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Issue Date: 18 October 2004

BALCA Case No.: 2003-INA-298
ETA Case No.: P2002-NY-02486486

In the Matter of:

5TH AVENUE DRUG AND SURGICAL,
Employer,

on behalf of

GINO ADUM,
Alien.

Appearance: Wilens and Baker, P.C.
New York, New York
For the Employer and the Alien

Certifying Officer: Delores DeHaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification filed by 5th Avenue Drug and Surgical (“the Employer”) on behalf of Gino Adum (“the Alien”) for the position of Pharmacy Technician classified as Pharmacy Stock Clerk.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 § 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 April 25, 2001, the Employer, 5th Avenue Drug & Surgical, filed an application for labor certification to enable the Alien, Gino Adum, to fill the position of Pharmacy technician, classified as Pharmacy Stock Clerk by the Alien Employment Certification Office of the New York State Department of Labor. Two years of experience in the job offered were required. (AF 2). The job requirements were to dispense prescription medication and pharmaceutical preparations, under the supervision of a pharmacist. Other duties included typing labels, maintaining patient files, and inventory. (AF 3).

The CO issued a Notice of Findings (“NOF”) on February 24, 2003. (AF 60). The CO found that three U.S. applicants were qualified for the position.² The CO dismissed the Employer's stated reasons for rejecting these applicants, noting that while Applicant #1 showed over a year of experience assisting a pharmacist in a high-volume store, the Employer rejected her because she did “not possess any experience in dispensing prescribed medication under the supervision of a Pharmacist, or measuring doses. She was unable to answer typical questions related to these duties and her pharmacy experience is restricted to purely clerical and customer service duties.” The CO sought specifics on the questioning done of this applicant and pointed out that the measurement and dispensing of medication was the responsibility of the pharmacist. Therefore, the lack of that knowledge was not a lawful job-related basis for disqualification of this applicant. The CO also pointed out that the position was a clerical one, asking the Employer to indicate what non-clerical functions the employee would perform.

Applicant #2 showed two and a half years of experience and was rejected for not being able to answer "typical questions" relating to dispensing prescribed medications and pharmaceuticals and for lacking significant experience since 1997. The CO

² As the finding regarding Applicant #3 was successfully rebutted, that finding will not be detailed herein.

determined that this applicant had nearly six months of experience in the job since 1997 and two years of experience prior to that date. The CO also pointed out that lack of currency in the position was not considered a job-related reason for rejection. The CO directed the Employer to indicate what questions were posed to the applicants and what responses by the applicants caused the Employer to disqualify them.

The Employer submitted rebuttal on March 28, 2003. (AF 67). The Employer argued that regardless of the name given the position, the duties of the job controlled the assessment and the duties were those of a pharmacy technician. The Employer disagreed with the CO's finding that the lack of knowledge of measurement of dosages and dispensing prescriptions could not be considered a lawful job-related basis for disqualification, as according to the Employer, the pharmacy technician can count pills and assist in dispensing drugs under the supervision of the pharmacist. The Employer believed these to be non-clerical duties, and therefore the pharmacist technician had to have knowledge of dispensing of prescriptions in order to assist the pharmacist. With regard to the rejection of the U.S. applicants, the Employer argued that Applicant #1 indicated that the company she and her husband owned was temporarily not doing well and she was looking for a temporary job. According to the Employer, the position at issue was permanent and not temporary. The Employer clarified that when it stated that Applicant #1 did not possess any experience dispensing prescribed medicines and pharmaceuticals under the supervision of a pharmacist, this referred to "giving out" medication. Additionally, the Employer listed the questions posed to the applicant, to which she was unable to provide responses, which the Employer found established that she lacked knowledge of the duties of a pharmacy technician. The Employer pointed out that the applicant misspelled the last names of some of the Employer's clients, which also established her inability to perform the job duties. Finally, the Employer claimed that it was unable to verify the applicant's prior employment.

The Employer argued that Applicant #2 had prior experience as a pharmacy technician. However, this was more than six years ago and upon contacting that employer, it was unable to verify her employment. The applicant was asked several

questions relating to containers and labels. According to the Employer, the applicant indicated that her favorite job was as a nursing assistant, and she quit her job as a pharmacy technician in 2000 in order to work as a nursing assistant. The Employer argued that in six years, the pharmacy industry had changed and Applicant #2 seemed more interested in working at nursing than as a pharmacy technician. The Employer indicated it needed an employee who would stay in the job permanently.

On April 14, 2003, the CO issued a Final Determination (“FD”), denying certification. (AF 70). The CO found that one of the questions posed to applicants by the Employer was ambiguous, while another concerned matters to be performed by the pharmacist, not the pharmacy store clerk. While the Employer claimed to have been unable to verify Applicant #1's employment, the requirement of references had not been listed in the ETA 750A, item 15. With regard to Applicant #2, the CO determined that the Employer had failed to establish that this applicant was not qualified for the position, pointing out that the Employer cannot expect a qualified applicant to hold the job opening in question as belonging to their favorite occupation and remain in the job permanently. The Employer's assertion that recent experience was necessary because of the changes in the industry in the last six years was rejected by the CO, who found that the recommendation of medications was the responsibility of the pharmacist, not the pharmacy stock clerk.

On May 16, 2003, the Employer filed a request for review and the matter was docketed by the Board on September 30, 2003. (AF 114).

DISCUSSION

In its Statement of Position filed on October 30, 2003, the Employer contends that the CO (1) failed to address the Employer's argument that the job was improperly classified and (2) neglected to consider the grounds for rejecting the applicants, as the apparent reason for the rejection was the result of the misclassification of the job and

ignoring the job duties as set forth in the ETA 750A. Employer also reiterated its reasons for rejecting the two applicants.

With regard to the rejection of Applicant #2, the Employer asserts that she was asked several work-related questions which she failed to answer correctly, and she was not rejected solely for her responses to two questions regarding her favorite employment and her reason for leaving a prior employment. The Employer contends that this applicant stated she enjoyed being a nursing assistant and that issue was raised because the Employer needed a permanent pharmacy technician. The Employer claimed that the applicant lacked verifiable experience, showed a distinct dislike for the work, and a preference to work in a different type of job. According to the Employer, the applicant did not prove that she was qualified for the job and she was not interested in this position permanently.

The applicant's resume indicates that she worked as a lab/pharmacy technician and had experience in quality control, proofreading, data entry, helping fill prescriptions, stocking, making and printing labels, and customer service. She worked as a pharmacy technician for five months in 2000, and from 1995 to 1997. The Employer initially claimed, in its recruitment results report, that Applicant #2 failed to properly answer questions regarding the position's requirements related to "duties such as dispensing prescribed medicines and pharmaceuticals preparations under the supervision of a pharmacist and measuring doses." The Employer also claimed that Applicant #2 had no significant employment experience in a pharmacy since 1997. (AF 55). Subsequently, in rebuttal, the Employer did not mention those arguments, but claimed that the applicant seemed more interested in working in a big hospital environment. (AF 62-63). The Employer also contended that it contacted the applicant's previous employer and "they were unable to verify employment."

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). Actions by an employer which

indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§ 656.1, 656.2(b). An employer 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*).

The Employer has raised varying arguments regarding its rejection of this applicant. One of those is the claim that the applicant will change jobs because she would prefer to be a nursing assistant rather than a pharmacy technician. Just as an employer cannot reject an applicant because of its “unfounded speculation that the applicant would have used the job as a stepping-stone,” or because an applicant would not commit beyond six months, the Employer herein cannot reject Applicant #2 based on its conjecture that she does not plan to stay in the job permanently. *See, e.g., Switch, U.S.A., Inc.*, 1988-INA-164 (Apr. 19, 1989)(*en banc*); *World Bazaar*, 1988-INA-54 (June 14, 1989)(*en banc*).

The Employer has also raised the argument that the applicant’s employment could not be verified. An employer can lawfully reject U.S. workers who do not respond to reasonable requests for verification of employment history and educational credentials. *Al-Ghazali School*, 1988-INA-347 (May 31, 1989)(*en banc*). In this case, however, there is no indication that the Employer made any request for employment verification directly from the applicant, or that the applicant was notified that there was a problem with verification of her previous employment. The Employer has provided no documentation or specifics regarding its attempts to verify the applicant’s employment, nor is there any indication that it attempted to verify employment with the more recent employer, for whom she worked as a pharmacy technician as well.

Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. In this case, the Employer has provided no more than bare assertions with regard to verification of the applicant’s past employment, and there is no evidence or

indication as to what specific attempts were made to contact the previous employer and the exact results of those efforts. Further, the Employer's claim that this applicant lacked interest in the job runs contrary to the fact that she applied for the position and appeared for an interview. As this applicant was rejected for other than lawful, job-related reasons, 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 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.