



Issue Date: 11 February 2008

BALCA Case No.: 2008-INA-00007
ETA Case No.: P-05119-83206

In the Matter of:

VIRGINIA MILLWORK, INC.,
Employer,

on behalf of

IGNACIO CHAVEZ-GONZALEZ,
Alien.

Certifying Officer: Barbara J. Shelly
Philadelphia Backlog Elimination Center¹

Appearance: James Hamilton
Pro se for the Employer and the Alien

Before: **Chapman, Wood 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 labor certification. 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

¹ The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about this application should be directed to the Chicago Processing Center.

the Code of Federal Regulations (“C.F.R.”).²

STATEMENT OF THE CASE

On November 5, 2002, the Employer – a cabinet manufacturer– filed an application for labor certification on behalf of the Alien for the position of “Cabinetmaker.” The Employer required a grade school education, two years of training in carpentry/plastic laminating and wood finishing, and one year of experience in the job offered or six months of experience in the related occupation of carpentry. Special requirements included training in OSHA procedures and being qualified to use power tools. The Employer offered a salary of \$10.00 per hour. (AF 33). The application was transferred to the CO before any supervised recruitment had been conducted.

On April 16, 2007, the CO issued a Notice of Findings proposing to deny certification on three grounds – (1) that the requirements of two years of training in carpentry/plastic laminating and wood finishing, and one year of experience in the job offered or six months of experience in the related occupation of carpentry, exceeded the Specific Vocational Preparation (SVP) for the occupation of Cabinetmaker as defined in the Dictionary of Occupational Titles (DOT) – which was one year, up to and including two years of combined experience, education and training – and therefore constituted unduly restrictive job requirements; (2) that the Alien did not possess these qualification when hired, and therefore they did not represent the Employer’s actual minimum requirements; and (3) that the wage offer of \$10.00 per hour was below the prevailing wage of \$14.00 per hour. The CO provided detailed instructions to the Employer on

² This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

how to rebut each of these deficiencies. The Employer was instructed, for example, to establish business necessity for the training and experience requirements. (AF 19-25).

The Employer's owner filed a rebuttal letter on May 17, 2007. In regard to the unduly restrictive job requirement citation, the Employer wrote:

Cabinet Maker is considered a trade skill, and as such, has a long history of training employees to achieve higher and higher mastery of the skill therefore it is reasonable to assume and attest considering the 16 year history of this company that the position existed prior to the hiring of Mr. Chavez-Gonzalez and that the job bears a reasonable relationship to the context of the business. [sic]

(AF 10). In regard to the actual minimum requirements, the rebuttal indicated that the Alien had gained experience while in its employ in regard to the positions of shop helper, cabinet maker helper, and cabinet maker apprentice. The Employer did not elaborate on the significance of this employment history, but it was apparently an attempt to establish that the Alien had gained his experience in positions with the Employer that were dissimilar to the position for which labor certification was being sought. (AF 10-11). Finally, in regard to the prevailing wage issue, the Employer stated its belief that the CO had improperly applied a 2007 wage rate to a 2002 application, and that the Alien's employment history showed that he was now at the commissary pay rate. (AF 11). A chart showing the Alien's salary history was attached to the rebuttal. (AF 12).

The CO found the rebuttal to be insufficient and issued a Final Determination denying certification on August 3, 2007. (AF 4-9). The CO found that the Employer had not established business necessity for the training and experience requirement, had not followed the NOF's instructions on rebuttal of the actual minimum requirements issue because the Employer had not specified the dates that the Alien performed the duties of the dissimilar positions, and had not amended the ETA 750, and that the

appropriate pay rate is determined at the time of the recruitment and not as of the date of the application.

By letter dated September 18, 2007, the Employer filed a Request for BALCA Review. (AF 1-7). The request pins blame for the deficiencies with the application on an immigration specialist who, according to the Employer, misclassified the position offered as a Cabinet Maker rather than as a Cabinet-Maker apprentice. The Employer contended that the Alien was hired as an apprentice and that he is still an apprentice, and that he was and is paid at a wage rate well above the median wage for a much more skilled worker.

The matter was referred to BALCA on October 10, 2007, and the Board issued a Notice of Docketing on October 24, 2007. Neither the CO nor the Employer filed an appellate brief in response to the Notice.³

DISCUSSION

Unduly Restrictive Job Requirements/Business Necessity

The labor certification regulation at 20 C.F.R. §656.21(b)(2) requires that the petitioning employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. If the application does not show that the job requirements are those normally required for the job in the United States and those defined for the job in the DOT, the Employer must establish business necessity for the requirements. To establish business necessity, 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

³ The copy of the Notice mailed to the Employer's attorney was returned as undeliverable by the U.S. Postal Service.

as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (en banc).

Where an employer is required to prove the existence of an employment practice or the performance of an act and its results, written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. A Certifying Officer, however, is not required to accept such assertions as credible or true, but give them the weight that they rationally deserve. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc). Numerous Board rulings have established the principle that a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc).

In the instant case, the Employer's owner's rebuttal statement was only a bare assertion without a reasonably specific discussion, or supporting documentation, to show why the Employer's training and experience requirements needed to exceed those specified in the DOT. This statement, standing alone, did not provide credible documentation of business necessity.

We find that the Employer's contention in the request for review that the job should have been classified as a Cabinetmaker Apprentice was not timely raised. Any new evidence or argument submitted by Employer with its request for review is not part of the record on appeal; such evidence and argument should have been raised prior to the issuance of the Final Determination. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989)(en banc). If the Employer's agent had misclassified the position, it should have raised this contention at the rebuttal stage of application.

Actual Minimum Requirements

The regulation at section 656.21(b)(5) provides that an 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. Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien: the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990). One way to rebut a citation under section 656.21(b)(5) is for the petitioning employer to show that the Alien gained the required experience in jobs which were not similar to the job for which certification is sought. *Brent-Wood Products, Inc.*, 1988-INA-259 (Feb. 28, 1989) (en banc). Relevant considerations on the issue of similarity include, for example, 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. *Delitizer Corp. of Newton*, 1988-INA-482 (May 9, 1990) (en banc).

The Employer's rebuttal on the actual minimum requirements issue consisted solely of a listing of jobs held by the Alien while employed by the Employer, and the basic duties of those positions. The Employer did not specify, as instructed in the NOF, the amount or percentage of time spent performing each duty. Nor did it provide, as instructed in the NOF, official company job descriptions, the job requirements for each position, information on where the jobs fit into the company's hierarchy, information about by whom the jobs had been performed in the past, or the job salaries. With such sparse information, the CO properly denied certification on this ground.

Prevailing Wage Determination

Under § 656.20(c)(2), an employer is required to offer a wage that equals or exceeds the prevailing wage determined under § 656.40. The Department of Labor's regulation at 20 C.F.R. § 656.20(c)(2) and the terms of 8 U.S.C. §1182(a)(5)(A), however, are forward-looking -- the prevailing wage is determined as of the date DOL reviews the application and issues the certification. *See Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989).

In the instant case, the Employer argued that the CO erroneously required a prevailing wage based on 2007 levels rather than the prevailing wage that was applicable when the application was filed in 2002. However, at the time that the CO reviewed the application, supervised recruitment had not yet commenced. Obviously, an accurate test of the U.S. labor market could not have occurred if the Employer was permitted to use a 2002 wage rate for a recruitment effort in 2007. Thus, the CO properly rejected the Employer's contention, and properly denied certification based on the Employer's insistence on maintaining an out of date wage rate.

Summary

The CO correctly found that the Employer's rebuttal was insufficient on all three citations. Thus, labor certification was properly denied.

ORDER

The Final Determination of the Certifying Officer denying 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 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.