



Issue Date: 03 September 2003

BALCA Case No. 2002-INA-195
ETA Case No. P2000-CA-09497360

In the Matter of:

DC SPORTS,

Employer,

on behalf of

JORGE LOPEZ,

Alien.



Certifying Officer: Martin Rios
San Francisco, CA

Appearance: Luis A. Sabroso
For Employer

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 Jorge Lopez (“Alien”) filed by DC Sports (“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 Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based 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 of the parties.

STATEMENT OF THE CASE

On May 23, 1997, Employer filed an application for labor certification on behalf of the Alien for the position of Welder. (AF 15-16).

On January 4, 2002, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the ground that Employer unlawfully rejected applicants Stephen Bell, Jorge Diaz, and Andrew Whitt. The CO found that all three US applicants were qualified for the position, as they all satisfied the minimum requirements for the occupation of Welder. The CO advised Employer that in its Rebuttal it had to document lawful, job related reasons for rejecting each of the candidates. The CO also found that Employer did not contact the applicants as soon as possible as directed by the state agency. Therefore, Employer did not recruit in good faith. To remedy the deficiency, Employer was advised to document that its attempts to contact the applicants were timely. (AF 11-13).

In its Rebuttal dated February 2, 2002, Employer argued that Mr. Bell's sole reason for applying for the position was for the salary and full benefits offered. Employer noted that it is seeking individuals who are going to benefit the employer and not on individuals who are interested in their profit only. Mr. Diaz was disqualified because he did not have a good welding test. Mr. Whitt was rejected because he did not have the experience required for the job, as his experience was in mobile home welding. Employer in its Rebuttal repeated its objection to other candidates who were motivated by the salary and health benefits in seeking the job opportunity.¹ Employer also asserted that he contacted the other candidates timely. (AF 7-9).

¹ Employer also alleged that the applicants who exceeded the requirements asked for more money than that offered.

On March 19, 2002, The CO issued a Final Determination (FD) denying certification (AF 5-6). The CO found that Employer in its Rebuttal did not demonstrate that the rejections of the three candidates the CO found qualified were for lawful, job related reasons. The CO noted that Employer did not explain what he meant by rejecting the applicants on the basis that “they were interested in salary only.” (AF 6). Additionally, the CO found that the rejections of Mr. Bell because he was employed, Mr. Diaz because he did not have a good welding test, when none was required, and Mr. Whitt because his experience was with trailer welding, were not valid, job related reasons for rejecting those applicants. Further, Employer did not document good faith recruitment effort in contacting the rest of the applicants. (AF 6).

On April 22, 2002, Employer filed its Request for Review (AF 1). Employer alleged that it demonstrated that its rejection of the applicants was justified and its recruitment efforts were timely.

The AF does not reflect that a brief was filed.

DISCUSSION

A U.S. job applicant is considered qualified for a job if he meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991).²

² In the NOF, the CO found three candidates to be qualified for the position of Welder. The CO advised Employer that to cure the deficiency, Employer in its Rebuttal had to document the lawful, job related reasons for rejection of each of the applicants to demonstrate its good faith efforts in recruitment. Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993). Under 20 C.F.R. § 656.24, the Rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). In the Rebuttal Employer repeated its general assertions that the candidates were only interested in the salary and that they failed to meet some unclear and previously undisclosed requirements. Denial of certification has been affirmed where the employer has made only generalized assertions, *Winner Team Construction, Inc.*, 1989-INA-172 (Feb. 1, 1990). Accordingly, Employer's failure to address the deficiency noted in the NOF is sufficient ground for denial of certification.

The minimum requirement for the position, in accordance with the ETA 750 and job advertisement, is two years of experience as a Welder. (AF 15-16). The three candidates mentioned by the CO in the NOF and FD have extensive experience as Welders. In fact, all of them exceed the minimum experience requirement.

In reviewing the qualifications of Mr. Stephen Bell (AF 70), we note that Mr. Bell has over ten years experience as a Welder. Since Employer's minimum experience requirement is two years, Mr. Bell meets and exceeds Employer's minimum experience requirement. Therefore, we agree with the CO in finding Mr. Bell qualified for the position.³

Employer's rejection of a job applicant is unlawful where it fails to provide an objective detailed basis for concluding that the U.S. job applicant cannot perform the main job duties. *Impell Corp.*, 1988 INA 298 (May 31, 1988)(*en banc*). The employer's burden of proof requires a convincing showing that the U.S. job applicant could not perform the job in an acceptable manner, as contemplated by 20 CFR § 656.24(b)(2)(ii). *Fritz's Garage*, 1988 INA 098 (Aug. 17, 1988)(*en banc*). As Mr. Bell's resume supports the CO's finding that he met the stated job requirements, Employer was required to submit convincing documentation that Mr. Bell was unable to perform the stated job duties. *See Future Furniture, Inc.*, 1989 INA 017 (Oct. 30, 1989).

However, Employer did not submit a single piece of documentation demonstrating that Mr. Bell was unable to perform the job in an acceptable manner. Employer's sole argument for rejecting Mr. Bell was its allegation that Mr. Bell was only interested in the position's salary and not in benefiting Employer. However, Mr. Bell's failure to be motivated by altruism in his quest for the job is not a lawful, job related reason for rejecting him.

³ We also concur with the CO's finding that the following applicants were qualified for the position: **Jorge Diaz** (AF 140), as he has over ten years experience as a Welder and **Andrew Whitt**, (AF 94) since he has over seven years experience as a Welder.

Employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). In this case, Employer failed to meet its dual burden, as Employer did not demonstrate that it rejected the qualified U.S. applicant for lawful job related reasons, and the AF is devoid of documentation in support of approval of the application.⁴

⁴ Albeit the fact that the decision is based on the unlawful rejection of Mr. Bell, this decision is equally applicable to the candidates we found to be qualified for the position in footnote number three. We must add that Employer in its Recruitment Report (AF 21-23), rejected Mr. Diaz because he did not have a good welding test, and it rejected Mr. Whitt because his experience was in mobile homes welding. Given that neither the ETA 750 nor the job advertisement indicate any of the two grounds for rejection as a requirement, these undisclosed requirements can not be used by Employer to reject otherwise qualified candidates. It is unlawful for the employer to reject U.S. workers for lack of particular courses or additional training or experience not specifically identified on the ETA 750 as job requirements. *SRS Network, Inc.*, 1990-INA-405 (Sep. 5, 1990); *Quantem Corp.*, 1989-INA-174 (Feb. 21, 1990).

ETA 750A, box 15, titled “Other Special Requirements,” was created to afford employers the opportunity to list their particular requirements. The requirements could then be evaluated by the state agency, and potential applicants are forewarned that such requirements exist. It was in box 15 that Employer should have indicated the need for a welding test and varied welding experience, however Employer listed no additional requirements. Employer, in rejecting Mr. Diaz and Mr. Whitt, is implying that these undisclosed requirements should have been known to all the applicants. However, while an employer may contemplate that certain duties specified in its job description may require certain education and/or experience, these requirements must be specified by the employer. Rejection of U.S. workers for not meeting unspecified requirements constitutes unlawful rejection of qualified U.S. workers pursuant to 20 C.F.R. § 656.21(b)(7). *Photo Network*, 1989-INA-168 (Feb. 7, 1990); *Musicrafts International*, 1988-INA-461 (Jan. 10, 1990); *Universal Energy Systems, Inc.*, 1988-INA-5 (Jan. 4, 1989). Additionally, in *Morrison Express Corp.*, 1991-INA-77 (Apr. 30, 1992) we found there was no evidence that the job offered was so complex that a competent accountant could not be taught the nuances with a minimal amount of orientation training. Similarly, in the instant case, even if Employer had disclosed the requirements of a welding test and varied experience in welding, this panel would have concluded, like in *Morrison Express*, that candidates like Mr. Diaz with over ten years experience in welding and Mr. Whitt with over seven years experience as a Welder could perform the job of Welder with minimum orientation. However, the fact remains that the requirements of a welding test and varied welding experience were undisclosed requirements, and as such could not be used to reject a qualified US worker.

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.