

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 24 November 2003

BALCA Case No.: 2003-INA 48
ETA Case No.: P2000-CA-09508118/JS

In the Matter of:

W.J. BYRNES & CO. OF LOS ANGELES, INC.,
Employer,

on behalf of

I-CHENG KUO,

Alien.

Appearance: Robert Lew Tan, Esquire
Los Angeles, California
For Employer and Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges



DECISION AND ORDER

PER CURIAM. W.J. Byrnes & Co. of Los Angeles, Inc. (“Employer”) has filed an application for labor certification¹ on behalf of I-Cheng Kuo (“Alien”) for the position of Import-Export

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 and any written argument. 20 C.F.R. § 656.27(c).

Agent. (AF 29). In June, 2002, the Certifying Officer ("CO") denied certification and this appeal ensued.

STATEMENT OF THE CASE

On the ETA 750A Application for Alien Employment Certification form Employer described the position of Import Export Agent as having minimum requirements of a Bachelor's Degree in International Business and one year of experience in the job offered. (AF 29). The job duties were stated to be:

Under supervision of Export Manager, coordinate movement of cargo from domestic warehouses to overseas buyers' destinations. Use electronic computers, calculators and charts to calculate and estimate shipping costs, shipping methods and packing methods for exporter. Analyze and break down costs of international and domestic transportation, import duties and related charges. Prepare export documentation as needed.

(AF 29).

Employer filed a recruitment report with the state job service on August 16, 2000, stating that only two U.S. applicants had been referred, and that neither of the applicants was qualified. (AF 48). Attached to the report were letters to the applicants explaining why Employer was denying their applications. The first indicated that Employer rejected the applicant based solely on a review of his resume, specifically: "While you do have a bachelors decree in International Business Administration and have some experience in import-export, the job requires that you have at least a year of experience as an Import-Export Agent with duties including the use of electronic computers to calculate the shipping cost, methods and packing for export. You do not have the experience required." (AF 54). This applicant's resume indicates that the applicant was the owner of an Import-Export business from 1993 to 1997, and had been an Import-Export Production Manager from 1989 to 1992. He received a Bachelor of Science degree in

International Business Administration and indicated that he has had training in Lotus 1-2-3 and Excel. (AF 55-56).

The letter to the second applicant indicates that Employer had performed a telephone interview with the applicant, and reviewed his resume. It states: "While you do have a master degree in International Management, your experience in the field of importing-exporting was ten years ago. In our interview by telephone with you on July 20, 2000, you indicated that you had no experience in importing goods into the U.S. The job requires that you have at least one year of experience as an Import-Export Agent, with duties including the use of electronic computers. You do not have the experience required." (AF 58). This applicant's resume states that she received a Masters Degree in International Management, and was a "Documentation Specialist" from 1986 to 1990, where she was responsible for four major accounts with overseas companies and was part of a team that marketed aircraft to a Japanese airline. The applicant's resume states that she is computer literate, and indicates that she worked with numerous computer systems relating to health insurance. (AF 59-63).

In the Notice of Finding ("NOF") issued on July 26, 2002, the CO denied certification on the grounds that two U.S. workers appeared qualified for the position offered based on review of their resumes, which show the required amount of education and experience. (AF 15). Noting that the Department of Labor considers a Bachelor's degree equivalent to about two years of experience and a Master's degree as equivalent to up to two additional years of experience, and that Employer only required a Bachelor's degree, the CO found that both applicants possessed the requisite experience. The CO also indicated that merely noting that an applicant's experience was distant was insufficient to show lack of qualification. (AF 14-16).

Employer filed its timely rebuttal on August 29, 2002. (AF 8-19). Employer essentially argued that the CO had not challenged Employer's job requirements as unduly restrictive, that one of the stated job requirements was one year of experience in the job offered, that one of the main job duties set forth was the use of personal computers, and that neither applicant's resume established such computer experience. Employer cited in this regard *Ashbrook-Simon-Hartley v. McLaughlin*, 863 F.3d 410 (5th Cir. 1989), for the proposition that the DOL cannot simply

narrow its inquiry to the question of whether the U.S. worker applicant has a certain number of years of education, training or experience. In regard to the first applicant, Employer argued that “[he] had disclosed that he had only trained but not worked with Lotus 1-2-3 and Excel.” (emphasis in original) (AF 11), and that one did not need to look beyond his resume to determine that he “lacked any experience in the use of computers in performing his work.” Employer argued that the second applicant did not mention any use of computers while working for the company with overseas customers, and that her computer experience was while working in an unrelated occupation. Employer also argued that in a telephone interview, this applicant had revealed “no experience in the use of computers to perform the duties of an Import-Export Agent.” (AF 11).

The CO issued a Final Determination denying labor certification on September 10, 2002, finding that Employer's rejection of both applicants was for reasons that were neither lawful nor job related in violation of 20 C.F.R. § 656.21(b)(6). (AF 6-7). The CO wrote in pertinent part: “The employer had not listed any requirement for excel or lotus, or any special computer experience, specific to the job of import-export agent or otherwise. The rebuttal does not show that either applicant lacks the required education and experience as stated on the application, or the computer experience that was not required. Moreover, only secondarily, the employer also has not documented even that these applicants have not used computer spreadsheets as named in rebuttal or that they cannot use a computer spreadsheet to perform the job duties.”

Employer, on appeal, argues that the CO, by referring to the computer requirements / experience in the Final Determination, has improperly raised an issue that was not first raised in the NOF, citing *Marathon Hosiery Co., Inc.*, 1988-INA-420 (May 4, 1989) (*en banc*). Employer also argued that its rebuttal adequately addressed the issues raised in the NOF. *See* Employer’s Brief, p.2.

DISCUSSION

Final Determination

Employer argues that the CO improperly raised an issue in the Final Determination that was not first raised in the NOF. Specifically, Employer argued that “The entire focus of the Final Determination was on the fact that personal computer experience was required of applicants for the job and that somehow that requirement was improper. No mention was made whatever in the earlier Notice of Findings (NOF) that this requirement was improper or not an ordinary business requirement.” Appellate Brief at 2.

Employer, however, misstates the CO’s ruling. The CO did not base the Final Determination on a finding that a one year experience requirement in the use of computers was unduly restrictive, but on a finding Employer had not listed “any special computer experience, specific to the job of import-export agent or otherwise” in its job description, .and therefore it was unlawful to reject a U.S. worker for lacking such experience. Unlawful rejection of U.S. applicants was the issue raised in the NOF and Employer’s rebuttal was that the applicants did not have adequate computer experience. The Final Determination merely reacted to Employer’s rebuttal – it did not inject a new finding of unduly restrictive job requirements into the case, but rather found, in essence, that Employer was using a previously unstated special skills requirement to reject otherwise qualified U.S. applicants. Thus, we do not find that the CO improperly raised a new issue or used new evidence in the Final Determination.

Unlawful Rejection

In the rebuttal to the NOF, Employer justified its rejection of the two U.S. applicants on lack of computer skills.² In the job description, Employer referenced “[u]se [of] electronic

² The rebuttal did not address the issue of whether 10 year old experience was a sufficient basis for rejection of a U.S. applicant. Section 656.25(e) provides that the employer’s rebuttal evidence must rebut all of the

computers, calculators and charts to calculate and estimate shipping costs, shipping methods and packing methods for exporter.” In defining the requirements for the job, experience in the job offered means experience performing the listed job duties. *Integrated Software Systems, Inc.*, 1988-INA-200 (July 6, 1988). An employer, therefore, may reject U.S. applicants who lack experience in some of the key duties. *Saritejdiam, Inc.*, 1989-INA-87 (Dec. 21, 1989). In *Quality Inn*, 1989-INA-273 (May 23, 1990), however, the panel held that when an employer raises a job duty as a ground for rejection, it must provide "a more objective detailed basis of its conclusions.”

The first applicant was rejected solely on review of his resume, even though it showed that he was the owner of an Import-Export business from 1993 to 1997, and had been an Import-Export Production Manager from 1989 to 1992, because the applicant only listed training in Lotus 1-2-3 and Excel rather than actual experience in using computers. In *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*), the Board held

When an applicant's resume is silent on whether he or she meets a "major" requirement such as a college degree, an employer might reasonably assume that the applicant does not and, therefore, rejection without follow up may be proper. In the case of a subsidiary requirement with detailed specifications -- something a candidate might not indicate explicitly on his resume though he possesses it -- an employer carries the obligation under *Nancy* [³]to

findings in the NOF and that all findings not rebutted shall be deemed admitted. On this basis, the Board has repeatedly held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). We find that Employer did not rebut the CO's rejection of the age of one of the applicant's experience as a ground for rejection of that applicant and therefore Employer has admitted that the CO was correct on this ground. Assuming arguendo that this issue is still viable, the Board has held that an employer may not reject an applicant for not possessing current knowledge of a professional specialty without adequate documentation; mere suspicion of such shortcomings does not satisfy an employer's burden to document lawful job-related reasons for rejection. *See, e.g., Hill-Fister Engineers, Inc.*, 199-INA-114 (Feb. 6, 1990). Employer provided no evidence or argument to establish that Import-Export Agents must have current knowledge or skills and therefore failed to rebut this aspect of the NOF.

³ The Board was affirming a principle first announced in *Nancy, Ltd.*, 88-INA-358 (April 27, 1989)(*en banc*), *rev. on other grounds, Nancy, Ltd. v. Dole*, Case No. 89-2257-CIV-Scott (S.D. Fla. August 8, 1990).

inquire further whether the applicant meets all the detailed specifications.

We find that the first applicant's resume did show such a broad range of experience, education, and training required for the job, that it raised the reasonable prospect that he met all of the Employer's stated actual requirements, and therefore Employer could not reject this applicant without further investigating his credentials. Thus, we affirm the CO's finding that Employer failed to document a lawful rejection of this applicant.

Employer faulted the second applicant's resume for not mentioning any use of computers while working for the company with overseas customers, but rather only while working in an unrelated occupation. Employer also argued that in a telephone interview, this applicant had revealed "no experience in the use of computers to perform the duties of an Import-Export Agent." As noted above, however, a panel of the Board has held that when an employer proffers lack of experience in a subsidiary job duty as a ground for rejection of an otherwise qualified U.S. applicant, the employer must provide "a more objective detailed basis of its conclusions." *Quality Inn, supra*. We concur with that ruling. Here, Employer's job description makes a generic reference to computer skills involving calculation and estimating of shipping costs, shipping methods and packing methods for exporters. Plainly, many computer skills are fungible. Many workers who are generally familiar with computers may be able to operate a specialized software setup with a nominal period of on the job training. This panel is skeptical about vague requirements of specialized computer skills. Here, it seems that Employer is admitting that applicant two has computer skills, but not the computer skills it seeks. This might be a valid reason for rejecting an applicant. A bare assertion, however, without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). To establish credibility, Employer should have provided some supporting reasoning or evidence to show why this applicant – who has a master's degree, several years of direct Import-Export experience, and several years of experience with computers -- could not perform the job because her computer experience did not directly involve Import-Export. In other words, what is it about Import-Export computer work

that disqualifies this applicant, who otherwise seems reasonably qualified for the position? *See, e.g., International World of Travel, Inc.*, 1987-INA-568 (Dec. 8, 1987) (applicant for the position of assistant manager of a travel agency who had clerical and management experience, and college training in Library Science, was found to meet sufficiently the employer's requirements of six months' experience in clerical work and two years of college with a concentration in business or office administration, and could not be rejected based on lack of familiarity with specifics of the travel business such as using the airline computer system); *Unisys*, 1987-INA-555 (Apr. 6, 1988) (applicant did not specifically list in his resume or application five years of experience with the computer systems listed in the ETA 750; nevertheless, the applicant's extensive computer background indicated that he would be capable of performing the job duties within a reasonable period of on-the-job training, such as that given to the alien). *See also Sun Mar Health Care*, 1996-INA-452 (Feb. 4, 2000) (a CO may consider a U.S. applicant's education, training, and experience, and the Employer's requirements for the position, and find that the applicant is competent to perform the job duties with minimal on-the-job-training).

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.

