U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 July 2004

BALCA Case No.: 2003-INA-200
ETA Case No.: P2001-CA-09510287/NDL

In the Matter of:

REGENCY PET,
Employer,

on behalf of

MARIA HUIZAR-OLGUIN,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Leonard W. Stitz, Esquire
Santa Ana, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Regency Pet ("the Employer") filed an application for labor certification[1] on behalf of Maria Huizar Olguin ("the Alien") on September 1, 2000 (AF 27).[2] The Employer seeks to employ the Alien as an animal keeper, head (DOT Code:

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

412.137-010).[3] This decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File, and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In its application, the Employer described the duties of the position as supervision and coordination of workers caring for animals at a pet care center, consultation with veterinarians and overseeing treatment of animals, and supervision of animal feeding and pen cleaning. The Employer required no advanced education but required two years of experience. (AF 27).

In the Notice of Findings ("NOF"), issued November 27, 2002, the CO found that the Employer did not demonstrate that U.S. workers were rejected for other than lawful job-related reasons, in violation of 20 CFR §§ 656.21(b)(6) and/or 656.21(j)(1)(iv). (AF 23-25). Specifically, the CO noted that a review of the eight resumes sent to the Employer showed four applicants had the required amount of experience. The Employer contacted the applicants by certified mail and requested that they complete an employment application. However, the Employer failed to provide copies of the letters or the employment applications sent to the applicants. Without copies of the letters, the CO stated that it was not clear that the US applicants would know to which job advertisement they were responding. In addition, the CO noted that the return receipts were addressed to the Employer's attorney, which would also confuse any potential applicants. (AF 25).

The CO requested copies of both the employment application form and the cover letters that were sent to the eight applicants. In addition, the CO stated that the Employer should explain exactly why employment applications were sent when the resumes already showed relevant work experience. Finally, the CO directed the Employer to submit the employment application form completed by the Alien. If the Alien did not fill out the

[3] In this decision, DOT is an abbreviation for the Dictionary of Occupational Titles.

employment application form, the Employer needed to explain why the Alien was treated differently. The CO also noted that item 15(c) on the ETA 750B was incomplete. The CO directed the Employer to submit an amended form with this section completed in full. (AF 25).

In its rebuttal, dated December 19, 2002, the Employer stated that the U.S. applicants were contacted by certified mail, which is sufficient evidence of a good faith recruitment effort. (AF 7-22). In addition, the Employer stated that the employment application is necessary to screen candidates to determine who is interested in working and is an important step in authorizing the Employer to contact an applicant's previous employers. Finally, the Employer noted that although the Alien did not fill out the experience section of the employment application, she had been referred by her brother, who had been working for the Employer for two years. As her brother verified her qualifications and work history, and because her brother is a trusted employee, further information was not required on the employment application. (AF 7-9).

The CO issued the Final Determination ("FD") on March 5, 2003, denying certification. (AF 5-6). The CO stated that the Employer failed to provide copies of the letters and the applications sent to the applicants. Rather, the Employer submitted a copy of a form letter which did not identify the Employer, give the Employer's address, or reference the specific job advertisement. The letter stated that two years of experience are required, but it did not indicate if the applicant's resume was deficient. In addition, the return address noted on the letter was for the Employer's attorney and did not provide any additional information to identify the attorney with the Employer or the job advertisement. Therefore, it was not clear whether the applicant would know to whom he or she was responding or why. (AF 6).

The CO also noted that the employment application for the Alien was incomplete because it included only the Alien's name, address and social security number. In addition, the employment application was dated May 2, 1998; however, according to the ETA 750B, the Alien began working for the Employer on January 1, 1998. The

Employer stated that the Alien's qualifications and work history were verified through her brother, a trusted employee. However, the CO found that this same consideration was not extended to the qualified U.S. applicants because completed employment applications were required prior to interviews. The CO concluded that the Employer had not satisfactorily rebutted the NOF and remained in violation of 20 CFR § 656.21(b)(6). (AF 6).

By letter dated March 13, 2003, the Employer requested review by this Board. (AF 1-4). The case was docketed on June 10, 2003, and the Employer filed an additional brief in support of its appeal. The Employer argues that the certified return receipt letters, along with the return receipt post cards, demonstrate a good faith recruitment effort by the Employer. The Employer also argues that his decision to reject U.S. applicants who did not respond to the letters establishes that the applicants were rejected for lawful reasons. The Employer states that the letters did indicate the job title, which would be a reasonable basis for an applicant to identify the Employer because the applicant had previously submitted a resume for the position. The Employer also argues that the fact that the letter failed to identify the Employer is irrelevant because an interested applicant would have responded to the letter regardless of the identity of the Employer. Finally, the Employer argued that his reliance upon the verification of the Alien's experience by the Alien's brother would have been extended to any U.S. applicants who were also friends or relatives of employees. However, because that was not the case, then the employment application authorizing contact with former employers was required to verify experience. The Employer argues that the fact that an application was required from U.S. applicants and not from the Alien does not show a lack of good faith recruitment, but rather that the Alien's experience was already verified through a trusted source.

DISCUSSION

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These

requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability. It is the employer who bears the burden of proof that all regulatory requirements have been satisfied, and this burden of proof must be met before an application for labor certification can be approved. 20 C.F.R. § 656.2(b).

Twenty C.F.R. § 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings of the NOF, and that all findings not rebutted shall be deemed admitted. On this basis, the Board has repeatedly held that a CO's finding which is not addressed in rebuttal is deemed admitted. *Belha Corp.,* 1988-INA-24 (May 5, 1989) (*en banc*). The employer must provide directly relevant and reasonably obtainable documentation that is requested by the CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

The NOF specifically directed the Employer to submit cover letters sent to the U.S. applicants with the employment application. Instead, the Employer submitted a blank copy of the form letter. The blank form submitted did not identify the Employer, nor did it identify the job advertisement. In addition, as noted by the CO, the return address was for the attorney's office, not the Employer's place of business, adding further uncertainty to the form letter. This blank form letter did not provide the applicants with an appropriate opportunity to respond to the Employer's contact. In addition, although the Employer submitted copies of the return receipt post cards, the Employer did not submit copies of letters with the U.S. applicants' addresses, as required both by the NOF and the earlier Final Documentation Notice from the Employment Development Department. (AF 23, 85). Thus, the Employer has not established that these confusing and incomplete form letters were actually included in the envelopes mailed to the U.S. applicants.

The requested documentation of copies of letters sent to the each of the U.S. applicants was directly relevant to the issue of whether the Employer used good faith

efforts to contact and consider potentially qualified U.S. applicants. The Employer did not indicate any reason why he failed to submit copies of letters with the U.S. applicants names and addresses. An employer's failure to provide documentation reasonably requested by the CO will result in a denial of labor certification. *Loma Linda Foods, Inc.,* 1989-INA-289 (Nov. 26, 1989) (*en banc*). The Employer's failure to provide documentation that the US applicants were contacted in a timely fashion after the receipt of the resumes indicates a failure to recruit in good faith.

In the light of the foregoing, we find that the CO properly determined that the Employer had not established that he put forth an adequate, good faith recruitment effort. We agree with the CO that the Employer's rejection of the U.S. applicants for their failure to respond to a confusing and incomplete form letter is an unlawful rejection. Therefore, we find that the CO properly denied certification.

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.