



Issue Date: 06 July 2004

BALCA Case No.: 2003-INA-150
ETA Case No.: P2000-CA-09499095/ML

In the Matter of:

METAL TEK,
Employer,

on behalf of

GUADALUPE J. GONZALEZ,
Alien.

Appearances: Margaret W. Pascual, Esquire
Orange, 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 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 Precision Lens Polisher.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, 1998, the Employer, Metal Tek, filed an application for labor certification to enable the Alien, Guadalupe J. Gonzalez, to fill the position of Precision Lens Polisher. (AF 67). The job duties included polishing metal flats, preblocking and grinding metal lens, and reading correct radii.

On November 18, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification due to insufficient recruitment effort. (AF 22). The CO found that while the Job Service Office had sent the Employer resumes on August 6, 2002, the Employer did not make an effort to contact the five qualified applicants until almost three weeks later. The CO noted that there was no copy of a letter sent or documentation of telephone contact provided. Recruitment was considered tardy and incomplete. The Employer was advised to provide rebuttal which addressed these issues and provided details of its attempts to interview the U.S. applicants. (AF 23).

The Employer submitted rebuttal on December 10, 2002. (AF 10-21). The Employer’s attorney stated that she had provided copies of postal receipts and could not explain what had happened to them. She enclosed a copy of the letter sent to each applicant, along with the postal receipts showing the date of mailing as August 22, 2002 and copies of the return receipts for four of the applicants. (AF 13-20). With respect to the fifth applicant, attempts were made to contact him by telephone because he did not provide an address. The Employer spoke to the applicant on two occasions and the applicant indicated that he did not want to come see the business because it was too far and he did not want the job. To document this contact, the Employer submitted a phone bill showing calls made on August 29, 2002 and September 5, 2002. (AF 21). The Employer contended that the resumes were not received until August 8, 2002 and because the contact letters were sent on August 22, 2002, this was actually fourteen days later, not three weeks as the CO stated. The Employer argued that each applicant was asked to contact the Employer for an interview and good faith efforts to recruit had been made. (AF 10-12).

A Final Determination (“FD”) was issued on January 29, 2003. (AF 8). The CO found that the Employer had failed to establish sufficient recruitment efforts. The CO determined that Applicants #1 and #2 did not receive their mail until five days after it was sent and there was no documentation of any effort to telephone them. The fifth applicant was contacted by telephone, however, the first such effort was not made until twenty-three days after his resume was sent to the Employer. Finally, the CO noted that the Employer did not send the tearsheet of the advertisement to the Employment Development Department (“EDD”) until three weeks after it ran. The CO noted that the EDD needed the tearsheets to confirm that the advertisement had run and that the applicants would be responding. A delay in sending the tearsheet could delay transmittal of the resumes to the Employer and prolong the time the applicants would have to wait from when they read the advertisement until they heard from the Employer. The CO concluded that the evidence was not convincing that the Employer had made a bona fide effort to recruit these U.S. applicants. (AF 9).

On March 3, 2003, the Employer filed a Request for Review and/or Reconsideration and the matter was docketed in this Office on April 10, 2003. (AF 1). In its request for review, the Employer contends that in the FD, the CO raises for the first time the issue of the tardy filing of the tearsheets, providing the Employer no opportunity to rebut that finding. The Employer also argues that its rejection of these U.S. applicants was reasonable. The Employer contends that it was not required to attempt contact of each U.S. applicant by both mail and telephone. Four applicants were contacted by mail and one was contacted by telephone. The latter indicated he was not interested in the job.

DISCUSSION

Included with the request for review are United States Postal Service “Track & Confirm” records. However, the Board’s review of the denial of certification is based solely on the record upon which the denial was based, the request for review, and legal briefs. The Board does not consider additional evidence submitted in conjunction with a

request for review. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989)(*en banc*).

The Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). 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 uncontested that the Employer received the resumes of the U.S. applicants by letter dated August 6, 2002, which the Employer states it received on August 8, 2002. (AF 42). In its letter to EDD on September 19, 2002, the Employer indicated that it attempted to telephone the fifth applicant on August 28, 2002 and left messages on August 29, 2002 and September 2, 2002. The telephone bill submitted by the Employer shows a call to the applicant on August 29, 2002 and September 5, 2002. (AF 21). The other four applicants were mailed letters on August 22, 2002. Those letters indicated that "this job is not even close to any of your other positions," while then inviting the applicant to set up an interview. The discouraging effect and tone of that correspondence was not raised by the CO, and therefore will not be discussed herein.

An employer remains under an affirmative duty to commence review and make all reasonable attempts to contact applicants as soon as possible. *Creative Cabinet & Store Fixture, Co.*, 1989-INA-181 (Jan. 24, 1990) (*en banc*). The standard for whether recruitment is timely was set forth in *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991) (*en banc*). In that case, the Board determined that the "as soon as possible" standard does not embody a specific time limit. It turns on how long an employer requires for a reasonable examination of the applicants' credentials, including but not limited to the following factors: (a) whether the position requires extensive or minimal credential; (b) whether the recruitment is local; and (c) whether many or only a few persons applied for the position. In this case, the Employer had only five applicants in a local recruitment for a position which did not require extensive credentials. The

Employer waited until August 22, 2002 to send letters out to four applicants whose resumes were provided on August 8, 2002 and then did not attempt telephone contact of the fifth applicant until August 28, 2002. No explanation for the delay has been provided. The evidence demonstrates a failure to recruit in good faith. Labor certification was properly denied and the remaining issues need not be addressed.

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.