



Issue Date: 14 August 2003

BALCA Case No. 2002-INA-87
ETA Case No. P1999-CA-09442720/JS

In the Matter of:

ACCENT AWNINGS,
Employer,

on behalf of

OBDULIO MALDONADO,
Alien.



Appearance: John Montano, Jr., Esquire
For Employer
Tustin, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judge

DECISION AND ORDER

PER CURIAM. This case arose from a labor certification application filed on behalf of the Alien by Employer under 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 CFR Part 656.¹ After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) issued a Final Determination (FD) denying the application, the Employer requested review pursuant to 20 CFR § 656.26.

¹ The following decision is based on the record upon which the CO denied certification, including the Notice of Findings (NOF), rebuttal and the Employer's request for reconsideration, as contained in an Appeal File (AF), and any written arguments of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On July 1, 1997, Employer, a custom welding and manufacturing company, filed an application for labor certification to fill the position of welder assembler. (AF 42). Employer advertised for the position, received 13 applications, and rejected all of those applicants as reflected in a January 29, 1999 recruitment report. (AF 47-51).

On June 1, 2001, the CO issued a Notice of Findings proposing to deny labor certification based on (1) failure to supply a complete ETA 750, Part B as it did not identify all of the Alien's employment history for the past three years as required by 20 C.F.R. § 656.21(a)(1), and (2) unlawful rejection of five of the U.S. applicants in violation of 20 C.F.R. § 656.21(b)(6). (AF 33-36).

Employer submitted a rebuttal, which was received by the CO on July 9, 2001. (AF 25-32). In the rebuttal, Employer submitted an amendment to the ETA 750B signed by the Alien advising that the Alien had been a self-employed welder from November 1994 to February 1998, working for multiple general contractors, but providing no details about the dates and names of the general contractors. In regard to the unlawful rejection issue, Employer asserted that applicants Ton and Rodriguez were rejected because they failed to attend a scheduled interview, and that there is no obligation on the employer to re-contact the applicants in these circumstances to schedule a new interview. In support, Employer provided copies of certified mail receipts showing that the applicants received and signed for the letters. Employer asserted that applicant Magana was rejected because of his lack of stability, having been laid off and fired numerous times, having changed jobs three times in four months, and having exhibited a history of unreliable attendance. Employer also alleged that Magana's "prior employer did not rehire him despite the fact that the position remained open." (AF 25). Employer stated that during his interview, Rodriguez expressed several opinions about management that bordered on being

subversive, and that upon investigation, Employer learned that Rodriguez “was fired from his last job due to problems with his manager and co-workers....” Employer asserted that applicant Habgood was rejected because during his interview he demonstrated a lack of interest in the position offered, stated that he was seeking a higher position, and failed to provide documentation requested to verify his credentials. (AF 25-26).

On July 23, 2001, the CO issued a Final Determination denying labor certification. (AF 22-24). The CO observed that the NOF had directed that the amendment to the ETA 750B include the name and address of employment, name of job and other information. Thus, although Employer submitted an amendment signed by the Alien and himself indicating that the Alien was self-employed from November 1994 to February 1998 as a welder-installer and worked for multiple general contractors, the amendment was deficient in that it provided no names or addresses of employment. Lacking an explanation for failing to name any contractor or provide any address of employment, the CO found that the ETA 750B was still incomplete and that Employer failed to satisfy the requirements of 20 CFR § 656.21(a)(1). (AF 23).

The Final Determination also rejected Employer’s rebuttal regarding the rejection of applicants Magana, Rodriguez, and Habgood. The CO found that Employer had not documented that Magana was not qualified, and concluded that the events recited from his employment history did not have a bearing on those qualifications. Similarly, the CO found that the statements purportedly obtained by Employer about Rodriguez’s having problems with his manager and co-workers in his prior job did not bear on the applicant’s ability to perform the job for which labor certification was sought. Finally, the CO found that there was no documentation as to how Employer requested documentation from Habgood or how the applicant may have been uncooperative in supplying such documentation.

By letter dated August 14, 2001, Employer filed a request for review/request for Reconsideration, contending:

(1) Employer did not fail to satisfy the requirements of 20 CFR § 656.21(a)(1) by not providing the names and addresses of employment because the employment was on a temporary basis and did not meet the regular standards of an employer-employee relationship; therefore, such information was unknown to the Alien and could not be furnished by the employer;

(2) regarding the rejection of Magana and Rodriguez, it is the policy of Employer not to employ people without integrity and an employer may reject U.S. applicants on a bad reference; and

(3) regarding the rejection of Habgood, the applicant stated he was no longer interested in the position offered and an employer may lawfully reject an applicant who fails to provide the employer with documentation verifying credentials.

(AF 1-2). The CO denied reconsideration on September 13, 2001. (AF 21). The Board issued a Notice of Docketing on February 21, 2002.

DISCUSSION

Section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful job-related reasons. Although the regulations do not explicitly state a "good faith" requirement, such a requirement is implicit. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification.

Employer alleges that applicant Rodriguez was rejected because he failed to show up for a scheduled interview, citing *Dynatech/U-Z, Inc.*, 1988-INA-230 (Sept. 27, 1989), for the propositions that U.S. applicants may be rejected if they fail to attend a scheduled interview and that there is no obligation on the employer to re-contact the applicants under these circumstances to schedule a new interview. (AF 25). However, the facts presented in *Dynatech/U-Z, Inc.* are distinguishable from the instant matter. In *Dynatech/U-Z, Inc.*, pursuant to a response to an advertisement, the employer contacted the two applicants by mailgram. The mailgram asked the applicants to contact the employer about a job interview. Each applicant contacted the employer as requested, and interviews were “scheduled *with* each applicant.” *Dynatech/U-Z, Inc.*, 1988-INA-230 (emphasis added). In the instant matter, there was a single notification of a unilateral scheduling by the employer of a date and time for an interview rather than an interview scheduled “with” each applicant.

Employer alleges that Magana was rejected because he had been fired or laid off numerous times. Regarding Rodriguez, Employer asserts that he was rejected because during his interview he expressed several opinions about management that were subversive, he worked for three companies in four years, was involved in a verbal dispute with a manager, and was fired. In support of Employer’s rejection of Magana and Rodriguez, Employer cites *Matter of Alfredo’s Restaurant*, 1990-INA-70 (June 12, 1991), for the proposition that an employer may reject U.S. applicants based on a bad reference. (AF 25). However, this case law is not sufficient to negate the employer's duty to provide adequate documentation of bad references or unreliable character reflecting that Magana or Rodriguez were rejected for lawful, job-related reasons. *Cutting Corners, Inc.*, 1987-INA-376 (April 5, 1988). *Domenico Marino*, 1994-INA-245 (July 19, 1995).

Employer has failed to provide any documentation to show Magana is unstable, that he caused any problems, or that he is not a qualified U.S. applicant. Employer has not provided any documentation or objective evidence that Rodriguez is not a qualified U.S. applicant.

Employer alleges that Habgood was rejected for wanting a managerial position and because he failed to provide Employer with the requested documentation to verify his credentials. (AF 26). The credentials ground was first stated in the rebuttal letter. In support of the employer's rejection of Habgood, Employer cites *Matter of Shinro Midwest, Inc.*, 1990-INA-571 (Jan. 31, 1992), for the proposition that an employer may lawfully reject an applicant who fails to submit verification of his or her credentials as requested by the employer. (AF 26). However, an employer unlawfully rejects U.S. workers for failure to provide verifiable references when there is no documentation that the employer specifically requested such reference and applicants did not comply. *CMC Quality Concrete*, 93-INA-108 (Oct. 25, 1994). The record does not contain information on precisely what was requested of Habgood in the way of verification of credentials; however, the letters to Ton (AF 12) and Rodriguez (AF 14), only required those applicants to bring their resumes, which were to contain a description of prior work experience, names of previous employers with addresses and phone numbers, and dates of employment. Because Employer did not document what was requested of Habgood or how he failed in this regard, we find that he was unlawfully rejected.

An employer may reject a qualified U.S. applicant who is shown not to be interested in the job. *New Consumer Products*, 1987-INA-706 (Oct. 18, 1988) (*en banc*). However, an Employer should document that the applicant was offered the job and rejected it, or failed to respond to the Employer in any way. See *Stefan & Jadwiga Bochna*, 1994-INA-389 (Nov. 7, 1995); *United Cerebral Palsy of the Inland Empire, Inc.*, 1990-INA-527 (Aug. 19, 1992); *Composite Research, Inc.*, 1991-INA-177 (Oct. 1, 1992). We find insufficient documentation in this case to establish that applicant Habgood was not interested in the position.

ORDER

The Certifying Officer's Final Determination denying labor certification 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.