



Issue Date: 16 January 2008

BALCA Case No.: 2007-INA-00271

ETA Case No.: D-04285-14921

In the Matter of:

HOUSTON MUSIC INSTITUTE,

Employer,

on behalf of

CHEONG YONG CHANG,

Alien.

Appearance: Niey Bor Hsyung, Esquire
Houston, Texas
For the Employer and the Alien

Certifying Officer: Jenny Elser
Dallas 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

STATEMENT OF THE CASE

On March 8, 1999, the Employer filed an application for labor certification to enable the Alien to fill the position of Music Instructor. (AF 60). The job requirements were a Bachelor’s Degree in Music and six months of experience in the job offered. The only job duty listed was teaching piano classes. Under item 15 on the ETA 750A, which inquires about “Other Special Requirements,” the Employer wrote “N/A.”

Upon supervised recruitment, the Texas Workforce Commission referred two U.S. applicants. The Employer’s recruitment report stated:

Name: [Applicant 1³]

Result: She was interviewed on January 24, 2001. She does not teach or have her Suzuki Certification (a specialized music teaching method) used in the music institute.

Name: [Applicant 2]

Result: He was interviewed on January 10, 2001. He prefers teaching voice and harp which we are working towards. In addition, he does not teach the Suzuki piano method.

(AF 48).

In a Notice of Findings ("NOF") dated March 17, 2006, the CO proposed to deny certification because the U.S. applicants were rejected for inability to teach using Suzuki method or lack of Suzuki certification, even though the Employer did not list Suzuki certification or experience as job requirements on the ETA 750A and there was no

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 Because the names of the U.S. applicants are not material to resolution of this appeal, the panel has redacted their names.

evidence on the ETA 750B that the Alien had such a certification or experience. (AF 27-29).⁴

The Employer submitted rebuttal on April 11, 2006. (AF 20-30). In a letter drafted by the Employer's attorney, and verified by the Employer's president, it is asserted that Applicant 1 was rejected "mainly because she did not have teaching experience in piano in addition to her lack for Suzuki Certification. The Suzuki Certification is one of favorable alternatives to teach student piano. Houston Music Institute would hire her should she have experience in teaching piano required in Form 750A then." In regard to Applicant 2, the Employer asserted that he was rejected "because he had different career directions. He preferred teaching harp and voice, which was not our agenda in the matter of recruitment of a piano teacher." (AF 21).

The CO found the rebuttal unconvincing, and issued a Final Determination denying certification on May 29, 2007. (AF 8-9).

The Employer requested BALCA review in a letter dated June 26, 2007, and received by the Dallas BEC on July 5, 2007. (AF 1-7). In the request for review, the Employer provided additional grounds for rejection of the U.S. applicants. The Employer stated that Applicant 1 lacked expertise in teaching piano methods and standard requirements of "Suzuki, Trinity College of London, National Piano Guild, and Music Teachers theory." In addition, the Employer stated that Applicant 1 only had four months of teaching experience. In regard to Applicant 2, the Employer indicated that he presented himself "as a teacher primarily in organ, harp and voice teacher and therefore not a candidate to teach private piano instruction." (AF 1). The Employer then listed the Alien's qualifications and attached a copy of her resume.

⁴ The CO also raised an issue relating to whether the Employer was offering full-time employment. However, this issue was not addressed in the Final Determination, and therefore is not at issue on appeal. *Barbara Harris*, 1988-INA-392 (Apr. 5, 1989) (en banc) (issues not preserved in the Final Determination are deemed successfully rebutted).

BALCA docketed the appeal on September 27, 2007, and issued a Notice of Docketing on September 20, 2007. The Employer submitted a brief dated October 9, 2007, and received by the Board on October 10, 2007.⁵ In the brief, the Employer wrote that Applicant 1 “was not rejected because of her lack of Suzuki Certification, but because of her lack of requisite experience in teaching course studies in piano offered at the Houston Music Institute.” Brief at 3. The Employer pointed out that the job duties stated in the ETA 750A were to teach piano classes, and therefore the Employer was seeking an applicant who demonstrated expertise and experience in teaching piano courses. Brief at 4. The Employer wrote that Applicant 1 “lacks the requisite in teaching piano methods and standards such as Suzuki, Trinity College of London, National Piano Guild, and National Music Teachers, that are the Institute’s course studies.” Brief at 4. The Employer stated that it made an error in the letter requesting review in stating Applicant 1’s length of experience, and that in fact at the time of her referral she had “more than 6 months of experience in other methods that are not part of the Houston Music Institute course studies.” Brief at 4.

In regard to Applicant 2, the Employer’s appellate brief states:

[Applicant 2] was not the [sic] rejected because of his preferred career path, but because of his lack of requisite experience in teaching piano course studies at Houston Music Institute. [Applicant 2] wanted to teach voice or harp and Houston Music Institute was not looking to hire him in that direction. [Applicant 2] represented himself as a teacher primarily in organ, harp and voice and therefore not the best candidate to teach private piano instruction at the Houston Music Institute. [Applicant 2]’s education was in organ, voice and music education. Furthermore, [Applicant 2]’s primary goal was to be a music minister. [Applicant 2] therefore, is not a candidate for teaching piano classes set forth in ETA 750 part A Item #13.

Brief at 4.

⁵ The CO did not file an appellate brief.

The Employer's appellate brief also stated that the U.S. applicants "were rejected because they lacked the experience in teaching the Institute's piano courses and standard program." Brief at 5. In addition, the Employer stated in the brief that the U.S. applicants "did not have the expertise in piano proficiency background. They lack the qualifications to the Houston Music Institute curriculum." Brief at 6.

DISCUSSION

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. Similarly, Section 656.21(j)(1)(iv) requires the employer's recruitment report to explain "with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed."

In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *Quality Products of America, Inc.*, 1987-INA-703 (Jan. 31, 1989) (en banc). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *American Cafe*, 1990-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 1988-INA-492 (Sept. 19, 1990); *Richco Management*, 1988-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 1988-INA-29 (Apr. 7, 1988).

In the instant case, the only job requirements specified on the ETA 750A were a Bachelor's degree in Music and six months of experience in the job of piano teacher. There is no evidence in the record indicating that either of the U.S. applicants lacked these qualifications. The ETA 750A indicated that there were no special requirements for the position.

The Employer's original recruitment report clearly based the rejection of Applicant 1 on lack of a Suzuki certification, and the rejection of Applicant 2 on his

preference to teach voice and harp, and on his lack of expertise or willingness to teach using the Suzuki method. The Employer's later statements about its reasons for rejecting the applicants are ambiguous, and even contradictory.⁶ It denies basing the rejections on lack of Suzuki certification or expertise, but then claims that the rejections were based on lack of expertise in the Employer's curriculum, which included, among other factors, Suzuki method. However, regardless of whether the rejection of the U.S. applicants was based on lack of Suzuki certification or lack of expertise in the Employer's curriculum, it is clear that the applicants were rejected for lacking qualifications not listed in the ETA Form 750A. The Employer's list of its required teaching methods and standards bear a remarkable consistency with the Alien's qualifications. If those teaching methods and standards were actual job requirements, however, they should have been listed in the ETA 750A. An employer's actual minimum requirements must be specified on the ETA 750A in order for the CO to be able to review and challenge them if unduly restrictive. *Lakeview Food Store*, 1992-INA-258 (Dec. 22, 1993).

The Employer also indicated that it rejected Applicant 2 based on his career goals of teaching harp, voice or organ. Upon careful examination of the Employer's statements about its reasons for rejecting Applicant 2, however, it is not clear that that the applicant indicated that he was unable to teach piano or that he actually declined the position based on different career goals. Rather, it appears that the Employer merely drew an assumption that the applicant was not a good candidate to teach piano and would not be interested in teaching piano at its school. A mere suspicion that the job does not match a U.S. applicant's long-term career goals, however, does not establish lawful grounds for rejecting that applicant. *J.J. Appelbaum's Deli Co.*, 1990-INA-475 (Jan. 30, 1992).

⁶ The Employer's request for review and appellate brief proffered new details and rationale concerning its rejection of the U.S. applicants. The Board's review of the denial of labor certification, however, is based solely on the record upon which the denial was based, the request for review, and legal briefs, and therefore the Board does not consider additional evidence submitted in conjunction with a request for review or brief. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (en banc); 20 C.F.R. § 656.24(b)(4). Moreover, even if we were to consider the additional information provided in the request for review and appellate brief, it merely confirms that the Employer used criteria not stated in the ETA 750A to reject the U.S. applicants.

In its request for review, the Employer listed the Alien's job qualifications and attached a copy of her resume. She appears to be an accomplished musician and music teacher. However, although an employer understandably may want to employ a better qualified alien, U.S. immigration law requires that jobs go to U.S. workers who meet an employer's minimum qualifications. *Veterans Administration Medical Center*, 1988-INA-70 (Dec. 21, 1988) (en banc).

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.