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: 30 June 2004

BALCA Case No.: 2003-INA-214
ETA Case No.: P2000-CA-09497121/ML

In the Matter of:

RONDALE CONSTRUCTION, INC.,
Employer,

on behalf of

ROGER MICHAEL CORONA,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Alexander Nassif Lopez, Esquire
Glendale, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

Rondale Construction, Inc. ("the Employer") filed an application for labor certification[1] on behalf of Roger Michael Corona ("the Alien") on January 13, 1998. (AF

[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.

95).[2] The Employer seeks to employ the Alien as a carpenter (DOT Code: 860.381-022).[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 of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer listed a number of duties of the position, including constructing fixtures of wood and using power tools. The Employer required a high school diploma and two years of experience. (AF 95).

In the first Notice of Findings ("NOF"), issued December 11, 2001, the CO found that the Employer had rejected two U.S. applicants for failure to pass a welding test, which was not a requirement on the ETA 750A. In addition, the CO found that the Employer's recruitment effort was not sufficient because the resumes were sent to the Employer on February 8, 2000, and there was insufficient evidence of contact with the six qualified applicants. The CO noted that the recruitment letter failed to include a telephone number and scheduled all six applicants for interviews at the same time. (AF 91).

The Employer submitted rebuttal and argued that Applicants #1 and #2 were rejected because they demonstrated no interest in the job opportunity after submitting their resumes. In addition, the Employer stated that all six applicants were contacted within fourteen days of receiving their resumes. (AF 88).

On January 16, 2002, the CO issued a supplemental NOF ("SNOF") stating that the narrative in the NOF issued on December 11, 2001 was incorrect. In the SNOF, the CO requested that the Employer submit additional information on four resumes, which were incorrectly sent to the Employer by the state employment office. The CO found that

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

Applicants #3 and #4 were rejected because they were interested in finish carpentry; however, these two applicants had eighteen years of documented experience in all phases of carpentry. In addition, Applicant #4 was rejected because he did not have experience running a crew; however, this requirement was not listed on the ETA 750A. Finally, the CO noted that resumes for Applicants #3-6 were sent to the Employer on January 26, 2001. The Employer stated that the letters were sent on February 5, 2001, but none of the letters were received until February 26, 2001 and the interviews were scheduled on March 6, 2001. Based on these facts, the CO found that the Employer had not demonstrated positive contact efforts "as early as possible," and the recruitment was considered tardy and incomplete. (AF 84-86).

In response to the SNOF, the Employer wrote a letter on February 9, 2002, stating that because the SNOF raised different issues, it appeared it was incorrect. (AF 83). On March 19, 2002, the CO stated that the SNOF was a re-issued NOF and the correct version. The CO stated that the Employer should submit rebuttal to the issues raised in the SNOF. (AF 80-82). On April 2, 2002, the Employer again stated that the SNOF raised new issues and was not just a correction of the narrative of the first NOF. The Employer then offered to retest the labor market. (AF 77-78).

On April 30, 2002, the CO remanded the application to the state to allow the Employer to amend the terms of the job opportunity and to re-recruit. Telephone notes also indicated that the advertisement by the Employer had required three years of experience, not two years, as listed on the ETA 750A. (AF 76)[4].

After remand and re-recruitment, the CO issued another NOF ("SSNOF") on January 10, 2003. The CO stated that there were no phone records to substantiate the Employer's statement that certain applicants were contacted by telephone. In addition, the CO questioned the Employer's contact of other applicants, as the letter the Employer sent did not contain the Employer's address. The CO stated that positive contact efforts

[4] We note that the advertisement on remand also included the incorrect three year experience requirement. The CO did not raise this issue in any of the subsequent NOFs or other communication.

include both attempts in writing (supported by dated return receipts) and by telephone (supported by phone bills). (AF 24-26).

On February 13, 2003, the Employer submitted rebuttal and noted that five resumes were received on July 12, 2002 and three on August 5, 2002. The Employer stated that letters were sent on July 17, 2002 and on August 13, 2002. In addition, the Employer submitted telephone records for calls made to two applicants. The Employer stated that telephone records for calls made to other applicants were not available because telephone bills for those calls had not been sent, as requested, from the telephone company.

The Employer argued that three applicants did not respond to the certified letters or to telephone messages. The Employer stated that three applicants were not interested in the position when contacted by telephone, after receipt of the certified letters. Two other applicants did not claim the certified letters. Telephone messages were left for these applicants; however, the Employer stated that when he called one applicant, he was told that the applicant was no longer living at that number and no forwarding number or address was available. In support of his arguments, the Employer submitted postmarked copies of the receipts for certified letters with return cards which were mailed to the applicants, copies of the returned post cards when available, and copies of telephone records for calls made to two applicants. (AF 7–23).

The Employer also argued that the finding in the NOF regarding the lack of an address in the recruitment letter was without merit. The Employer noted that the return address was listed on the envelope, as demonstrated by copies of the certified return receipts. In addition, the recruitment letter included the Employer's name, telephone number and contact person. (AF 7-23).

The CO issued a Final Determination ("FD") on March 14, 2003, denying labor certification. (AF 5-6). The CO stated that the Employer's rebuttal to the NOF had not corrected the deficiencies. Specifically, the CO noted that the Employer submitted some

telephone records and restated his reasons for rejecting U.S. applicants. The CO raised the concerns about the certified letter not including the Employer's address. In addition, the CO stated that the letter's statement that "[i]f you feel that you have the necessary experience…" was a tone that could deter U.S. applicants. Because these applicants had submitted resumes which showed that they had the necessary experience, the CO stated that the letter appeared to be an attempt to delay consideration of qualified U.S. applicants and to hope that they would give up interest. Thus, the CO concluded that the evidence was not convincing that the Employer had made a good-faith effort to recruit qualified U.S. workers. (AF 5-6).

On April 17, 2003, the Employer requested review and the matter was docketed in this Office on June 10, 2003. In its request for review, the Employer argued that the CO failed to consider evidence submitted on rebuttal. Specifically, the Employer argued that the address was listed on the envelope in which the recruitment letters were sent. In addition, the Employer argued that this issue is moot because the advertisement to which the applicants responded did not include the Employer's address. The Employer contended that the CO's failure to address the Employer's argument on rebuttal indicates that the CO failed to review all the evidence submitted. In addition, the CO did not discuss the phone bills and certified mail return receipt postal cards. Regarding the tone of the letter, the Employer noted that this issue was not raised in the NOF. The Employer stated that the listing of the duties in the letter was to advise the applicants about the position at issue. The Employer concluded that "[t]he simple fact that an applicant submitted a resume does not in and of itself prevent the employer from inquiring into his or her qualifications, experience, and interest in the position." (AF 1-4).

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 proving that all regulatory requirements have been satisfied, and this burden of proof must be met before labor certification can be granted.

In support of his argument that telephone contact was attempted with all eight applicants, the Employer submitted records which establish telephone calls to two of the U.S. applicants. Standing alone, such records may be insufficient to establish telephone attempts to all eight applicants; but when considered in conjunction with the copies of the certified return receipt letters sent to all applicants, these records support the Employer's good faith effort to recruit the U.S. applicants in this matter. *See, e.g., M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*).

Despite the fact the CO did not discuss the certified return receipt letters in reviewing the attempts to contact the U.S. applicants, the CO did note in the SSNOF that the letter sent to U.S. applicants did not give the Employer's address. In response to this deficiency, the Employer argued that the envelopes had the Employer's return address, and the letter did include the Employer's name and telephone number, providing the U.S. applicants with a method for contacting the Employer. We note that the record supports the Employer's assertion that the envelope included his address. (AF 46, 51). We find that this letter provided sufficient information to the U.S. applicants about the job opportunity. Including the Employer's address, as well as his telephone number, in the body of recruitment letter would have been preferable to including it only as a return address on the envelope. Upon consideration of the fact that the Employer's name and telephone number were included in the letter, we find that the Employer's failure to include the business address in the body of the letter under these particular circumstances is not a deficiency that would be a basis to deny certification under 20 C.F.R. §§ 656.20(c)(8) and 656.21(b)(6).

However, we agree with the CO's analysis of the tone of the Employer's letter. Specifically, the wording "[y]et it is not clear from your resume whether you posses (sic)

the required experience for this position. If you feel that you have the necessary experience and are interested in this position, please call me to set up an interview" is discouraging to the applicant. All of the U.S. applicants had well over the two years of experience required in the advertisement and on the ETA 750A. Thus, the Employer's statement is confusing at least and indicates he had not reviewed the resumes prior to sending these letters. We agree that the tone of this letter could act as a deterrent to the recipients.

We also agree that the CO failed to cite this deficiency in the NOF. Specific statements of alleged violations in the NOF enable and encourage employers to file clear responses in rebuttal. The CO's failure to include any finding in the NOF regarding the discouraging tone of the recruitment letter does not allow an employer the opportunity to respond to this allegation on rebuttal. An employer must be given the chance to rebut the findings on which a denial of certification is based. *North Shore Health Plan*, 1990-INA-60 (June 30, 1992) (*en banc*); *Tarmac Roadstone (USA) Inc.*, 1987-INA-701 (Jan. 4, 1989) (*en banc*); *Barbara Harris*, 1988-INA-392 (Apr. 5, 1989) (*en banc*).

Thus, we find that the Employer presented sufficient evidence regarding the proof of contact of the U.S. applicants to establish good faith recruitment. We also find that the CO correctly raised the issue of the discouraging tone of the letter, but failed to provide the Employer a chance to rebut this issue. Accordingly, the CO should consider issuing another NOF addressing the tone of the letter and providing the Employer the opportunity to address this issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and the matter is **REMANDED** to the CO for proceedings consistent with this Decision.

For the panel:

A

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.