U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 July 2004

BALCA Case No.: 2003-INA-174
ETA Case No.: P2002-NJ-02485167
In the Matter of:

JERSEY PRECAST CORP.,
Employer,

on behalf of

EMILIO MORENO,
Alien.

Appearance: Leslie V. Lipton, Esquire
Perth Amboy, New Jersey
For the Employer and the Alien

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien employment certification. Permanent alien employment 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."). 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 5, 2001, the Employer filed an application for alien employment certification on behalf of the Alien, Emilio Moreno, to fill the position of Welder. (AF 111). The job duties included welding components together and various related tasks. The Employer required the worker to pass performance tests to meet certification standards. (AF 111).

On May 15, 2002, the New Jersey Alien Labor Certification Office provided instructions to the Employer on how to conduct recruitment for the welder position. (AF 12-13). In response, the Employer advertised the position in its office lunch room from May 23, 2002, through June 6, 2002. It received no responses to this posting. (AF 15-16). It also advertised the position in The Star Ledger on May 28, 29, and 30, 2002. (AF 17, 33-34, 101, 103). The Employer received thirteen resumes and was instructed to contact these applicants within two weeks of receipt of their resumes.

On June 6, 13, and 18, 2002, the Employer's counsel instructed the Employer to contact the aforementioned applicants in the following manner: "Please write to all of them to call you to set up an interview. The letter must be certified so that the receipts can be presented to the Dept. of Labor as proof you contacted them." (AF 20, 21, 48).

In a letter to its counsel, dated July 15, 2002, the Employer listed the names of each U.S. applicant who submitted a resume for the welder position, and the reason each applicant was rejected. The Employer stated, with regard to the three aforementioned applicants, "JPC called to set up an interview, applicant did not return call." (AF 39). On a second copy of the document, a handwritten note appears next to the above-quoted language that reads "also sent cert mail." (AF 88).

On December 7, 2002, the CO issued a Notice of Findings ("NOF"), proposing to deny certification on the grounds that the Employer rejected three U.S. applicants for other than lawful, job-related reasons. (AF 51-54, 97-99). The Employer filed a rebuttal

dated January 7, 2003. (AF 58). However, the CO found the rebuttal to be unpersuasive regarding the above-stated deficiency, and issued a Final Determination ("FD") denying labor certification, dated February 1, 2003. (AF 58-59).

DISCUSSION

An employer who seeks to hire an alien for a job opening must demonstrate that it 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). Actions by employers that demonstrate lack of an effort to recruit U.S. workers, or that prevent qualified U.S. workers from pursuing their applications, constitute grounds for denial of labor certification.

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.

An employer who offers a job opportunity to an alien 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). If a U.S. applicant has applied for the position, the CO must consider the applicant able and qualified for the job opportunity if the applicant, by education, training, experience or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. 20 C.F.R. § 656.24(b)(2)(ii).

Here, the CO found three U.S. applicants to be qualified for the Employer's advertised welder position. (AF 58). The applicants had ten, fifteen, and twenty-two years of welding experience, respectively. (AF 42-44, 46, 53). Although the Employer does not deny the experience of the applicants, the Employer claimed that after

contacting these applicants to schedule interviews, all three applicants failed to return the phone calls. (AF 39). The Employer then hired the Alien, who had approximately nine years of experience, for the welder position. (AF 105-106).

The Employer claimed that in addition to contacting the three applicants by phone, it contacted them by certified mail, but that the certified mail receipts could not be located. (AF 114).

In the NOF, dated December 7, 2002, the Employer was instructed to provide proof of its telephone or mail contacts with the three applicants. The Employer was advised that if it was unable to obtain certified mail return receipts, then the Employer could, in the alternative, produce phone records evidencing the contacts. The CO explained that, upon request, telephone companies will issue itemized telephone bills that include listings of local calls made. The CO stated however, that if the Employer's telephone company refused to cooperate with a request for such a listing of local calls, then the Employer could submit the telephone company's statement to that effect. (AF 53).

In rebuttal, the Employer simply continued to allege that it had contacted the three applicants. The Employer still was unable to produce any evidence of such contacts. The Employer also failed to produce an itemized telephone bill or a statement from the telephone company stating that an itemized telephone bill could not be issued. (AF 114). The only explanation that the Employer offered was that it had called the three applicants at local phone numbers, which it believed would not show on an itemized telephone bill. (AF 57).

Thus, the Employer failed to demonstrate timely contact with the three qualified applicants and was unable to justify their rejection with job-related reasons. Although the Employer claimed that it contacted the three applicants, it was unable to produce any proof whatsoever of the alleged contacts. Because the Employer failed to satisfy its burden of proof by demonstrating that it rejected the U.S. applicants for lawful, job-

related reasons, its application for alien employment certification is denied. 20 C.F.R. § 656.21(b)(6).

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.