

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 June 2010

BALCA No.: 2009-PER-00416
ETA No.: A-06038-83991

In the Matter of:

VIRGINIA CAROLINA CONSTRUCTION,
Employer,

on behalf of

JOSE CULLER,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Dean E. Wanderer, Esquire
Hillsville, Virginia
For the Employer and Alien

Gary M. Buff, Associate Solicitor
Clarette H. Yen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson, and Rae**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

PER CURIAM. 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.”).

BACKGROUND

On February 8, 2006, the CO accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Supervisor.” (AF 165-174).¹ The Employer required 32 months of experience in the job offered, and 6 months of training as a certified welder. (AF 166-167).

On March 31, 2006, the CO issued an Audit Notification, directing the Employer to provide evidence of recruitment. (AF 160-164). The Employer submitted the documentation requested. (AF 103-159).

On December 15, 2006, the CO denied certification, in part, because the Alien did not meet the Employer’s minimum education, training and experience requirements, as listed in Section H, at the time of filing, in violation of 20 C.F.R. 656.17(i).² (AF 100-102). Specifically, the CO stated that the application required 6 months of training as a certified welder and the application does not show that the Alien had this training.³ (AF 102).

The Employer submitted a request for reconsideration on January 16, 2007. (AF 87-93).⁴ The Employer contended that the Alien has a total of 13 years of experience in

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

² The CO also indicated an additional ground for denial, but since we are affirming denial on the above-stated ground, we will not discuss the second ground here.

³ The CO also explained that the Employer required 32 months as a supervisor or in the construction business and the Alien had only 27 months of experience at the time of filing.

⁴ The Appeal File appears to be missing six pages from this section: there are no pages 94-98.

construction work and gave the dates of his previous positions at Vannoy Construction and Hoy Payne Construction. (AF 87-88).

On January 20, 2009, the CO again denied certification.⁵ (AF 49-51). The CO stated several reasons for denial, one of which was that the Alien did not meet the Employer's minimum requirements as described in Section H. (AF 50). The CO explained that the Employer required 6 months of training as a certified welder and the application does not show that the Alien is a certified welder. *Id.*

The Employer submitted a request for reconsideration on February 23, 2009. (AF 13-48). Referencing denial reason #1, which stated that the Alien did not have the required training (*see* AF 50,) the Employer stated:

Upon posting the position in the newspaper, there was only 1 person to apply during the allotted time frame, and at that time the alien, Jose Culler, had 13 years of experience in industrial welding. As Mr. Jose Culler was the **only applicant** and met every requirement of the posting including that of a certified welder and with his years of experience and references; Jose Culler was then offered the position.

(emphasis in original)(AF 13-14). On February 26, 2009, the Employer submitted a "Formal Complaint," again asserting that the Alien was the only applicant and met every requirement of the posting. (AF 3-7).

On July 28, 2009, the CO issued a letter of reconsideration, finding that the denial of certification was valid, in part, because the Alien did not meet the Employer's minimum educational requirements. (AF 1-2). The CO asserted that although the Employer indicated in its request for review that the foreign worker was a certified welder, it did not submit any evidence to support its claim. (AF 1).

BALCA issued a Notice of Docketing on August 17, 2009. The Employer filed a Statement of Intent to Proceed on September 8, 2009, and a Statement of Position on

⁵ The CO also denied certification on August 22, 2008, finding that the Employer's sponsorship of the foreign worker could not be verified. (AF 84-86). The Employer subsequently submitted evidence of sponsorship, which the CO appears to have accepted. (AF 64-84). On December 9, 2008, the CO issued a request for additional audit information, which does not pertain to the grounds for denial discussed in the decision. (AF 62-63).

October 6, 2009, reiterating the arguments from its request for reconsideration. The Employer attached several documents, but even assuming that they could be considered by the Board on appeal, none of this documentation supports the Employer's claim that the foreign worker is a certified welder.⁶

The CO submitted an appellate brief on October 1, 2009, asserting that the foreign worker did not meet the minimum requirements of the job opportunity. He asserted "Even though the Employer marked 'yes' to the question 'Did the alien complete the training required for the requested job opportunity, as indicated in question H.5?' (AF 170), none of [the Alien's] work or education information on the ETA Form 9089 reflects any sort of training or certification as a welder." (CO's brief at 4). He further contended that the Alien's education experience merely shows a high school degree, and "his job details descriptions fail to demonstrate that [he] received training in, or performed, any welding." *Id.* Additionally, the CO asserted that the Employer's statement in its request for review that the Alien had 13 years of welding experience is not sufficient to document that the Alien met the minimum requirements.

DISCUSSION

The regulations at 20 C.F.R. § 656.17(i)(1) state that, "[t]he job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity." In the instant case, in Section H-4 of ETA Form 9089, the Employer required 6 months of training as a certified welder. (AF 166-167). However, the Employer did not indicate in the Alien's work experience job details, in section K, that he received training in, or performed, any welding. Thus, as the CO found, the Alien did not meet the Employer's minimum training requirements.

Although the Employer indicated in its request for review that the foreign worker was a certified welder and had 13 years of welding experience, it did not submit any evidence to support its claim. *See Matter of Wings Wildlife Productions, Inc.* 1990-INA-69 (Apr. 23, 1991) ("An employer's conclusory statement that the alien meets its

⁶ The Board may not consider evidence that is first filed with an employer's appellate brief. 20 C.F.R. § 656.27(c) limits BALCA's review to the record that had been available to the CO.

minimum requirements does not constitute adequate documentation that the alien does meet those requirements.”). In fact, none of the Alien’s work or education information on the ETA Form 9089 reflect any sort of training or certification as a welder.

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**.

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. 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.