

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 September 2003

BALCA Case No.: 2002-INA-157
ETA Case No.: P2001-NY-02467349

In the Matter of:

LASTICK'S AEROSPACE, INC.,
Employer,

on behalf of

YASSER ELSARIF,
Alien.



Appearance: Earl S. David, Esquire
New York, New York

Certifying Officer: Dolores DeHaan
New York, New York

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 by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "quality control engineer."¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ 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."). 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).

STATEMENT OF THE CASE

On September 7, 2000, Lastick's Aerospace, Inc. ("Employer") filed an application for labor certification to enable Yasser Elsarif ("Alien") to fill the position of "quality control engineer." (AF 17). A Bachelor of Science ("B.S.") in engineering was required.

Employer placed appropriate advertisements, and submitted the results of its recruitment to the Alien Employment Certification Office of the State of New York's Department of Labor on July 17, 2001. (AF 74). Employer rejected numerous applicants for lack of experience in mechanical quality control and aerospace knowledge.

The Certifying Officer ("CO") issued a Notice of Findings ("NOF") on November 1, 2001, proposing to deny certification on the ground that Employer rejected eleven U.S. applicants because they lacked mechanical or aerospace industry experience. (AF 80). The CO determined that every applicant met Employer's requirement of a B.S. in engineering, and therefore their rejection by Employer was deemed not to have been for lawful job-related reasons. Employer was advised to document lawful, job-related reasons for the rejection of the eleven U.S. applicants.

Employer's counsel submitted a rebuttal letter on January 10, 2002. (AF 85). Counsel argued that it had made a valid good faith recruitment effort, attaching as documentation Employer's letter of July 17, 2001, wherein the results of its recruitment were set forth.

A Final Determination was issued on January 31, 2002. (AF 87). Therein, the CO denied certification, pointing out that Employer had submitted as rebuttal that evidence upon which the NOF was based. Since Employer's initial reasons for rejection were based on applicants not having experience in the job offered and no experience was required in its job offer, the CO determined that the U.S. workers were rejected for unlawful job-related reasons.

On February 28, 2002, Employer requested review of the denial of certification by the Board

of Alien Labor Certification Appeals (“Board” or “BALCA”). (AF 94).

DISCUSSION

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). It is the employer who 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 the instant case, the position at issue required a B.S. in engineering. There was no stated requirement regarding experience. Employer then proceeded to reject eleven U.S. applicants because they lacked experience for the position.

Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Banque Francaise Du Commerce Exterieur*, 1993-INA-44 (Dec. 7, 1993). If an applicant clearly meets the minimum qualifications for the job they are considered qualified. *UPS*, 1990-INA-90 (Mar. 28, 1991). Thus, an employer unlawfully rejects an applicant where the applicant meets the employer’s stated minimum requirements but fails to meet requirements not stated in the application or the advertisement. *Phyllis Rowland*, 1992-INA-366 (Dec. 17, 1993); *Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991)(*en banc*). Such is the case here for the eleven U.S. applicants. Employer rejected the U.S. applicants based on lack of experience in the position offered, despite the fact that Employer failed to state an experience requirement in its recruitment advertisement. Hence, labor certification was properly denied.

ORDER

The Certifying Officer's denial of 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 PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review 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 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.