U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 November 2004

BALCA Case No.: 2003-INA-279
ETA Case No.: P2001-CA-09511352/LA

In the Matter of:

JBR GOURMET FOODS,
Employer,

on behalf of

JUAN FLORES-ALVAREZ,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Esperanza V. Bada, Esquire
La Puente, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. 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 the 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 January 26, 2001, the Employer filed an application for labor certification on behalf of the Alien to fill the full-time position of "Master Roaster (Coffee)." (AF 32). When submitted, the job requirements were identified as a high school degree plus two years of experience "in operating machines for roasting and blending coffee." A detailed description of job duties noted that the applicant would supervise workers who were "grinding, blending, roasting, and packaging" gourmet coffees, as well as performing technical work designating ingredients, adjusting "roasting profiles," training workers on the equipment, monitoring operation of the equipment, and assessing the finished product for "specified viscosity, texture, color, and taste."

On March 4, 2003, the CO issued a Notice of Findings ("NOF") with an intent to deny certification pursuant to 20 C.F.R. §§ 656.21(b)(5), 656.21(g)(8), 656.21(a)(2), and 656.20(c)(7). (AF 27-30). The CO agreed with the Employment Service's classification of the position as "Supervisor, Coffee" rather than "Master Roaster (Coffee)," and noted that "[e]xperience gained from the petitioning employer cannot be used to qualify the alien." (AF 28).

The Employer's signed rebuttal to the NOF was dated April 7, 2003. (AF 11-26). The rebuttal defended the "Master Roaster (Coffee)" classification, explaining that the position is "very unique and is used mainly in the coffee industry which specializes in gourmet coffees." (AF 16-17). The Employer pointed out that "[t]here are over 748 flavor components in a cup of coffee" and that the safe and effective use of the specialized coffee roasting equipment to produce "gourmet coffee" as opposed to "ordinary, standard coffee" is a challenging skill requiring natural talent and years of experience to acquire. *Id.* The Employer reviewed the duties presently performed by the Alien as a Master Roaster, such as training workers, overseeing daily coffee roasting,

modifying the roasting procedures, and cupping or tasting the coffee to maintain quality. (AF 17). The Employer argued that the minimum job requirement of two years of experience as a coffee roaster is justified, and that the CO's decision to classify the position as "Supervisor (Coffee)" is incorrect. Furthermore, the Employer argued in the rebuttal that it is no longer feasible to train a worker who has no experience because of "changes in our system of roasting and producing coffee" since January 2001, when the application was filed. (AF 19). Training a new hire who lacked two years of experience as a roaster would hurt the morale of existing employees and "severely affect the production of our coffee." Although the Employer submitted no documentation to support the claims made in its rebuttal, the five-page letter did provide detailed discussion responding to the facts and issues raised by the CO. (AF 16-20). Finally, as to the second and third deficiencies identified by the CO, the Employer agreed to amend the ETA 750A as directed and to provide overtime pay at the rate of $37.95 per hour. (AF 19-20).

The CO issued a Final Determination ("FD") denying labor certification on June 18, 2003. (AF 4-6). The CO found that the Employer had submitted no documentation to support its claim that training an otherwise qualified applicant in the art of coffee roasting and in the proper operation of roasting machines would adversely affect the quantity, quality, and consistency of the coffee produced during the training period. (AF 5). Thus, the Employer remained in violation of 20 C.F.R. § 656.21(b)(5) for not documenting its actual minimum job requirements or, alternatively, for not documenting that it is not now feasible to hire an applicant with less experience than is presently listed on the job announcement. Furthermore, the Alien's job history showed no prior supervisory experience before being hired by the Employer, thus the Alien obtained his supervisory experience while working for the Employer. (AF 6). As U.S. workers presently applying for the position are not being offered a similar opportunity to obtain the required experience on the job, the Employer is in violation of 20 C.F.R. § 656.21(g)(8) for offering less favorable terms of employment to U.S. applicants than to the Alien. Finally, the Employer's rebuttal offered no explanation or amendment addressing the fact that the ten hour work schedule over a standard five day work week

does not produce a forty hour work week as listed on the ETA 750A. (AF 6). Failure to provide additional information "precludes the Certifying Officer from making an independent evaluation whether the work schedule is not contrary to state, federal or local law" as required by 20 C.F.R. § 656.20(c)(7). (AF 6). In view of these deficiencies, the CO denied labor certification.

On July 18, 2003, the Employer requested review of the denial of certification. In a brief filed October 2, 2003, the Employer responded to the CO's grounds for denial.

DISCUSSION

The employer's job requirements must be the actual minimum requirements for the position advertised. As provided in 20 C.F.R. § 656.21(b)(5):

> [t]he employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that offered by the employer's job offer.

Thus, an employer violates 20 C.F.R. § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring, unless the employer has documented it is not now feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Brent-Wood Products, Inc.*, 1988-INA-259 (Feb. 28, 1989) (*en banc*); *MMMats, Inc.*, 1987-INA-540 (Nov. 24, 1987) (*en banc*). A similar restriction emerges from 20 C.F.R. § 656.21(g)(8), which states that the employer's job advertisement shall offer wages and terms of employment "no less favorable than those offered to the alien."

It is undisputed that the job opportunity advertised by the Employer presently requires two years of experience, whereas the Alien lacked such experience when hired. In the NOF, the CO identified corrective actions that could be taken to remedy this deficiency while retaining the experience requirement: the Employer must either "provide

convincing justification that it is not now feasible to hire anyone" with less than two years of experience, or "document that the occupation in which the alien was hired is dissimilar from the occupation for which the employer is seeking labor certification." (AF 29). In its rebuttal to the NOF and again in its legal brief on appeal, the Employer argued both of these points to justify the experience requirement. (AF 16-19).

The Employer asserts that the present use of new and more complicated equipment installed since the Alien was hired now precludes hiring an applicant with no experience. (AF 19). The Employer also asserts that this would "severely affect the production of coffee" and "affect the morale of our workers." (AF 19). In its brief, the Employer cites *Vac-Tec, Inc.*, 1988-INA-353 (Aug. 2, 1989), for the proposition that technological change since the date of the alien's hire might now justify a higher experience requirement. However, the Employer failed to submit any documentation with the NOF to support its claim that newer equipment now justifies an experience requirement. In prior cases, for example, employers have submitted letters from similar firms or affidavits from persons knowledgeable in the technology to support such claims. *David Razo Gardening Service*, 2002-INA-129 (Apr. 23, 2003); *Vac-Tec, supra*. Nor has the Employer submitted any documentation to support its contention it is not now feasible to train a new employee as the Alien was trained. (AF 19).

To meet the substantial burden of demonstrating infeasibility to train, the employer must establish more than mere inconvenience or inefficiency. *Farbell Electronics*, 1994-INA-59 (Apr. 28, 1995); *58th St. Restaurant Corp.*, 1990-INA-58 (Feb. 21, 1991). Here, the unsupported assertions of the Employer are insufficient to establish infeasibility to train or a change in circumstances.

To justify the present experience requirement, the Employer further asserts that the new equipment now used in the production process renders the presently advertised job sufficiently dissimilar from the job which the Alien assumed in January 2001. (AF 16-19). The Alien's job history on the ETA 750B shows that he worked for the Employer as a "Helper" from January 1991 to October 1994, then as a "Roaster" from

October 1994 to the present. (AF 61). In the rebuttal, the Employer claims that the Alien's experience up until 1998 "involved [the] operation of machines" and gaining "sufficient knowledge and experience as a roaster." (AF 19). After that time, the Alien worked for three years "in charge of the other roasters in the night shift," making decisions about procedures and providing training to other workers. (AF 17). The Alien was then appointed "Master Roaster" for the company, where he spends more time supervising and training, and less time operating equipment. (AF 17). A fair summary of the Alien's experience with the Employer is that it reveals increasing competence running roasting equipment and the eventual assumption of responsibility for supervising other roasters operating the equipment.

This Board has held that the alien's experience with the employer advertising the position may qualify as acceptable experience and allow an employer to avoid denial based on the actual minimum requirements rule of 20 C.F.R. § 656.21(b)(5). *Brent-Wood Products, Inc.*, 1988-INA-259 (Feb. 28, 1989) (*en banc*). However, the burden is on the employer to show that the prior position is "not similar to the job for which certification is sought," and that the two are "sufficiently separate and distinct positions." *Id.* In *Delitzer Corp. of Newton*, 1988-INA-842 (May 9, 1990) (*en banc*), the Board identified factors to be considered in making a determination of similarity or dissimilarity:

> [s]ome relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.

While the Employer claims that the position of Master Roaster is sufficiently dissimilar from Roaster to meet the standard articulated in *Brent-Wood Products*, we disagree. The Employer created the Master Roaster position specifically for the Alien. (AF 18). The Employer states that both Roaster and Master Roaster require identical experience, two years of experience in operating coffee roasting machines. (AF 18-19). The Employer claims that the Master Roaster is a distinct position because 60% of the Master Roaster's time is spent supervising other Roasters and only 30% of his time is spent operating

roasting machines. (AF 18). However, the Alien had supervisory responsibilities when working as a Roaster on the night shift prior to assuming the Master Roaster position, supervising the activities of the three other Roasters working on that shift. (AF 17).

Finally, while the Employer's rebuttal letter provided a lengthy and detailed discussion of the relevant job duties and responsibilities, no documentation was provided to support the depiction of the two positions as separate, dissimilar, and distinct. We find that the Employer has not met its burden of showing the two positions are distinct or dissimilar and that the Alien's prior experience as a Roaster does not satisfy the requirement of two years of experience. The requirement of two years of experience does not represent the Employer's actual minimum requirement, and certification was properly denied.

As certification is denied based on actual minimum requirements issue as noted above, we decline to address the other points raised by the CO in the FD.

ORDER

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

Entered at the direction of the Panel by:

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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.