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Issue Date: 29 March 2004

BALCA Case No.: 2003-INA-6
ETA Case No.: P2001-OR-09513874/ET

In the Matter of:

FEATHERLAND FARMS, INC.,
Employer,

on behalf of

RANDOLF EUGENE FRIESEN,
Alien.

Appearance: Raquel E. Hecht, Esquire
Eugene, Oregon
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial of alien labor certification for the position of sales manager (poultry scientist).¹ The

¹ Permanent alien labor certification is governed by § 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).

Certifying Officer (“CO”) denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

STATEMENT OF THE CASE

On March 20, 2001, Featherland Farms, Inc. (“Employer”) filed an application for labor certification to enable the Alien, Randolph Eugene Friesen, to fill the position of sales manager (poultry scientist). (AF 155). A Bachelor’s degree in animal science or a related field was required. No experience or training was required. The job requirements included directing and monitoring customers’ programs for breeding chicks, customer development and service, and account collection, among other duties. (AF 155).

On April 8, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification. (AF 52-55). Specifically, the CO determined that Employer rejected U.S. applicant Zahler because he was not interested in traveling outside the intended area of employment, a requirement which was not shown on the ETA 750A. Employer was directed to show that the U.S. worker was not qualified based on his failure to possess the requirements set forth in the ETA 750A.² (AF 54-55).

By cover letter dated May 6, 2002, Employer’s counsel submitted rebuttal. (AF 21-52). Included was a letter from Employer’s manager, arguing that Employer did not require travel as part of the position; however, in order to fulfill the job duties, such as managing sales presentations and maintaining regular customer contact, the sales manager may travel to the location of the sales prospect as he sees fit. If a manager could fulfill the job duties without traveling, he could do so. Employer stated that applicant Zahler was disqualified for other reasons. Employer indicated that Zahler admitted that he had not worked in the field of animal or poultry science for the past twenty years and he did not have current knowledge of the science or current trends in the area. Therefore,

²As the other issues raised in the NOF were remedied by Employer, they will not be detailed herein.

he did not possess the necessary knowledge and experience to fulfill the job requirements and “does not want the job.” (AF 23-24).

A Supplemental NOF was issued on May 9, 2002. (AF 17-20). The CO did not find Employer’s assertions regarding the travel requirements persuasive. The CO noted that the Alien, who was currently performing the duties, was conducting promotion and sales throughout the western United States as a California Sales Manager, as shown on ETA 750B. The CO reiterated its initial findings regarding the travel requirement. Rebuttal for this finding needed to establish that the U.S. worker at issue was not qualified based on his failure to possess the requirements set forth in the ETA 750A. The CO noted that Employer’s letter of May 6, 2002, stated that Zahler was rejected because he did not possess the necessary knowledge and experience to fulfill the job requirements; however the position did not require experience or current knowledge of science in the application or published advertisements. Therefore, the applicant was considered qualified. Rebuttal needed to show that this applicant was rejected solely for lawful, job-related reasons. (AF 19-20).

Rebuttal was filed on May 28, 2002. (AF 9-16). Employer reiterated that it did not require travel as part of the position at issue. Although Zahler was asked if he would like to travel to fulfill the job duties, he was not disqualified solely because he was unwilling to travel outside the area. Employer contended that upon checking Zahler’s references, he had two negative references from his previous work places. Based upon those reports, this applicant was not considered a qualified candidate for the position. (AF 10-11).

A Final Determination was issued on May 30, 2002. (AF 7-8). The CO found that Employer’s assertion that Zahler was asked if he would like to travel clearly indicated that travel was involved as part of the job duties and was an implied requirement. Furthermore, Employer rejected the applicant for a lack of experience or current knowledge, requirements that were not listed on the ETA 750A. The CO also noted that Employer never mentioned the negative references in the initial results of recruitment or

in the letter of March 5, 2002. The CO found that Zahler was a qualified U.S. applicant based on the fact that he met the stated minimum requirements of the position. The CO found Employer's rebuttal unconvincing and as such, labor certification was denied. (AF 8).

On June 20, 2002, Employer requested review of the denial of labor certification and the matter was docketed in this Office on October 8, 2002. (AF 1).

DISCUSSION

In the Request for Review, Employer conceded that travel was not listed as a requirement on the ETA 750A, and "therefore, we do not dispute that the applicant's unwillingness to travel as part of the job is not grounds to disqualify him." (AF 2). Employer contended, however, that the degree requirement was not an empty requirement. Employer argued that a degree which was twenty years old and not accompanied by any experience afterwards was "the same as having no degree at all." (AF 2). Employer also contended that after receiving the NOF, it reviewed its files and found the additional reason for Zahler's rejection (i.e., the negative references). This information was not provided earlier simply because Employer believed that the other reasons for disqualifying this applicant were sufficient. (AF 3).

An employer's stated reason for rejection is insufficient to establish a lawful ground for rejection of a U.S. applicant where it is a mere assertion. *Marnic Realty*, 1990-INA-48 (Nov. 21, 1990); *Quality Products of America, Inc.*, 1987-INA-703 (Jan. 31, 1989). Employer herein has made numerous assertions, one of which has now been retracted (the undisclosed requirement to travel), another adjusted (the requirement of a degree in animal science coupled with no experience), and a third newly created (the negative references from past employers). The credibility of Employer's recruitment efforts is at issue, as is the credibility of its assertions regarding the reasons for its rejection of a seemingly qualified U.S. applicant.

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 this case, Employer conceded that its first two stated grounds for rejecting Zahler were not lawful reasons for rejection. Employer now contends that the combination of an outdated degree and no experience is the equivalent of no degree. However, an applicant cannot be rejected for lack of current knowledge of a particular field without adequate documentation. An employer's mere suspicion that the applicant's knowledge is faulty does not satisfy the employer's burden to document lawful rejection. *Hill-Fister Engineers, Inc.*, 1989-INA-114 (Feb. 6, 1990). Employer's assertion that Zahler's degree was inapplicable because it was awarded twenty years ago is unfounded. Employer did not require a degree recently obtained and has not presented evidence as to how Zahler's degree was irrelevant. Employer's assertion that Zahler's degree is outdated is groundless. In addition, Employer now asserts that Zahler had negative references, an argument first raised after issuance of the Supplemental NOF.

Once an employer has rejected an apparently qualified applicant for an unlawful reason, the CO is not required to investigate the legitimacy of a totally independent reason for rejection offered by an employer for the first time in response to the NOF. *Foothill International, Inc.*, 1987-INA-637 (Jan. 20, 1988).

The totality of the facts herein dictate a finding that Employer has not met its burden of establishing that Zahler was rejected for lawful, job-related reasons. This U.S. applicant met the minimum stated requirements of the job and yet was rejected. Therefore, Employer has failed to show a good faith recruitment effort. Labor certification was properly denied, and the following order shall issue:

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel 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 of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.