U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 September 2007

BALCA Case No.: 2007-INA-00020
ETA Case No.: **P-05118-80039**

In the Matter of:

RIGO INDUSTRIES,
Employer,

on behalf of

TIMOTEO AGUILAR,
Alien.

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center

Appearance: Susanne C. Huebel, Esquire
Law Offices of Moses Apsan, P.C.
Newark, New Jersey
For the Employer and the Alien

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 U.S. Department of Labor Certifying Officer ("CO") denial 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 the Code of Federal Regulations ("C.F.R.").[1]

[1] 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.

STATEMENT OF THE CASE

On April 30, 2001, the Employer filed an application for labor certification to enable the Alien to fill the position of Wallpaper Printer I. (AF 16). The Employer required two years of experience in the job offered. (AF 16). On August 20, 2002, the Employer requested that the application be converted to reduction-in-recruitment (RIR) processing. (AF 18-24). The Employer supported the RIR conversion request with evidence of recruitment done in early June of 2002. Two U.S. applicants applied, but both were rejected. One of the applicants was rejected, in part, based on his failure to have "experience in setting up and operating machine to print colored patterns on vinyl wallpaper." (AF 18).

On June 13, 2006, the CO issued a Notice of Findings (NOF) proposing to deny certification under 20 C.F.R. § 656.21(b)(5) on the ground that the Alien did not have two years of experience in the job offered when hired by the Employer. (AF 13-15). The NOF instructed that the Employer could rebut by documenting that the Alien had such experience at the time of hire or that it was not presently feasible to hire a worker without such experience. The NOF also instructed the Employer to document that the position existed prior to the Alien's hire.

The Employer's rebuttal was received by the CO on July 16, 2006. (AF 7-12). The Employer did not attempt to document that the Alien had the requisite experience prior to being hired by the Employer, but rather that it would not be feasible presently to hire a worker without such experience. The Employer's President stated that the Wallpaper Printer position requires a high level of skill; that the position has had low turnover; and that, because of an increase in business, neither he nor one of the managers would be able to train a new worker without incurring an extraordinary and unjustifiable loss in business. (AF 8-9). The President stated that the position existed prior to hire of the Alien, identified the employee who filed the position, and provided a copy of a wage

stub to show that this worker was an employee back in 1992 (the Alien having been hired in 1994). (AF 9-10). The Employer's Plant Manager stated that training for this position requires a great deal of trial and error with consequent defective materials, and that the company keeps low turnover for the position when it finds someone good. (AF 11). In an earlier letter from October 2002, the Plant Manager also stated that business volume had increased to such an extent that there was no spare time to train workers. (AF 12).

On March 29, 2007, the CO issued a Final Determination denying labor certification. (AF 4-6). The CO focused on the Employer's failure to provide documentation requested in the NOF to establish that the position existed prior to hire of the Alien. Specifically, the NOF observed that the Employer failed to produce a position description, organizational chart, payroll record, or resume of a former incumbent. The single pay stub supplied contained no information identifying the occupation for which the payment was made. Thus, the CO concluded that the job had been created specifically for the Alien to the exclusion of U.S. workers.

On April 3, 2007, the Employer requested BALCA review. (AF 1-3). In the request for review, the Employer does not challenge the CO's finding that the job had been created specifically for the Alien, but rather seeks only to have the application remanded for supervised recruitment. Specifically, the Employer cited GAL 1-97, GAL 2-02, the "Zieglar Memo" of March 18, 2002, a letter from the former DOL Region 5 CO to an attorney, and December 22, 2006 ETA web site FAQs. The Employer's prayer for relief stated that it "**respectfully request[s] that [the DOL] return this case to the traditional process and send recruitment instructions taking into account that no experience will be required**." (AF 3, emphasis as in original).

The Board docketed the appeal on May 10, 2007, and issued a Notice of Docketing on May 31, 2007. Neither the Employer nor the CO filed appellate briefs.

DISCUSSION

Section 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.

Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien: 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). Moreover, an employer may be found to have imposed unduly restrictive job requirements where it tailors the job requirements to the alien's qualifications. *Snowbird Development Co.*, 1987-INA-546 (Dec. 20, 1988) (en banc).

In the instant case, the Employer does not challenge on appeal that the CO correctly denied certification on this ground, but argues solely that because the application was before the CO in the posture of an RIR conversion case, the CO should have remanded for supervised recruitment rather than denying the application outright.

In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003) a panel of the Board ruled that that a denial of an RIR request mandates a remand for non-RIR processing. Subsequent to the *Compaq Computer* decision, however, panels of the Board ruled that a remand for supervised recruitment is not mandated if the reason for the denial cannot be cured by a supervised recruitment. *See, e.g., Beith Aharon*, 2003-INA-300 (Nov. 18, 2004) (lack of a bona fide job opportunity); *Beverly Fetner*, 2004-INA-30 (Mar. 8, 2005) (lack of sufficient funds to pay the alien's wages); *Crosslands Transportation Inc.*, 2005-INA-198 (Jan. 22, 2007) (failure to establish that part of the salary offer was not based on commissions in violation of 20 C.F.R. §656.20(c)(3)); *Houston's Restaurant*, 2003-INA-

237 (Sept. 27, 2004) (failure to comply with a deadline set by the CO for responding to the CO's inquiries about an RIR request); *Smith Group Inc.*, 2005-INA-39 (Nov. 27, 2006) (refusal or failure to agree to amend offered wage to prevailing wage rate).

In *Express Photo, Inc.*, 2005-INA-128 et al. (May 16, 2007) (en banc), the Board reviewed the caselaw precedent, regulatory history, and policy statements of ETA relating to the question of whether a "granted" RIR must result in a remand for supervised recruitment. The Board, limiting its ruling to RIR requests based on pre-application recruitment, found that where such recruitment "may not have been adequate under DOL criteria for conducting an acceptable recruitment, whether it be stating job requirements not required of the Alien, an unduly restrictive job requirement, failure to timely contact U.S. applicants, not presenting a 'lawful' (within the meaning of the labor certification regulations) grounds for rejecting a U.S. applicant, are all reasons for not granting the RIR and requiring the employer to go through supervised recruitment -- or for only partially granting the RIR and requiring directed actions to rectify the deficiency to the CO's satisfaction." Slip op. at 24 (footnote omitted). Thus, at least in a pre-application recruitment situation, rejection of U.S. workers based on unduly restrictive job requirements was found to be a matter that normally could be cured with supervised recruitment. In a footnote, however, the Board stated:

> The CO, however, would act reasonably in testing whether an employer would eliminate, modify or justify by business necessity an unduly restrictive job requirement prior to remanding for supervising recruitment. If an employer refuses to eliminate or reasonably modify such a requirement, or fails to establish business necessity for such a requirement, the case would fall into the category of those that do not need to be remanded but could be dismissed on the merits. Similar procedures would be reasonably followed if the prevailing wage was in question, or there was a question whether the position offered was a bona fide job opportunity, or there was some other potentially "fatal" defect with the application. …

Id. at n. 18.

In the instant case, the CO's challenged the Employer's two year experience

requirement as unduly restrictive based on the Alien's lack of such experience when hired by the Employer. If at that point the Employer had confessed error, dropped its RIR request, and agreed to delete its experience requirement and readvertise, a remand for supervised recruitment might have been appropriate. However, in the instant case the Employer's contention on rebuttal was that it was no longer feasible to train a worker.

In *Professional Staffing Services of America*, 2006-INA-48 (Mar. 13, 2007), the panel upheld the CO's finding that the Employer had failed to establish that the Alien possessed the qualifications that the Employer was now requiring of U.S. applicants. In regard to whether the matter should be remanded for supervised recruitment, the panel wrote:

> This case was before the CO in the posture of a request for reduction in recruitment. Generally, when the CO denies an RIR, such denial should result in the referral of the application for regular processing. *Compaq Computer Corp.*, 2002-INA- 249-253, 261 (Sept. 3, 2003). A referral for regular processing, however, is not mandated where an application is so fundamentally flawed that such a procedure would be pointless. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004) (no remand where the employer had not presented a bona fide job opportunity). In the instant case, the CO gave the Employer the opportunity to cure the actual minimum requirements issue by revising or removing the experience requirement and readvertising. The Employer, however, chose to retain the requirement. We hold that where an employer was afforded the opportunity in rebuttal to an NOF to readvertise the job after revising or removing a requirement that did not reflect its actual minimum requirements for the job because it hired the Alien without such qualifications, and the employer instead opted to retain the requirement and argue that the Alien in fact had the requisite qualifications prior to hire, the employer in effect declined the opportunity to proceed under regular processing.[4] Thus, a *Compaq Computer* remand is not warranted in this case.

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4 *Compare Ronald J. O'Mara*, 1996-INA-113 (Dec. 11, 1997) (en banc) (an employer who attempts to establish the business necessity for a job requirement must unequivocally agree to readvertise in accordance with the requirements set forth by the CO if its business necessity rebuttal is unsuccessful, in order to be entitled to subsequently re-advertise the position).

Slip op. at 5.

The instant appeal is similar to *Professional Staffing Services of America*. When the Employer contended that it is now not feasible to train a worker, it was making a factual assertion that was incompatible with an offer to delete and readvertise. The Employer was asserting that it was not feasible to train a worker when the rebuttal was filed. Only upon learning that its rebuttal was not accepted was it willing to delete the experience requirement completely. In such a circumstance, the offer to delete the experience requirement on remand for supervised recruitment came too late.

ORDER

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

Entered at the direction of the Board by:

A

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 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.