



Issue Date: 28 August 2008

BALCA Case No.: 2008-INA-00042
ETA Case No.: P-05208-47429

In the Matter of:

ABE'S ON TIME LIMOUSINE,
Employer,

on behalf of

RACHED SALIM EL-KHOURY,
Alien.

Appearance: Raymond P. D'Uva, Esquire
Newark, New Jersey
For the Employer

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center¹

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 This decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

The Employer – a limousine company – filed an application for labor certification on behalf of the Alien on March 2, 2005 to fill the position of Dispatcher. (AF 27)³. The application was signed by Daniel Nelson, President.

In its application, the Employer described the duties of the position as “Coordinate schedules of limousines. Report disruption to service using radiotelephone. Inspect mechanical malfunctions of vehicles along route and direct repair.” The Employer required four years of experience in the job offered. (AF 27).

On March 20, 2007, the CO issued a Notice of Findings (NOF) proposing to deny certification since the requirement for four years of experience exceeded the Specific Vocational Preparation (SVP) for the job as set forth in the *Dictionary of Occupational Titles* (DOT) of “over 1 year and up to 2 years” for Dispatchers, Except Police, Fire and Ambulance, Occupational Code, 43-5032. Therefore, the CO found that the job opportunity included an unduly restrictive job requirement in violation of Section 656.21(b)(2). The CO stated that the Employer could rebut this finding by one of three options: 1) submitting evidence that the requirement arises from a business necessity; or 2) showing that the job requirement bears a reasonable relationship to the occupation in the context of the employer’s business and is essential to perform, in a reasonable manner, the job duties described by the employer, and that the job as currently described

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.

³ In this decision, AF is an abbreviation for Appeal File.

existed before the alien was hired; or 3) reducing the requirements to the DOT standard. (AF 11-14).

The Employer submitted rebuttal on April 10, 2007. (AF 9). In its rebuttal, the Employer argued that the occupational title of Traffic Inspector - Dispatcher (DOT Code 184.163-101) with an SVP of two to four years more closely matched the duties listed in this application. Specifically, the Employer argued that the job duties for Traffic Inspector - Dispatcher (DOT Code 184.163-101), which include “inspection of mechanical malfunction of vehicles along route and direct corresponding repair to such mechanical malfunction,” were similar to the duties for the occupation in this application. (AF 9-10).

The CO issued a Final Determination on July 12, 2007. (AF 2-8). In the Final Determination the CO found that the Employer’s rebuttal was a request to re-code the position to Traffic Inspector - Dispatcher (DOT Code 184.163-101). The CO declined to approve that request. The CO noted the job duties of Traffic Inspector - Dispatcher (DOT Code 184.163-101) included coordinating scheduled service within the assigned territory of a streetcar, bus, or railway transportation service. The CO stated that rather than duties associated with streetcars, buses or transportation systems, the job opportunity in this application involved only duties related to a fleet of Lincoln Town Cars.

By letter dated August 13, 2007, the Employer requested BALCA review. In its request is reiterated the argument that the job opportunity included both dispatching limousines and conducting mechanical inspection of vehicles. Therefore, the Employer continued to assert that the correct code for this job opportunity was Traffic Inspector - Dispatcher (DOT Code 184.163-010) (Occ. code 53-6051) with an SVP of 7 – or two to four years of experience. (AF 1).

BALCA docketed the appeal on October 26, 2007, and issued a Notice of Docketing on November 1, 2007. The Employer filed a Statement of Position on November 23, 2007.

DISCUSSION

The regulation at 20 C.F.R. § 656.21(b)(2) requires an employer to document that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the successful performance of the job in the United States. Excessive requirements would preclude the referral of otherwise qualified U.S. workers. One of the measures by which a job requirement is tested to determine whether it is unduly restrictive is inclusion of the requirement in the definition of the job in the *Dictionary of Occupational Titles* (“DOT”). To determine whether a particular job requirement falls within the applicable DOT code, the CO must determine the job title which best describes the job and determine whether the job requirements specified by the employer fall within those defined in the DOT. *LDS Hospital*, 1987-INA-558 (Apr. 11, 1989)(en banc). Where the employer cannot document that the job requirement is normal for the occupation or that it is included in the DOT, the employer must establish business necessity for the requirement. 20 C.F.R. § 656.21(b)(2).

The Employer argued that the job opportunity should have been coded as Traffic Inspector - Dispatcher, (DOT Code 184.163-101)(Occ. Code 53-6051) which has an SVP 7 or two to four years of experience. The job description for Traffic Inspector - Dispatcher in the DOT is as follows:

Coordinates scheduled service within assigned territory of streetcar, bus, or railway transportation system: Periodically observes vehicles along route to ensure that service is provided according to schedule. Investigates schedule delays, accidents, equipment failures, and complaints, and files written report. Reports disruptions to service, using radiotelephone. Determines need for changes in service, such as additional coaches, route changes, and revised schedules to increase operating efficiency and improve service. Drives automobile along route to detect conditions hazardous to equipment and passengers, and negotiates with

local government personnel to eliminate hazards. Assists in dispatching equipment when necessary. Recommends promotions and disciplinary actions involving transportation personnel. Inspects mechanical malfunctions of vehicles along route and directs repair.

The CO, however, concluded the appropriate job title was Dispatcher (Occ. Code 43-5032), which has an SVP of 4 to 6 or from 3 months to two years of experience. The job description for that occupation is:

Schedule and dispatch workers, work crews, equipment, or service vehicles for conveyance of materials, freight, or passengers, or for normal installation, service, or emergency repairs rendered outside the place of business. Duties may include using radio, telephone, or computer to transmit assignments and compiling statistics and reports on work progress.

As noted above, the job duties described in the application for labor certification were:

Coordinate schedule of limousines. Report disruption to service using radiotelephone. Inspect mechanical malfunctions of vehicles along route and direct repair.

(AF 27-30).

On review of the three job descriptions, we agree with the CO that the proper job code for the occupation in this application for labor certification is that of Dispatcher (Occ. Code 43-5032). The job description of Dispatcher includes supervision of emergency repairs rendered outside the place of business in addition to dispatching workers for conveyance of passengers. That description is similar to the duties listed in this application. The job description of Traffic Inspector – Dispatcher (DOT Code 184.163-101)(Occ. Code 53-6051), however, includes many other duties not included in this application such as “drives automobile along route to detect conditions hazardous to equipment and passengers, and negotiates with local government personnel to eliminate hazards. . . . Recommends promotions and disciplinary actions involving transportation personnel.” The Traffic Inspector - Dispatcher (DOT Code 184.163-101)(Occ. Code 53-6051) coordinates scheduled service for a system wide streetcar, bus or railway operation,

while the job occupation in this application coordinates only the fleet of limousines owned by the Employer. Therefore, we find the CO properly coded this job as Dispatcher (Occ. Code 43-5032).

Twenty C.F.R. §656.25(e) provides that an employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. Accordingly, the Board has repeatedly held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *See, e.g., Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). On rebuttal, the Employer did not establish that there was a business necessity for the excessive experience requirement or that the requirement bears a reasonable relationship to the occupation in the context of the Employer's business and existed before the alien was hired. Nor did the Employer amend the application to reduce the requirement to the DOT standards. Thus, the Employer did not rebut the CO's findings as set forth in the NOF.

The instant case was before the CO in the posture of a request for reduction in recruitment. Normally when the CO denies an RIR, such denial should result in the referral of the application for regular processing. *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). We have ruled, however, that a remand for supervised recruitment is not mandated if the reason for the denial cannot be cured by a supervised recruitment. *Smith Group Inc.*, 2005-INA-39 (Nov. 27, 2006). Since the Employer refused to reduce the experience requirements to those set forth in the SVP for the correct job classification, remand for supervised recruitment is not mandated.

Therefore, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of 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. 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.