



Issue Date: 03 March 2008

BALCA Case No.: 2008-INA-00082
ETA Case No.: P-05011-16872

In the Matter of:

LATIN AMERICAN ENTERPRISES, INC.
d/b/a
TELELINK, INC. ,
Employer,

on behalf of

PETER WENDEL HOCH,
Alien.

Certifying Officer: Barbara J. Shelly
Philadelphia Backlog Elimination Center

Appearance: Joanne C. Guy, Esquire
North Miami Beach, Florida
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

the Code of Federal Regulations (“C.F.R.”).¹

STATEMENT OF THE CASE

On April 30, 2002, the Employer – a telecommunications company – filed an application for labor certification on behalf of the Alien for the position of “Information Technology Director.” (AF 80). The only job requirement listed on the ETA 750A was a Bachelor’s Degree in Electronic Engineering. No experience or other special requirements were listed. The job duties were stated to be:

Responsible for managing and coordinating all information technology aspects of company. Including management of design, installation and maintenance of all telecommunication systems. Also the administration of these systems and the hiring of new carriers to provide excellent and low cost service, the hiring, training and management of personnel to accomplish this goal.

The job was advertised as only requiring a Bachelor’s degree in electronic engineering. (AF 35, 42-45).

On September 25, 2007, the CO issued a Notice of Findings proposing to deny certification. (AF 18-21). One of the grounds for denial was that the Employer rejected three U.S. applicants for grounds not stated in the ETA 750A, to wit: insufficient knowledge of Telecommunications, Prepaid Phone Card Systems and the technology involved including TDM and Voip Protocols, Dialogic boards, Parity Software Vos and Visual FoxPro programming. The CO observed that the only job requirement listed on the ETA 750A was a Bachelor’s Degree in Electronic Engineering. A second ground for

¹ 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.

denial was that it appeared that the Alien was hired without possessing these specialized requirements.

The Employer filed rebuttal on October 10, 2007. (AF 14-17). The rebuttal provided information on the Alien's qualifications for the job, but did not address the rejection of the three U.S. applicants.

The CO issued a Final Determination denying certification on October 19, 2007. (AF 10-13). The CO accepted the rebuttal documentation as proving that the Alien possessed the specialized knowledge requirements prior to being hired by the Employer. However, because the Employer did not address the rejection of the U.S. applicants, she found that the Employer had not provided lawful grounds for their rejection.

The Employer requested BALCA review on November 21, 2007. (AF 1-2). In the request for review the Employer's attorney argued that the job duty of "...management of design installation and maintenance of all telecommunications systems..." mandated knowledge of TDM and Voip Protocols, Dialogic boards, Parity Software Vos and Visual FoxPro programming. Similarly, the Employer contended that the job duty of hiring, training and managing personnel in the use of these systems mandated that the incumbent have knowledge of (as opposed to experience with) these telecommunications systems.

The Board docketed the appeal on November 30, 2007, and a Notice of Docketing was issued on December 4, 2007. The Employer filed a statement of position on December 27, 2007. The Employer argued that the CO had based her decision on a lack of understanding of the terminology used in the telecommunications field, that the CO was not in a position to judge what constitutes a lawful job related reason for rejection of a U.S. applicant for a requirement not stated on the ETA 750A and job advertisements, that the Employer should be permitted to ask questions related to the position such as

knowledge of systems, that the job duties showed a knowledge requirement, and the systems referred to in rejecting the applicants are the leading systems in the telecommunications industry. The Employer also objected to the CO's observation that the knowledge requirements are generally not acceptable as job requirements for the purposes of labor certification because they are unquantifiable. Finally, the Employer argued that it would be simply unfair and impracticable for the Department of Labor to require that interviewees for the position of Director not be asked about their knowledge of the field.

DISCUSSION

Failure to Address Unlawful Rejection Issue in Rebuttal

Section 656.25(e) provides that the employer's rebuttal evidence must rebut all of the 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*). Under the regulatory scheme of 20 C.F.R. Part 656, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

In the instant case, the NOF very clearly raised two issues. The Employer only addressed one of the issues on rebuttal. It did not even allude to the unlawful rejection of U.S. applicants issue in its rebuttal. In neither its request for BALCA review nor its appellate brief did it seek to explain that failure.

Thus, we find that the CO properly denied certification based on the Employer's failure to timely rebut the NOF citation concerning unlawful rejection of three U.S. applicants.

Merits of Unlawful Rejection Issue

Assuming arguendo that the argument made by the Employer in its request for review and appellate brief concerning the rejection of U.S. applicants were timely made, we still would affirm the CO's denial of certification.

The regulation at section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful job-related reasons. *See also* 20 C.F.R. § 656.21(j)(1)(iv) (recruitment report must explain "with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed"). An employer must state all the requirements for the petitioned position on the Form ETA-750A application for alien labor certification, and if an applicant meets the requirements as stated by Employer, he or she is deemed qualified for the job. *See Bell Communications Research, Inc.*, 1988-INA-26 (Dec. 22, 1988)(en banc); *Veterans Administration Medical Center*, 1988-INA-70 (Dec. 21, 1988) (en banc). In general, labor certification is properly denied where an employer unlawfully rejects workers who meet stated minimum education and experience requirements. If employer has specific requirements, they should be specified in the application. *See Presbyterian Hospital*, 1988-INA-38 (Feb. 21, 1989)(en banc); *Just Clothes, Inc.*, 1988-INA-252 (Mar. 21, 1989)(en banc). Job requirements relating to education, skills, training or experience are so fundamental that they must be stated from the outset of the application process. *Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1981)(en banc). An employer may incorporate the job duties as job requirements where it indicated on the ETA 750A that it is requiring experience in the job offered. *Bel Air Country Club*, 1988-INA- 223 (Dec. 23, 1988).

In the instant case, the Employer did not incorporate the job duties by requiring experience in the job offered. Rather, the Employer's argument is essentially that the knowledge it was requiring was implicit in the nature of the job offered. The Board has recognized that certain job requirements may be implied on the theory that the requirements were not stated precisely because they are obvious and likely to be met by any one who would apply for the job. *Veterans Administration Medical Center*, 1988-INA-70 (Dec. 21, 1988) (*en banc*). A general knowledge or familiarity requirement, however, is closely scrutinized. *Baosu International, Inc.*, 1989-INA-38 (Oct. 30, 1989). Thus, for example, an employer unlawfully rejected a U.S. applicant where it required "familiarity" with garment, textile and warehouse operations and the applicant's resume indicated that he did have such familiarity. *Baosu International, Inc.*, 1989-INA-38 (Oct. 30, 1989).

In *Quality Inn*, 1989-INA-273 (May 23, 1990), the panel held that an employer may reject an applicant for the inability to perform the main job duties, despite meeting the minimum specified requirements. The panel indicated, however, that when an employer raises such a ground for rejection, it must provide "a more objective detailed basis of its conclusions." In *Quality Inn*, the applicant met the minimum requirements for the position of Cook-Broiler; however, the employer unlawfully rejected the applicant for not knowing particular recipes or standard recipe measurements because it had failed to provide an objective detailed basis for its conclusions. Similarly, in *Fritz's Garage*, 1988-INA-98 (Aug. 17, 1988) (*en banc*), the Employer unlawfully rejected an applicant for the position of foreign car mechanic - which included the job requirement of four years in the position offered and the job duty of repairing and overhauling German automobiles - because the applicant was not an expert in Volkswagen repair. The Board found that the applicant had been unlawfully rejected because expertise in VW repair was not listed as a requirement on the ETA 750A or in the advertisements; hence, it was an undisclosed requirement. The Board also stated that even assuming such a requirement

was implicit, the basis for rejection was vague and unconvincing. *See also Gould Semiconductors, Inc.*, 1987-INA-631 (Jan. 29, 1988), holding that the employer unlawfully rejected two U.S. applicants for non-job-related reasons when they satisfied the listed requirements based on their training and experience, but did not have knowledge of skills which the employer asserted were required to perform the duties assigned, but which had not been listed for the job in the application for labor certification. The employer had not required experience in either the job offered or a related occupation.

In the instant case, the only job requirement listed on the ETA 750A and the advertisements was a Bachelor's Degree in Electrical Engineering. The job duties were of a general nature – at their core, managing and coordinating information technology in the Employer's telecommunications business. The applicants were rejected for lack of sufficient knowledge of “Telecommunications, Prepaid Phone Card Systems and the technology involved including TDM and Voip Protocols, Dialogic boards, Parity Software Vos and Visual Foxpro programming.”

Parsing these knowledge requirements, we find that lack of knowledge of telecommunications is too vague and generic to provide a meaningfully objective basis for rejection of applications. Lack of knowledge of prepaid phone card systems, in contrast, is a very specific requirement. The Employer omitted any argument in its request for review or appellate brief about this particular requirement.

Rather, the Employer focused on the argument that the technology involved with TDM and Voip Protocols, Dialogic boards, Parity Software Vos and Visual FoxPro programming, are matters about which an applicant for a IT Director position at a telecommunications company should have knowledge. This may be true. But the Employer provided no documentation whatsoever to support this assertion, and it is not

obvious that it is true.² The burden of proof in a labor certification application is on the petitioning employer rather than the CO. 20 C.F.R. § 656.2(b). Thus, it was not an adequate response to the CO's questioning of unstated job requirements to argue that the CO did not understand the industry. Rather, it was incumbent on the Employer to document why its knowledge requirements were so fundamental to the position that they did not need to be listed as requirements on the ETA 750A. 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. Moreover, when the occupation involves a field with technical requirements, an employer's evidentiary burden may become more difficult since it must present its case in a manner that can be understood by the reviewing official. *See Bakst International*, 1989-INA-265 (Mar. 14, 1991) (noting that technically complex fields are open to abuse of the labor certification process by obscuring real needs in jargon and technical language tailored to the alien's qualifications).

Moreover, if knowledge of the specific telecommunications protocols and applications were in fact job requirements, they should have been expressly stated in the job description on the ETA 750A so that the CO would have had an opportunity to review them and gauge whether they were job requirements for which business necessity needed to be established.

² We are skeptical, for example, of the proposition that knowledge of Visual FoxPro would be considered an inherent requisite for an IT director in a telecommunications company. This requirement appears to relate to knowledge of the particular programming application used by the petitioning employer rather than a standard for the entire industry.

Summary

The CO properly denied certification because the Employer failed to address in rebuttal the issue of rejection of U.S. workers based on knowledge requirements that were not specified in the ETA Form 750A. The CO also properly denied certification on the ground that the Employer did not establish that its knowledge requirements were so fundamental to the nature of the position that they were inherent job requirements without needing to state them in the Form 750A.

ORDER

The Final Determination of the Certifying Officer denying 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 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.