640 (January 27, 1988) (alien's experience as an accountant did not qualify her for the position of export manager).

I am in general agreement with the excellent summary of the general law in the majority's opinion. However, based on the particular facts of this case, for the reasons stated in my dissent to the three-judge panel's decision, I would affirm the denial of labor certification or, at a minimum, remand for a new recruitment with a clear specification of the broadness of the Employer's experience requirement.

In summary of my previous dissent, in this case U.S. workers with experience equal to the Alien's, which the Employer now clarifies is acceptable, would have been discouraged from applying for the job. I respectfully believe that the majority here fails to come to grips with this fundamental point. I am pleased that the majority (at p. 8) corrects the panel decision's view by affirming the principle of O'Malley Glass, 88-INA-49 (Mar. 13, 1989), that the fact that there were some responses by applicants who met the after-the-fact clarified lower requirements does not mean that the advertisement did not discourage other qualified U.S. workers. However, the majority finds this error harmless because ". . . the panel did not need to rely on the existence of such responses to find the Alien qualified by virtue of his experience." This view does not satisfy one of the independent grounds for my dissent: the disparate treatment between accepting the Alien as qualified for an "accountant" job while endorsing an advertisement which clearly is potentially discouraging to a U.S. applicant who is not a degreed accountant.

For the reasons stated, I respectfully dissent from the result, but commend the majority's excellent summary of the law in this area as a resource for practitioners.

LAWRENCE BRENNER
Administrative Law Judge