U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 June 2004

BALCA Case No.: 2003-INA-171
ETA Case No.: P2002-NY-02487012

In the Matter of:

BLISS SMULIAN,
Employer,

on behalf of

VELMA EUNICE HARRISON,
Alien.

Appearance: Stanley Cohen, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Delores DeHaan
New York, New York

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 her application for alien 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 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 30, 2001, the Employer filed an application for labor certification on behalf of the Alien to fill the position of "Home Attendant." (AF 14). The only job requirement was a sixth grade education. The Employer seeks to employ a home attendant to assist in the care of her husband, who is incapacitated due to Alzheimer's disease. (AF 4).

The New York Department of Labor Alien Employment Certification Office provided instructions on recruitment in a letter to the Employer's attorney dated July 30, 2002. (AF 17-19). The letter noted that a written recruitment report would be required and noted that the Employer must document her attempts to contact each applicant. The state office recommended procuring a telephone log from the telephone company, certified mail receipts and return receipts stamped by the Post Office, and copies of e-mails sent to applicants.

The position was advertised in the New York Post on August 11, 12 and 13, 2002. (AF 23-26).

The state office sent six responses to the advertisement to the Employer on August 20, 2002. (AF 27-28). The state office noted that the Employer must provide a full written report of recruitment results, and recommended keeping detailed records of contacts with applicants, including dates of phone calls and interviews. It recommended using certified mail, return receipt requested when contacting applicants by mails, and making copies of the letters and return receipts. The state office also informed the Employer that she must submit a signed and dated statement "giving the specific job-related reasons for any rejection [of U.S. applicants] including documentation of the employer's attempts to contact the applicants." The state office again recommended obtaining a telephone log from the telephone company, using certified mail return receipt requested, and making copies of e-mails.

On August 23, 2002, the state office sent four additional responses to the Employer. On September 13, 2002, the state office sent another nine responses to the Employer. Both transmittals again noted the recruitment report requirement and recommendations for documenting the recruitment. (AF 29-32). In total, the state office supplied nineteen applications to the Employer.

Thereafter, Employer's attorney submitted a recruitment report apparently prepared by Employer's daughter. (AF 32-93).[1] Attached to the report is a telephone log showing telephones calls to several of the applicants on September 27, 2002. (AF 91-92). Most of the calls were under two minutes in duration. One was about five minutes and another about eight minutes in duration. The remainder of the report consisted of checklists, apparently prepared for use in interviewing the applicants, on which brief handwritten notes about the contacts were made.

The state office transmitted the application to the CO and the CO issued a Notice of Findings ("NOF") on December 18, 2002, proposing to deny certification pursuant to 20 C.F.R. §§ 656.21(j), 656.24(b)(2)(ii), 656.21(b)(6) and 656.20(c)(8). (AF 99-102). The CO found that all nineteen applicants were qualified for the position. The CO found that the Employer's recruitment report submission was not sufficient as a formal recruitment report, and stated that DOL required "a list of the applicants' names with the specific job-related reasons for any rejection including documentation of the employer's attempts to contact the applicants." The CO noted that several of the checklists indicated that applicants were being rejected for lack of experience, but that the Employer had not listed any experience requirements for the position. The CO then listed documentation that should be provided to rebut the NOF.

The Employer's rebuttal was filed on January 27, 2003. (AF 103-105). The rebuttal listed each applicant's name and stated brief descriptions of either an

[1] The recruitment report contained in the Appeal File does not indicate the date it was prepared or submitted to the state office.

unsuccessful attempt to contact the applicant or a reason for rejecting the applicant. The rebuttal was not signed by the Employer.

The CO issued a Final Determination denying labor certification on February 1, 2003, finding that sections 656.24(b)(ii) and 656.21(b)(6) had not been rebutted. (AF 106-107). Specifically, the CO found that the Employer had failed to document that each applicant was timely contacted and interviewed.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(7). 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 stop short of fully investigating an applicant's qualifications. When an employer files an application for labor certification, it is signifying that it has a *bona fide* job opportunity that is open to U.S. workers. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*). Inherent in this presumption is the notion that the employer legitimately wishes to fill the position with a U.S. applicant and will expend good faith efforts to do so. *Id*. What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the particular facts of the case under consideration. In some circumstances more than a single type of attempted contact is required. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*).

An employer who does no more than make unanswered phone calls, or who only leaves a message on an answering machine, has not made a reasonable effort to contact the U.S. worker where mailing addresses were available for applicants. In such cases the employer should follow up with a letter, which may be certified mail, return receipt requested, to provide certain documentation of the contact. *Any Phototype, Inc.,* 1990-INA-63 (May 22, 1991); *Gambino's Restaurant,* 1990-INA-320 (Sept. 17, 1991). If certified mail, return receipt requested was not used, an employer may provide a written

assertion or attestation of its attempts to contact U.S. applicants, supported by any available substantiating evidence such as contemporaneous evidence of the mailing and documentation of other recruitment efforts, such as telephone contacts. *See, e.g., Lotus Corp.*, 1991-INA-203 (July 28, 1992); *Ambras Trading Co.*, 1997-INA-406 (July 27, 1998). A CO must weigh such evidence and give it the weight it rationally deserves; unsupported assertions may not be entitled to much weight in view of conflicting evidence, such as a U.S. applicant's statement that he or she was not contacted.

The Employer's effort to contact the nineteen US applicants in this case was minimal. For most of the applicants the Employer merely made a single phone call or sent a single e-mail and did not attempt any alternative means of communication. The Appeal File contains no evidence that the Employer attempted to contact any of the applicants by mail when telephone calls were unsuccessful or by mail or phone when the e-mails were not answered. Most of the resumes supplied to the Employer contained the applicants' mailing addresses. Although the Employer supplied phone logs, they only confirm that Employer's efforts to contact applicants were minimal. The New York Department of Labor provided the Employer with repeated notice of the need for a well-documented recruitment report. The CO properly denied labor certification because the Employer failed to document good faith efforts to recruit.[2]

Finally, we observe that in rebuttal the Employer indicated that she rejected an applicant based on the applicant's refusal to provide a Social Security number. The panel in *Star Dollars*, 1997-INA-219 (May 13, 1999), found that an employer's insistence on applicants supplying a Social Security number during recruitment was an unlawful device for discouraging U.S. applicants. The panel wrote:

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[2] The CO's NOF indicated that certified mail and return receipts would be required as rebuttal documentation. In *M.N. Auto*, the Board held en banc that "use of certified mail, return receipt requested, is not mandatory, although it is a useful device for documenting recruitment efforts." *M.N. Auto, supra.* Thus, a CO cannot base a denial of labor certification solely on the failure of an employer to have used certified mail, return receipt requested to document contacts of applicants. In the instant case, however, the denial was based on a general lack of documentation of good faith recruitment rather than specific failure to use certified mail.

> The requirement that an employer verify authorization to work in the United States pursuant to 8 U.S.C. section 1324a cannot be used as a means during recruitment in a labor certification application to discourage applicants. *See Polysindo (USA), Inc*. 95-INA-03 (Sept. 30, 1997)(employer not required to verify immigration status until actual good faith recruitment); *Percy Solotoy*, 92-INA-331 (Nov. 9, 1993). *See also Collins Foods Int'l, Inc. v. U.S.I.N.S.*, 948 F.2d 549 (9th Cir. 1991); 8 CFR section 274a2 (verification not required until time of hire).

It is understandable that a job applicant would be reluctant to provide a Social Security number to a prospective employer prior to hire, and we concur with the *Star Dollars* panel that an employer who rejects an applicant on this ground has done so on a ground that will not be considered lawful under the labor certification regulations.

ORDER

The CO'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 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North

Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.