U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 November 2013

BALCA Case No.: 2012-PER-00392
ETA Case No.: A-09253-63877

In the Matter of:

TWINS, Inc., D/B/A TWINS HARDWARE FLOORS
Employer

on behalf of

RUBEN ANTONIO DOLCE,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Susan Larrance, Esq.
Law Offices of Susan Larrance, PLLC
Seattle, WA
For the Employer

Gary M. Buff, Associate Solicitor
Louisa M. Reynolds, Esq.
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC

For the Certifying Officer

Before: **McGrath, Geraghty, Calianos**
Administrative Law Judges

TIMOTHY J. McGRATH
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of

Federal Regulations ("C.F.R."). For the reasons set forth below, we affirm the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On September 11, 2009, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Hardwood Floor Installer." (AF 160-69).[1] On April 26, 2010, the CO issued an Audit Notification, requesting the Employer provide certain information, including a recruitment report as described in 20 C.F.R. § 656.17(g)(1), stating the reasons why any U.S. workers were rejected. (AF 156-59). On May 25, 2010, the Employer submitted its response to the Audit Notification. (AF 51-155).

On May 6, 2011, the CO denied the Employer's application, concluding the Employer had rejected three U.S. applicants for reasons that were not job-related. (AF 50). Specifically, the CO found the rejections were based on failure to meet Employer's requirement that applicants have two years of hardwood flooring installation experience. (AF 50). The CO further found that each of the three U.S. applicants possessed sufficient related experience in the construction industry to be considered qualified for the position, noting that one of the applicant's résumés expressly listed hardwood flooring as a proficiency. (AF 50). The CO cited § 656.10(c)(9) as grounds for the denial. (AF 50).

On June 2, 2011, the Employer filed a request for reconsideration and request for BALCA review, arguing the CO erred in determining the U.S. applicants were qualified for the position. (AF 8). While the Employer acknowledged the three relevant résumés each indicated significant experience in general carpentry and/or construction, it denied that type of experience qualified any of the applicants for the position of Hardwood Floor Installer. (AF 8-11). The Employer noted the one résumé which listed hardwood flooring as a proficiency did not reference how the applicant gained that experience or when he worked as a Hardwood Floor Installer. (AF 5).

To support its position, the Employer pointed to a business necessity letter it submitted with its audit response. The letter stated that hardwood floor installation "is a craft that requires

[1] In this decision, AF is an abbreviation for Appeal File.

discrete, specified skills that can only be developed through lengthy training and experience" and "cannot be performed by someone with just general construction experience." (AF 72). The Employer rejected the CO's inference that applicants who spent more than two years as carpenters could be reasonably presumed to have hardwood flooring experience. (AF 12).

The Employer also submitted copies of follow-up letters it sent to applicants who were ultimately rejected. (AF 94, 105, 108). Those letters informed the applicants that their résumés did not appear to demonstrate they possessed the prerequisite two years of hardwood flooring experience. *Id.* The letters requested evidence of such experience and upon receipt, the employer would reconsider the application. The letter also advised the applicants that failure to respond within ten days would lead the Employer to assume the applicant was no longer interested in the position. *Id.* In its appellate brief ("Er. Br."), the Employer claims none of the three applicants whom the CO deemed qualified responded to the letters. (Er. Br. 3).

On November 8, 2011, the CO upheld the original denial because the Employer had "unlawfully rejected United States workers who were able and qualified for the job opportunity," in violation of 20 CFR § 656.10(c). (AF 1). The CO pointed out that a U.S. worker is considered qualified for a position "if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved. . ." (AF 1). The CO added "if a worker lacks a skill that may be acquired during a reasonable period of on-the-job training, the lack of skill is not a lawful basis for rejecting an otherwise qualified worker." (AF 1). On November 8, 2011, the CO forwarded the case to BALCA for administrative review. (AF 1).

On February 15, 2012, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on February 21, 2012, and filed an appellate brief on April 2, 2012. Although the CO did not file a Statement of Position, the Office of the Solicitor requested BALCA affirm the CO's decision based on the record, citing *Big Apple Compactor Co., Inc., D/B/A Big Apple Fire Sprinkler Co.*, 2008-INA-00009 (Mar. 3, 2008). On April 10, 2013, the Employer certified to this panel the job identified on the PERM application is still open and available and the alien identified in the application remains ready, willing, and able to fill the position.

DISCUSSION

An important goal of the Immigration and Nationality Act is to prevent foreign workers from obtaining permanent employment in the United States unless there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work. *See* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.1(a)(1). Accordingly, when an employer files an application for permanent employment certification, it must certify that "[t]he job opportunity has been and is clearly open to any U.S. worker" and "the U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons." § 656.10(c)(8), (9). Furthermore, the PERM regulations require an employer to conduct mandatory recruitment steps in a good faith effort to recruit U.S. workers prior to filing an application for permanent alien labor certification. *See* § 656.17(e). The employer must also prepare a recruitment report stating the number of U.S. applicants rejected for the job and categorizing them by the lawful job-related reasons for their rejection. § 656.17(g)(1).

Pursuant to § 656.24(b), the CO "makes a determination either to grant or deny the labor certification on the basis of whether or not: . . . (2) There is in the United States a worker who is able, willing, qualified, and available for and at the place of the job opportunity." When determining whether to grant or deny certification on this basis:

> The Certifying Officer must consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. For the purposes of this paragraph . . . a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.

§ 656.24(b)(2)(i)

When a U.S. applicant's résumé raises the reasonable prospect that the applicant meets an Employer's stated requirements, "the Employer has a duty to make a further inquiry, by interview or other means, into whether the applicant meets all of the actual requirements." *Big Apple Compactor Co., Inc. d/b/a Big Apple Fire Sprinkler Co.* at 6. The Employer indicated in its ETA Form 9089 that the minimum requirement for the job opportunity was two years of

experience in the job offered. (AF 162). The Employer's recruitment report provided with its audit documentation indicated eleven U.S. applicants were rejected because they each lacked two years of experience as a Hardwood Floor Installer. (AF 91-92). The Employer recognizes an application from a potentially qualified domestic worker triggers an obligation to take affirmative steps to determine whether that worker is actually qualified. (Er. Br. 2). The Employer argues it met any such obligation by sending inquiry letters to the U.S. applicants, wherein it sought additional information about their experience, or possible reconsideration of their applications. *Id.*

On the basis of application materials contained in the recruitment report, the CO concluded that three of the U.S. applicants were qualified because they "would most likely be able to acquire any special knowledge of hardwood floor installation during a reasonable period of on-the-job training." (AF 1). The Employer insists that two or more years of experience as a hardwood floor installer is an absolute requirement for the position. (AF 72). In its Business Necessity letter, the Employer expressly stated, ". . .we hire only experienced hardwood floor installers . . . (w)e would not and could not hire someone with less than two years experience for this position." *Id*. A domestic worker, however, is qualified if he or she can be trained within a reasonable time period. §656.24(b)(2)(i).

The Board has long held that under the PERM regulations, the Employer bears the burden to establish eligibility for labor certification. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (en banc). An Employer's mere statement, standing alone, has been found insufficient to meet the burden. *Jakob Mueller of America, Inc.*, 2010-PER-01069, PDF at 5 (*citing Your Employment Service, Inc*., 2009-PER-00151 (Oct. 30, 2009)); *see also Quantifi, Inc.*, 2010-PER-894 (May 12, 2011). Furthermore, PERM is an exacting process, designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *See HealthAmerica*, 2006-PER-1, PDF at 19 (July 18, 2006) (en banc) *superseded in part by regulation, Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27912, 27916-17 (May 17, 2007).

The Employer made no attempt with its letters to determine whether or not the applicants could become qualified within a reasonable period of on-the-job training. (AF 42-44). Instead, the letters only requested evidence the applicant had the "required length of experience." *Id.* Furthermore, the record fails to establish that the applicants actually received the inquiry letters. Had the Employer sent the letters via certified mail or could otherwise establish their receipt, it may have come closer to meeting its burden to establish that there were insufficient able, willing, qualified, and available U.S. workers to fill the position.

We agree with the CO that the Employer rejected three U.S. applicants for reasons that were not lawful or job-related. The CO reasonably determined the applicants potentially could have become fully trained within a reasonable time period, thus placing the burden on the Employer to demonstrate the applicants were not in fact qualified. For the reasons stated above, the Employer has failed to meet this burden.

Accordingly, we affirm the CO's denial of certification.

ORDER

It is **ORDERED** that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

Digitally signed by TIMOTHY MCGRATH
DN: CN=TIMOTHY MCGRATH, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

TIMOTHY J. McGRATH
Administrative Law Judge

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. 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, NW Suite 400
Washington, DC 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.