U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 June 2004

BALCA Case No.: **2003-INA-77**
ETA Case No.: P2000-CA-09508770/ML

In the Matter of:

ELEGANT INTERIORS,
Employer,

on behalf of

MARIA-THERESA DIY,
Alien.

Appearance: Dorothy A. Harper, 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 arises from an application for labor certification[1] filed by Elegant Interiors, Inc. ("the Employer") on behalf of Maria-Theresa Diy ("the Alien") for the position of Manager, Merchandise. (AF 65-66).[2] The Certifying Officer ("CO") 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 Certifying Officer

[1] 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 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF") and written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 14, 1998, the Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Merchandise Manager. (AF 65-66). Minimum requirements for the position were listed as two years of college in Interior Design Studies and two years of experience in the job offered or in the related occupation of home furnishings sales. The job duties included coordinating merchandising activities for a home furnishing wholesaler, as well as determining inventory, discount policies, and promotion activities. The Employer received four applicant referrals in response to its recruitment efforts. The Employer rejected two applicants as unqualified for the position and two applicants as unavailable for the position. (AF 71-84).

A Notice of Findings ("NOF") was issued by the CO on July 29, 2002, proposing to deny labor certification based upon a finding that the Employer had unlawfully rejected each of the four U.S. worker applicants. The CO challenged the Alien's qualifications for the job and hence, the grounds for rejecting two qualified applicants. The CO also questioned the Employer's efforts to timely contact the other two qualified applicants. The Employer was instructed to document the Alien's qualifications and to further document lawful rejection of the four U.S. applicants. (AF 60-63).

In Rebuttal, the Employer submitted documentation of the Alien's qualifications and further asserted that two of the applicants were not qualified because they failed to meet the education requirement and the specific requirement of experience in home furnishings. With respect to the unavailable workers, the Employer stated that there was a delay in receipt of the resumes because the Employer's attorney had recently moved and the resumes were mailed to the wrong address. The Employer stated that she did

contact the applicants in a timely manner, as shown by the e-mails received from these applicants and previously submitted into the record. (AF 52-57).

A Final Determination ("FD") denying labor certification was issued by the CO on September 24, 2002, based upon a finding that the Employer had failed to adequately document lawful rejection of the four U.S. workers who applied for the job. In regards to the two unavailable applicants, the CO found the Employer's rebuttal unconvincing, and argued that the Employer's attorney did not notify the Job Service about an impending move until four days prior to the move and the notification was only by mail. (AF 50-51).

The Employer filed a Request for Review by letter dated November 7, 2002, and the matter was docketed in this Office on January 28, 2003. (AF 1-49). The Employer submitted an Appeal Brief on March 4, 2003.

DISCUSSION

The burden of proof in the labor certification process is on the employer. 20 C.F.R. § 656.2(b); *see also Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997); *Marsha Edelman,* 1994-INA-537 (Mar. 1, 1996). Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.,* 1987-INA-607 (Oct. 27, 1988). 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.

Twenty C.F.R. § 656.21(b)(6) states that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may be rejected solely for lawful, job-related reasons. This regulation applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because

of actions taken by the employer. Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

Accordingly, an employer has an affirmative obligation to contact potentially qualified U.S. applicants as soon as possible after it receives resumes or applications, so that the applicants will know that the job is clearly open to them. *Loma Linda Foods, Inc.,* 1989-INA-289 (Nov. 26, 1991)(*en banc*). Otherwise, the applicants may lose interest in the position. As noted by the Board in *Loma Linda*, "[a]llowing an employer to delay contact would be tantamount to allowing an employer to thwart the policy of preferring qualified U.S. workers over aliens for U.S. jobs."

The Employer has, in part, proffered a justification or excuse for its delay in contact based upon the fact that the resumes were initially mailed to the wrong address. The Board has held that an equitable remedy may be applied to relieve hardship on an innocent employer if the employer demonstrates that the job service or CO delayed the employer's contact of U.S. applicants. *Loma Linda, citing Lee & Chiu Design Group,* 1988-INA-328 (Dec. 20, 1988)(*en banc); La Salsa, Inc*., 1987-INA-580 (Aug. 29, 1988). However, if the employer proves that the job service or CO contributed to the delay, but the employer *also* contributed to the delay, then certification must be denied unless a reasonable justification is established. *Id.*

In the instant case, the Employer was well aware of the need to comply with deadlines and that time was of the essence. The Assessment and Recruitment Notices repeatedly required a "postmark no later than" date. (AF 95, 98, 103). Yet when the Employer was actively advertising and recruiting for the position, she waited until more than three weeks after the ad was run and only four days prior to the relocation to mail a notification of a change in the address to which the resumes were to be sent. (AF 87). The Employer has argued that there is no set time period in which a change of address notification needs to be filed. However, as the Employer waited until the eve of the relocation to notify the EDD of the address change, the Employer clearly contributed to the delay in receipt of resumes.

Moreover, the Employer has indicated that its contact was through e-mail. The Employer documented responses by the applicants with dates and times of the responses, yet did not document its own e-mails with date and time to show when contact efforts were actually made. The Employer was notified that timeliness was an issue and the NOF requested documentation of timely contact. The Employer failed to provide any documentation of this timely contact and instead relied on the applicants' responses that they were unavailable. (AF 80, 84).

Resumes were sent to the Employer on July 28, 2000 and received by the Employer on August 8, 2000. (3rd page of rebuttal letter).[3] It is not clear from the record when the Employer attempted contact by e-mail. However, given the fact that the Employer advertised in June, that there was a delay in receipt of the resumes and that only four resumes were received, presumably an employer who genuinely wanted to fill the position would have contacted the applicants as soon as possible. Clearly, contact by the Employer's chosen method, e-mail, could have been almost immediate. The Employer elected not to document its effort at contact. The Employer did not submit copies of the e-mails she sent to the applicants, but only submitted the applicants' responses, which did not show the original message or the date it was sent. The Employer argues that the date of the initial contact with the applicants can be inferred based on the applicants' responses; however, the Employer has not justified the failure to submit the requested documentation and cannot rely on his assertion that the contact was timely without such documentation. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). On this basis, we conclude that the Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity, and accordingly, determine that labor certification was properly denied.

[3] The third page of the Employer's rebuttal letter is missing from the Appeal File, but is contained in the Employer's Statement of Position on appeal.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

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 of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.