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Issue Date: 13 September 2004

BALCA Case No.: 2003-INA-215
ETA Case No.: P2000-CA-09487387

In the Matter of:

MARIA ANGELES LAW OFFICE,
Employer,

on behalf of

ROWENA BUGBAY,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Maria Angeles, Esquire
Glendale, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a law firm for the position of Legal Secretary. (AF 116-117).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification, together with the Employer’s request for review, as contained in the Appeal File (“AF”) and written arguments of the parties. 20 C.F.R. § 656.27(c).

¹ 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 20 C.F.R. Part 656.

² “AF” is an abbreviation for “Appeal File.”

STATEMENT OF THE CASE

On January 14, 1998, the Employer, the Law Offices of Maria C. Angeles, filed an application for alien employment certification on behalf of the Alien, Rowena Bugbay, to fill the position of Legal Secretary. Minimum requirements for the position were listed as an Associates degree or two years of college and two years of experience in the job offered or related secretarial work. (AF 116-117).

The Employer received eleven applicant referrals in response to its recruitment efforts, all of whom were rejected as either uninterested in or unavailable for the position. The Employer reported that eight of the eleven applicants were called for a personal interview but did not appear, that two applicants stated that they were no longer available or interested, and a third applicant was looking for a bigger law firm. (AF 50-51, 73-74).

A Notice of Findings (“NOF”) was issued by the CO on December 13, 2002, proposing to deny labor certification based upon a finding of insufficient recruitment effort. (AF 46-48). The CO concluded there was insufficient evidence that the Employer’s effort to contact the applicants took place timely, if at all, and there was no evidence she attempted telephone contact with these applicants. The CO noted that “[p]ositive contact efforts include both attempts in writing (supported by dated return receipts) and by telephone (supported by phone bills).” The Employer was instructed to submit rebuttal addressing the issues and giving details of the attempts to interview the U.S. applicants.

In Rebuttal, the Employer asserted that each applicant was timely contacted by mailing a letter on August 5, 2002 giving them notice of their specific appointments for interview on August 13, 2002. The Employer cited her final documentation of the recruitment effort, which contained a copy of each letter to the applicant with a copy of the U.S. Post Office receipt of Certificate of Mailing, also postmarked August 5, 2002. The Employer stated that contact by mail was chosen because documentation of contact would be clearer and noted that none of the letters sent out was returned and therefore,

while only three acknowledged the letter, it could be assumed that each applicant received proper notice. (AF 29-45).

A Final Determination (“FD”) denying labor certification was issued by the CO on February 13, 2003, based upon a finding that the Employer had failed to adequately document a good-faith effort to recruit the qualified U.S. worker applicants. (AF 27-28).

The Employer filed a Request for Review and Reconsideration by letter dated March 17, 2003. (AF 23-26). The Employer filed an Appeal Brief on May 7, 2003. (AF 1-21). The Request for Reconsideration was denied and the matter was docketed by the Board on June 10, 2003. (AF 22).

DISCUSSION

Twenty C.F.R. § 656.21(b)(6) states that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may be rejected solely for lawful job related reasons. This regulation applies not only to an employer’s formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are “able, willing, qualified and available” to perform the work. 20 C.F.R. § 656.1.

In the instant case, the CO challenged the Employer’s good faith in the recruitment of U.S. workers. The burden of proof is on the employer in an alien labor

certification. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996). Hence, it is the employer's burden to demonstrate good faith in recruitment and to show that U.S. workers are not able, willing, qualified or available for this job opportunity.

The Board in *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*), has held that in order to establish good faith recruitment, an employer does not need to establish actual contact of applicants but only reasonable efforts to contact applicants. The Board further held that a CO may not require an employer to use certified mail, return receipt requested, when contacting U.S. applicants, but rather that an employer must be given an opportunity to prove that its overall recruitment efforts were in good faith.³ However, as further noted by the Board, "where there is no return receipt the employer has no way of knowing whether the letter was received." *Id.* What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the facts of the particular case. As cited to by the Board in *M.N. Auto*, *supra*, in some circumstances reasonable effort requires more than a single type of attempted contact. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991)(*en banc*).⁴

In this case, the Employer reported that only three of the eleven applicants responded to its letter of invitation to interview and the Employer does not know whether its letter was received. While the Employer used a U.S. Postal Service Certificate of Mailing in order to ensure proof of mailing, such documentation does not establish receipt by the intended recipient. Presumably, an employer who has a *bona fide* opening

³ The Board held that a CO may not summarily discard an employer's assertions about what efforts were made to contact applicants, but advised employers to be cognizant that although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

⁴ As was noted in *M.N. Auto Electric*, *supra*, most BALCA panels have taken the position that reasonable efforts to contact qualified U.S. applicants may require more than a single type of attempted contact. See *Diana Mock*, 1988-INA-255 (Apr. 9, 1990); *Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991); *C'est Pizzazz Industries*, 1990-INA-260 (Dec. 5, 1991); *Zephyr Grill Restaurant*, 1996-INA-296 (May 7, 1998); *S. Balian Designs*, 1989-INA-299 (Sept. 20, 1991); *Saturn Plumbing*, 1992-INA-194 (Feb. 3, 1994); *Johnny Air Cargo*, 1997-INA-123 (Mar. 4, 1998); *Dr. Frank Storts, Chiropractor*, 1997-INA-330 (May 22, 1998).

it desires to fill would, in exercise of good faith, make additional efforts to contact these applicants again, either by certified mail or by the telephone number provided on each of the applicants' resumes to ensure contact. The Employer made no such efforts.

On this basis, we conclude that the Employer has not met its burden to show that there are not sufficient U.S. workers are not "able, willing, qualified or available" for this job opportunity, and accordingly, labor certification was properly denied.

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 of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.