

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 26 May 2004

BALCA Case No.: 2003-INA-21
ETA Case No.: P2000-CA-09508763/ML

In the Matter of:

**HORIZON INTERNATIONAL,
a/k/a HORIZON INTERNATIONAL FINANCE & TRADE, INC.¹**
Employer,

on behalf of

RUYA SUNAL,
Alien.

Appearance: Eliezer Kapuya, Esquire
Los Angeles, California
For the 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 arose from an application for labor certification on behalf of Ruya Sunal (“the Alien”) filed by Horizon International (“the Employer”) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A)(“the Act”), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer (“CO”) of the United States Department of Labor denied the

¹ On the ETA 750, the Employer’s name is listed as ‘HORIZONTAL INTERNATIONAL.’ (AF 24). However, the Employer’s letterhead indicates that the full corporate name is “HORIZONTAL INTERNATIONAL FINANCE & TRADE, INC.” (AF 1, 8, 10, 33).

application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based 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 of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On September 3, 1999, the Employer, Horizon International, filed an application for labor certification to enable the Alien, Ruya Sunal, to fill the position of "Administrator of Import/Export Dept.," which was classified by the Job Service as "Import-Export Agent." (AF 24). The job duties for the position were to coordinate activities of the import-export agency and to supervise workers engaged in receiving and shipping freight, among other tasks. The Employer noted that the job was similar to DOT Code 184.117-020. The only stated requirement was two years of experience in the job offered. (AF 24).

In a Notice of Findings ("NOF") issued on July 26, 2002, the CO proposed to deny certification on the grounds that the Employer's recruitment efforts were insufficient and that the Employer had rejected qualified U.S. applicants for other than lawful job-related reasons. (AF 20-22). The Employer submitted its rebuttal on August 15, 2002 (AF 5-19). The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated September 16, 2002, denying certification on the same basis. (AF 3-4). On October 18, 2002, the Employer filed a Request for Review and the matter was docketed in this Office on November 4, 2002. (AF 1-2).

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for

rejecting U.S. applicants, and not stopped short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988); *Tilden Car Care Center*, 1995-INA-88 (Jan. 27, 1997). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

The report of recruitment results, dated August 30, 2000, stated that eleven U.S. applicants applied for the position but none were hired by the Employer. The CO found that five U.S. applicants had not been adequately recruited and/or were rejected by the Employer for other than lawful, job-related reasons. (AF 4, 21, 33-34). In the recruitment report, the Employer stated that three applicants were contacted to schedule an interview; Applicant #1 declined an interview and Applicants #2 and #3 did not respond to the interview invitation. Applicant #4 was interviewed, but the Employer claimed that he did not have the necessary experience for the job and he stated that he was not interested in the position. Applicant #5 was interviewed, but the Employer stated that based on his resume and the interview, the applicant was not qualified for the position. (AF 33-34).

In the NOF, the CO stated that the Employer had failed to establish that it had contacted Applicants #1-3 in a timely manner, if at all. The CO noted that "although you [Employer] supply the date when the letters were sent, there is no evidence any of them were received and there is no evidence of telephone contact." Regarding these applicants, the CO directed the Employer to provide evidence of written and telephone attempts to contact the applicants. (AF 21). Regarding Applicants #4 and #5, the CO

stated in pertinent part that these applicants were rejected for other than valid, job-related reasons. The CO noted that both applicants had multiple years of experience.

The Employer's rebuttal consisted of a letter, dated August 15, 2002, copies of letters addressed to all five U.S. applicants cited by the CO, receipts and returned letters which show that the Employer sent the correspondence by certified mail to at least four of the applicants, evidence that the letter to Applicant #3 was returned to the Employer because it was unclaimed, evidence that when the Employer initially sent the contact letter to Applicant #5, it was returned to the Employer because it had an insufficient address, and a copy of Applicant #5's resume with a handwritten notation. (AF 5-19).

In the FD, the CO found the Employer's rebuttal unpersuasive, stating that the Employer had not demonstrated that it made a good faith effort to contact Applicants #1-3. In addition, the CO noted that the Employer did not contact Applicant #5 until three weeks after receipt of his resume.

The Employer's rebuttal is not only inadequate, but it contradicts statements made in the report of recruitment results. Although the Employer's rebuttal establishes that letters were sent to the applicants, the Employer has still not established that it actually contacted Applicants #1-3 in a timely manner, if at all. (AF 8-18). The Employer's rebuttal did not even suggest any attempt to contact Applicant #2 by telephone. The rebuttal revealed that the Employer spoke to Applicant #1's husband, not to the applicant herself and the Employer failed to specify any details of the alleged phone contact of Applicant #3. (AF 5-6).

The Employer's rebuttal regarding its rejection of Applicants #4 and #5 is also unpersuasive. As outlined above, in the report of recruitment, the Employer stated that these applicants were both interviewed and neither one had the necessary experience or qualifications for the position. In addition, the Employer noted that Applicant #4 wanted a position with a larger company and was not interested in the position. (AF 33-34). The Employer's rebuttal did not mention these applicants' purported lack of experience or

qualifications as a basis for rejecting them. (AF 6). Moreover, while the Employer again indicated that Applicant #4 was interested in securing a position with a larger company that offered better benefits, the Employer did not specify that it had actually offered the job to this applicant. (AF 6). The Employer stated that Applicant #5 was not available for the scheduled interview and he did not arrange another one. This conflicts with the report of recruitment, in which the Employer stated that Applicant #5's interview revealed that he lacked experience for the position. (AF 6, 33).

In view of the foregoing, the Employer has failed to document that it made a good faith recruitment effort and/or that the above-named U.S. applicants were rejected solely for lawful, job-related reasons. Accordingly, we find that 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