U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 April 2004

BALCA Case No.: 2003-INA-125
ETA Case No.: P2002-WA-09523309/ET

In the Matter of:

GLOBAL VENTURE ,
Employer,

on behalf of

NOOR SHAHAB UDDIN,
Alien.

Appearances: M. Ali Zakaria, Esquire
Houston, Texas
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman 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 alien labor certification for the position of Production Manager.[1] The CO denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

[1] Permanent alien labor certification is governed by § 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."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 2, 2001, Global Venture ("the Employer") filed an application for labor certification on behalf of Shahab Noor Uddin ("the Alien") for the position of "Production Manager." (AF 45). The Occupational Title was listed as "Manager, Branch." Two years of experience in the job offered were required. The job duties included scheduling print jobs, preparing service packages, analyzing data and preparing recommendations for profit strategies, among other tasks. The salary for the position was $46,093 per year.

On November 18, 2001, the CO issued a Notice of Findings ("NOF") proposing to deny certification based on the unlawful rejection of U.S. workers. (AF 40-42). Specifically, the CO noted that thirty applicants were referred by the local office; eighteen applicants were rejected for not appearing for their scheduled interviews and the rest of the applicants were rejected for not having the required two years of experience. With regard to the applicants who did not appear for their interviews, the CO noted that eight applicants were sent invitation letters for interviews scheduled for the same day or for dates preceding the day they received the letters. These applicants were considered qualified based on their applications. It appeared to the CO that no candidates were interviewed or given a fair amount of time to respond to the invitation to be interviewed. (AF 42).

By cover letter dated December 20, 2002, the Employer's counsel submitted rebuttal. (AF 20-39). Included with the rebuttal were a supplemental summary of applicants and copies of letters sent to U.S. applicants subsequent to the issuance of the NOF. (AF 24-39). The Employer claimed that the applicants who received their letters after the scheduled interview dates were invited to a second interview.[2] Most of those applicants failed to appear for this second interview. One applicant did appear and was interviewed, but refused to consider the job offer because she did not believe that she had

[2] The applicants were not contacted to schedule second interviews until after the issuance of the NOF, over six months after the original interviews.

the required experience. (AF 21-23).

A Final Determination ("FD") was issued on January 3, 2003. (AF 18-19). The CO pointed out that the Employer's attempts to contact applicants six months after the recruitment period was not part of the recommended corrective action. The concern raised in the NOF was the lack of good faith recruitment on the part of the Employer, as the Employer did not utilize any other means to contact the applicants after the initial invitation letter was sent. Furthermore, the applicants who received the letter of invitation were not given a reasonable time in which to respond. The Employer's rebuttal was found to be inadequate. (AF 19).

On February 5, 2003, the Employer's counsel submitted a request for review of the denial of labor certification and included a letter dated February 3, 2003, from the Employer's President. (AF 1-17). The matter was docketed in this Office on March 6, 2003.

DISCUSSION

In its request for review, counsel for the Employer claims that the Employer made adequate efforts to contact these applicants, as a "simple written invitation to appear for an interview is sufficient." (AF 1-2). When the applicants failed to appear, the Employer had no obligation to re-contact them. The Employer argues that if the applicants had had an interest in the job offered, they would have contacted the Employer to request a rescheduling of the interview.

In his letter of February 3, 2003, the Employer's president makes new allegations regarding the contact with the applicants and raises new reasons for their rejection, indicating that it "regret[s] not having responded to the Notice of Finding with detailed explanations why the applicants were not pursued." (AF 10-11). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after

the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.,* 1987-INA-607 (Oct. 27, 1988). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*).

In the instant case, the Employer rejected applicants who did not appear for scheduled interviews that they did not know were scheduled, due to their failure to receive the Employer's invitations before the dates of the scheduled interviews. (AF 65, 73, 79, 95, 99, 106, 144, 148, 152, 172, 188, 192, 196). This course of conduct and subsequent rejection cannot be viewed as a good faith effort on the part of the Employer to fill the position with a U.S. worker. The Employer's efforts to contact these applicants after issuance of the NOF, particularly in light of the rejection letters, do not indicate good faith recruitment. *See, e.g., American Inn of Bethesda*, 1994-INA-44 (Oct. 5, 1994). As such, labor certification was properly denied.

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 20 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 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, N.W., Suite 400
Washington, D.C. 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 typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.