U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 20 July 2004

BALCA Case No.: 2003-INA-175
ETA Case No.: P2002-NY-02479

In the Matter of:

CELESTE CARLESIMO,
Employer,

on behalf of

MARIA KRZEMINSKA,
Alien.

Certifying Officer: Delores Dehaan
New York, New York

Appearances: Albert S. Lefkowitz, Esquire
New York, New York
For the Employer and the Alien

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 an application for alien labor certification. 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 January 12, 1998, the Employer filed an application for labor certification on behalf of the Alien to fill the position of "House Worker, General Housekeeper." (AF 5). The only job requirements listed were a grade school education and three months of prior experience in the same position.

The New York Department of Labor Alien Certification Office provided instructions on recruitment in a letter to the Employer dated April 4, 2001. (AF 13-15). The letter noted that a written recruitment report would be required and that the Employer must document her attempts to contact each applicant. The state office advised the Employer to procure a telephone log from the telephone company and to obtain a certified mail receipt from the Post Office in order to document each contact with the applicants. (AF 13).

On April 23, 2001, the state office sent one response to the advertisement to the Employer. (AF 23-25). The state office again noted that the Employer must provide a full written report of recruitment results, and recommended keeping detailed records of contacts with applicants, including dates of phone calls and interviews. It recommended using certified mail with a return receipt when contacting applicants by mail and making copies of all letters and return receipts. The state office also informed the Employer that she must submit a signed and dated statement "giving the specific job-related reasons for any rejection [of U.S. applicants] including documentation of the employer's attempts to contact the applicants." (AF 25). The state office again recommended obtaining a telephone log from the telephone company and using certified mail with return receipts to document contacts with job applicants.

On May 7, 2001, the state office sent another two responses to the Employer. (AF 28-30). On May 8, 2001, the state office sent one additional response to the Employer. (AF 26-27). Both transmittals again noted the recruitment report requirement and recommendations for documenting the recruitment. In total, the state office supplied four applications to the Employer.

The Employer's attorney submitted a recruitment report dated June 12, 2001, which included a one-page statement by the Employer, resumes of three of the four job applicants with brief handwritten notes on each, a one-sentence note summarizing the one interview with a job applicant, and copies of the materials forwarded to the Employer by the state office. (AF 16-41).

The state office transmitted the application to the CO, who issued a Notice of Findings ("NOF") on October 9, 2002, proposing to deny certification pursuant to 20 C.F.R. §§ 656.24(b)(2)(ii), 656.21(b)(6), and 656.20(c)(8). (AF 49-51). The CO found that all four applicants were qualified for the position. The CO noted that letters inviting the applicants to interview were mailed to the applicants only five days before the scheduled interview date. (AF 32, 34, 36). In addition, these letters requested the applicants to bring references to the interview, whereas the job advertisement made no mention of references. Finally, the CO found the Employer's rejection of Applicant #1 for lack of sufficient cooking experience was unfounded, as the applicant performed cooking as part of her job duties over the last five years in her two most recent positions. No details concerning the fourth applicant were noted in the NOF, although the Employer's recruitment report indicates that she was sent a letter and did not respond. (AF 38).

The Employer's signed rebuttal was filed on October 31, 2002. (AF 57-58). The rebuttal indicated the Employer's willingness to re-interview the candidates or additional job applicants, but insisted on the Employer's prerogative in selecting the person to be hired. No reason was given for the one month delay between receiving the applicants' resumes and contacting them. The Employer noted that the Alien had been employed by

the Employer since May 1994, and it did not make sense to hire and retrain a new person "when the ideal candidate is already doing the job and has been for the past eight-and-one-half years." (AF 57).

The CO issued a Final Determination ("FD") denying labor certification on November 20, 2002, finding that the violations of 20 C.F.R. §§ 656.24(b)(2)(ii), 656.21(b)(6), and 656.20(c)(8) had not been rebutted. (AF 59-60). The CO questioned whether the Employer made good faith efforts to recruit the U.S. workers deemed qualified for the job.

On December 20, 2002, the Employer filed a Request for Review and the matter was docketed in this Office on April 17, 2003. (AF 61-70). The AF does not reflect that a brief was filed.

DISCUSSION

The regulations provide that the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Furthermore, an employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(7). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. 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 make "reasonable efforts to contact applicants." *Id.* Making reasonable efforts requires that job applicants be contacted in a timely fashion, giving them adequate time to respond to the employer's offer of an interview. *Budget Iron Work*, 1988-INA-393 (Mar. 21, 1989) (*en banc*). Unjustified delays in contacting job applicants is inconsistent with good faith attempts to hire a qualified U.S.

worker. *Creative Cabinet and Store Fixture, Co.*, 1989-INA-181 (Jan. 24, 1990) (*en banc*).

An employer who does no more than make unanswered phone calls, or who only leaves a message on an answering machine, has not made a reasonable effort to contact the U.S. worker where mailing addresses were available for applicants. In such cases the employer should follow up with a letter, which may be certified mail, return receipt requested, to provide certain documentation of the contact. *Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991); *Gambino's Restaurant*, 1990-INA-320 (Sept. 17, 1991). If certified mail, return receipt requested was not used, an employer may provide a written assertion or attestation of its attempts to contact U.S. applicants, supported by any available substantiating evidence such as contemporaneous evidence of the mailing and documentation of other recruitment efforts, such as telephone contacts. *See, e.g., Lotus Corp.*, 1991-INA-203 (July 28, 1992); *Ambras Trading Co.*, 1997-INA-406 (July 27, 1998). A CO must weigh such evidence and give it the weight it rationally deserves; unsupported assertions may not be entitled to much weight in view of conflicting evidence, such as a U.S. applicant's statement that he or she was not contacted.

The Employer did not make good faith efforts to recruit qualified U.S. job applicants. The last of the four referrals from the state office was mailed to the Employer on May 8, 2001, yet the Employer did not mail letters to the applicants until June 2, 2001, over three weeks later. The assigned day for interviews was June 7, 2001, only four days from the earliest time when the applicants might have received notification from the Employer. In addition, the letter advised applicants for the first time of the need to bring "all your references" to the interview. (AF 32, 34, 36). The Employer offered no justification in either her rebuttal or the request for review for the delay in contacting the applicants. Only timely contacts with U.S. job applicants constitute reasonable efforts at recruitment.

The Employer failed to provide any signed certified mail return receipts as requested in the NOF. (AF 49). While it is clear that the applicant who was interviewed

received a letter, the Employer has submitted no evidence that the other applicants even received their letters. Moreover, the Employer apparently made no attempt to contact the other applicants by telephone, although phone numbers were provided on at least two of the resumes. (AF 35, 37). The Employer was duly aware of the requirements for documenting recruitment, as noted multiple times by the state office. The Employer's limited, untimely communications with job applicants falls short of the good faith efforts required in recruiting qualified U.S. workers for a bona fide job opening.

One of the three job applicants the Employer attempted to contact did appear for an interview. Despite three years of cooking experience in her most recent position as a housekeeper, the applicant was rejected by the Employer because "she doesn't have enough experience, especially in cooking." (AF 31). The job ad stated that only three months of prior experience were required. In her rebuttal, the Employer offered no additional reasons for rejecting this applicant. In the request for review, the Employer misidentified the interviewed applicant as a different applicant, and handwritten notes directly on the applicant's resume who was interviewed state "[s]he never showed up." (AF 35). In addition, the details provided in the request for review concerning the applicant's not being willing to cook and having quit her prior job because cooking was required, are at odds with the contemporaneous handwritten notes by the Employer concerning the interview, where the Employer said "she doesn't have enough experience, especially in cooking." (AF 31). The Employer's confused and inconsistent statements in the request for review neither identify nor support any lawful reason for rejecting this job applicant.

In summary, the Employer has not offered evidence establishing that she made reasonable efforts to recruit qualified, available U.S. workers or demonstrating that applicants were rejected for lawful job-related reasons.

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.