U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 September 2004

BALCA Case No.: 2003-INA-255
ETA Case No.: P2002-NV-09526872/IW

In the Matter of:

UNIQUE GENERAL AUTO REPAIRS,
Employer,

on behalf of

LAZARO CASTILLO,
Alien.

Appearance: Jose Escalona
Las Vegas, Nevada
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Unique General Auto Repairs' ("the Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its 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 April 30, 2001, the Employer filed an application for labor certification on behalf of the Alien, seeking to fill the position of Auto Mechanic. The Employer required completion of the sixth grade and one and a half years experience. (AF 29-92). The Employer included a list of applicants who applied for the position, but were not hired. (AF 37). The Employer stated that he did not hire ten of the twelve applicants, articulating his reason as "[n]ot interested has good job." The Employer rejected one applicant because he did not appear for his interview, and rejected the final applicant because he specialized in diesel engines.

On February 25, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny labor certification. (AF 24-26). Citing 20 C.F.R. §§ 656.21(b)(6) and 656.21(j)(1)(iii) and (iv), the CO found that U.S. workers were rejected for other than lawful, job-related reasons. He noted that twelve applicants responded to the Employer's advertisements and that all of the applicants appeared qualified. Asserting that the Employer's explanation for not hiring the U.S. applicants lacked specificity, the CO requested detailed notes of the interviews conducted, the dates and times each applicant was interviewed, documentation of the attempts made to contact the applicants, and copies of the correspondence sent to each applicant to schedule an interview. The CO also found that the applicant who allegedly lacked experience with gas engines did in fact have pertinent experience, as demonstrated in his resume.

The Employer filed a rebuttal on March 27, 2003. (AF 18-23). The rebuttal consisted solely of a letter from the owner of the business, in which he explained that the recruitment process could take as long as three months, by which time most applicants had obtained other employment. The Employer also stated that the applicant specializing

in diesel engines did not have "hands on" experience with gas engines and hence was not qualified.

Finding that the Employer remained in violation of 20 C.F.R. § 656.24(b)(2)(ii), the CO issued a Final Determination ("FD") denying labor certification on April 8, 2003. (AF 15-17). The CO explained that the Employer submitted neither the requested documentation of the interviews conducted nor copies of the correspondence sent to applicants.

On May 8, 2003, the Employer filed a Request for Reconsideration, which was denied on May 16, 2003. This matter was docketed by the Board on August 5, 2003.

DISCUSSION

According to 20 C.F.R. § 656.21(b)(6), an employer must document that U.S. workers who have applied for the job opportunity were rejected solely for lawful job-related reasons. Similarly, 20 C.F.R. § 656.21(j)(1)(iv) requires the employer to provide the local office with a written report of all post-application recruitment, which explains "with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed." An employer may reject U.S. applicants because they are unavailable. *Lebanese Arak Corp.*, 1987-INA-683 (Apr. 24, 1989). However, when an employer asserts that it did not hire U.S. workers because they were unavailable, the CO may require the employer to submit documentation of its efforts to contact qualified U.S. workers. *William W. Wright Stables*, 1987-INA-502 (Jan. 6, 1988).

In this case, the CO denied certification because the Employer failed to explain with specificity why it rejected the U.S. applicants. The Employer merely asserted that ten of the twelve applicants were not available because they had already procured other employment. The Employer was required to document his efforts to contact these workers and the CO properly requested that the Employer submit documentation of the interviews conducted and of the correspondence sent to the applicants. *See Gencorp*,

1987-INA-659 (January 13, 1988) (*en banc*) (holding that a CO may request a document which has a direct bearing on the resolution of an issue.). An employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification, especially where the employer does not justify its failure. *Edward Gerry*, 1993-INA-467 (Jun. 13, 1994); *Vernon Taylor*, 1989-INA-258 (Mar. 12, 1991).

The Employer produced no documentation and offered no explanation for his failure to do so. The Employer merely produced a statement saying that these applicants were unavailable. The CO should consider an employer's bare assertion without supporting documentation and give it the proper weight it deserves. *See Gencorp, supra*. In this case, the Employer's statement, without any supporting documentation, was insufficient to support the burden to document lawful, job-related reasons for the rejection of US applicants. Therefore, the CO properly denied certification.

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.