U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 16 June 2004

BALCA Case No.: 2003-INA-22
ETA Case No.: P2000-CA-09484282/ML

In the Matter of:

PLEXUS GUEST HOME,
Employer,

on behalf of

MARIA JIMENA VITUG,
Alien.

Appearance: Dan E. Korenberg, Esquire
Sherman Oaks, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Maria Jimena Vitug ("the Alien") filed by Plexus Guest Home ("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 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 August 22, 1997, the Employer, Plexus Guest Home, filed an application for labor certification to enable the Alien, Maria Jimena Vitug, to fill the position of "Cook/Diet," which was classified by the Job Service as "Cook." (AF 62). The job duties for the position were to plan and prepare low sodium, non-fat and no cholesterol meals according to proper therapeutic diets. (AF 62).

In a Notice of Findings ("NOF") issued on September 28, 2001, the CO proposed to deny certification on the grounds that the Employer's requirements relating to a specialized low sodium, non-fat, therapeutic diet were unduly restrictive. (AF 58-60). In its rebuttal, dated October 20, 2001, the Employer deleted the unduly restrictive requirements, submitted a proposed advertisement for approval, and expressed a willingness to readvertise. (AF 54-57). The Employer amended the application for labor certification and on November 6, 2001, the CO remanded the application to the State Job Service for re-recruitment. (AF 53, 62).

In a second NOF ("SNOF"), dated April 24, 2002, the CO proposed to deny certification on the grounds that the Employer's recruitment effort was insufficient. (AF 33-35). The CO found that the Employer "did not run a Sunday ad as Job Service directed," and the advertisement "did not run concurrent with the CALJOBS, also as Job Service had clearly instructed." (AF 34). The CO instructed the Employer to indicate a willingness to readvertise.

In rebuttal, dated April 30, 2002, the Employer expressed a willingness to re-recruit and provided a draft advertisement. (AF 31-32). On May 8, 2002, the CO again remanded the application to the State Job Service for re-recruitment. (AF 30). On June

12, 2002, the Job Service issued a "Remand Recruitment Notice," in which it provided instructions to the Employer regarding the recruitment process, including the timing and placement of advertisements. (AF 26-28).

On July 24, 2002, the Employer advised the Job Service that the advertisement ran in The Los Angeles Times, Orange County Edition on Sunday, July 7, 2002 and the Employer attached one copy of the tearsheet for the advertisement. (AF 23-24). On August 12, 2002, the Employer issued a final statement of recruitment results, reiterating that the advertisement was placed in The Los Angeles Times, Orange County Edition on Sunday, July 7, 2002. Furthermore, the Employer stated that notice of the position was posted on a bulletin board at the Employer's business premises for more than ten days. However, neither Employer nor the Job Service received any response to the job posting or the advertisement. (AF 18-19). In addition, a copy of the posted job notice was provided. (AF 16-17, 20).

On October 1, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 12-13). The CO found that the Employer had failed to comply with Job Service instructions regarding recruitment and thus failed to adequately test the labor market. On October 28, 2002, the Employer filed a Request for Review, together with supporting documents, and the matter was docketed in this Office on November 12, 2002. (AF 1-11).

DISCUSSION

Upon review, the CO's conclusion that the Employer's recruitment was not in compliance with the Job Service instructions is correct. The Employer's correspondence, dated July 24, 2002 and August 12, 2002, confirms that the advertisement was run on Sunday, July 7, 2002, in The Los Angeles Times, Orange County Edition. (AF 18-19, 22). Thus, as stated in the FD, the advertisement ran in the wrong publication and outside the CalJOBS order time frame. Nevertheless, the FD cannot be affirmed because the CO failed to provide the Employer an opportunity to address the deficiency.

Contrary to the CO's statement in the FD, the Employer's submissions, dated August 12, 2002, were not the Employer's "rebuttal evidence" to the SNOF issued on April 24, 2002. (AF 13). The August 12, 2002 correspondence was the Employer's report of recruitment and a copy of the posting notice. (AF 16-20). The Employer's rebuttal is contained in the April 30, 2002 submissions, in which the Employer expressed a willingness to retest the labor market and included a draft advertisement, in accordance with the "Corrective Action" set forth in the SNOF. (AF 31-34).

In its Request for Review and supporting documents, the Employer contends that the problems regarding the timing and placement of the advertisement were caused by a clerical error of The Los Angeles Times classified ad section, an alleged failure to follow the instructions given by the Employer's counsel. (AF 1-11).

The problems related to the placement and timing of the advertisement during the most recent recruitment effort were first raised in the FD. Accordingly, in the absence of a new NOF, the Employer was precluded from submitting rebuttal evidence which possibly could address its failure to comply with the Job Service's instructions. Therefore, a remand to the CO is appropriate in order to give the Employer adequate opportunity to address this deficiency. *See, e.g., Bel Air Country Club*, 1988-INA-223 (Dec. 23, 1988) (*en banc*); *Barbara Harris*, 1988-INA-392 (Apr. 5, 1989) (*en banc*).

On remand, the CO should consider the issuance of a new NOF to provide instructions to the Employer specifying the documentation needed to rebut the CO's finding of inadequate recruitment.

ORDER

The Certifying Officer's denial of labor certification is hereby VACATED, and this case is REMANDED to the Certifying Officer for further proceedings consistent with this Decision.

For the Panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

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.