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Issue Date: 02 September 2004

BALCA Case No.: 2003-INA-80
ETA Case No.: P2000-CA-09507686

In the Matter of:

AQUA AIR ENTERPRISES,
Employer,

on behalf of

MILOS MILINKOVIC,
Alien.

Appearance: Edward M. Weisz, Esquire
Beverly Hills, California
For the 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 arose from an application for labor certification on behalf of Milos Milinkovic ("the Alien") filed by Aqua Air Enterprises ("the Employer") pursuant to § 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 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the 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 the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On November 5, 1999, the Employer, Aqua Air Enterprises, filed an application for labor certification to enable the Alien, Milos Milinkovic, to fill the position of Sales Engineer, which the Job Service classified as Sales Engineer, Agricultural Equipment. The job duties included making recommendations for purchases of farm equipment, irrigation, power, and electrification systems, depending on the needs of the customer. The job requirements for the position were a Bachelor's of Science degree in Agricultural Engineering and two years of experience in the job offered. (AF 339).

In a Notice of Findings ("NOF") issued on October 2, 2002, the CO proposed to deny certification on the grounds that the job appeared to be tailored to the unique experience of the Alien, instead of being clearly open to any qualified U.S. workers as required in 20 C.F.R. § 656.20(c)(8), and thus the requirements were unduly restrictive under 20 C.F.R. § 656.21(b)(2)(i)(A). (AF 334-337). The CO instructed the Employer to submit documentation showing that the position had previously been filled with the same requirements or that there was a major change causing the job to be created. The CO also found that the requirement of an agricultural engineering degree and two years of experience was unduly restrictive.

On November 5, 2002, the Employer filed its rebuttal. (AF 131-333). The rebuttal consisted of a cover letter from the Employer's counsel, a letter from Jovo Babic, the Employer's Owner and Director, degrees and transcripts from the University of Belgrade, establishing that Mr. Babic and the Alien both possessed Bachelor's of Science degrees in agricultural engineering, a copy of an H-1B visa issued to the Alien, correspondence and other documents from various equipment companies regarding the purchase of agricultural machinery, equipment, and other devices from the Employer, an invoice to the Employer from a tractor test laboratory, and various documents showing

export by the Employer of agricultural machinery, devices, parts, and equipment to Eastern Europe. (AF 131-183).

In his rebuttal letter, Jovo Babic, the Employer's Owner and Director, stated that the requirements stemmed from business necessity and are essential to performance of the job. He indicated that the company was involved in sales and export of farm equipment to Eastern Europe, particularly Yugoslavia. Mr. Babic argued that the position required in-depth knowledge of agricultural engineering because it involved determining requirements for equipment based on customers' needs. Mr. Babic stated that the Alien is currently performing the job and prior to hiring the Alien, he performed the job. He noted that he has the required degree and enclosed a copy. Mr. Babic stated that the position has existed since the company's inception in 1996. (AF 134-135).

On December 5, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 129-130). The CO noted that the Employer's statement that until hiring the Alien, the Owner had been performing the job, indicated that the job was not clearly open to U.S. workers. The CO also found that although the Employer asserted that the experience and education requirements were based on business necessity, he failed to provide any documentation. The CO noted that the position involved mostly sales, but not design of agricultural systems and practices. (AF 4). Therefore, the CO found that the requirements were unduly restrictive, not based on business necessity, and tailored to the Alien's background.

On January 9, 2003, the Employer filed a Request for Review. The matter was docketed in this Office on February 14, 2003 and the Employer filed a brief on April 3, 2003.

DISCUSSION

The regulation provides at 20 C.F.R. § 656.21(b)(2)(i) that the employer shall document that the job opportunity has been and is being described without unduly

restrictive job requirements. If the job opportunity's requirements are beyond those normally required for the job in the United States or are beyond those defined for the job in *the Dictionary of Occupational Titles*, they are considered unduly restrictive unless the Employer adequately documented the requirements as arising from business necessity. To establish business necessity under §656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (en banc).

Upon review, we find the Employer's rebuttal to be unpersuasive. Although the Employer's rebuttal is lengthy, the documentation is inadequate. The crux of the Employer's argument is that the job was not created for the Alien and the requirements are not unduly restrictive because Jovo Babic, the Owner/Director, held the position prior to hiring the Alien, and the Alien has the same essential qualifications as Mr. Babic. However, the only rationale provided by the Employer for hiring the Alien was that Mr. Babic "wanted to devote [his] time to other business matters." (AF 135). This statement does not constitute adequate documentation "that there was a major change in the business operation which caused/s the job to be created," as requested in the NOF. (AF 335).¹

Moreover, the mere fact that Mr. Babic and the Alien both had a Bachelor's degree in Agricultural Engineering does not establish that this specific degree requirement arises from business necessity and is not unduly restrictive. As stated by the CO, the primary duty of the petitioned position involves sales, not designing agricultural systems and practices. The Employer has not shown how "in-depth knowledge of agricultural equipment" requires a Bachelor's degree in agricultural engineering. The

¹ Although not the basis for our decision herein, we note that the Employer's rebuttal suggests that a relationship between Mr. Babi and the Alien existed before the Alien was hired. The rebuttal reveals that Jovo Babic and Milos Milikovic both attended the University of Belgrade and received their degrees in Agricultural Engineering on the same date. (AF 136,142). Furthermore, the Employer also apparently had a working relationship with the Alien when he was employed by Grabex D.O.O. in Yugoslavia. (AF 190-253).

Employer has not provided any documentation to support this statement. Thus, the Employer has failed to document that a worker with a different degree and two years experience in the job offered would not be qualified for the job opportunity.² In view of the foregoing, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

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 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, N.W., 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 ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

² In its request for review, the Employer sought to further address this issue by submitting new evidence. However, such evidence should have been submitted on rebuttal and is not properly before the Board. 20 C.F.R. § 656.24(b)(4); *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*); *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989)(*en banc*).

