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Issue Date: 29 September 2004

BALCA Case No.: 2003-INA-289
ETA Case No.: P1999-HI-09462919

In the Matter of:

ROBERT L. PETERSON, M.D.,
Employer,

on behalf of

PING LU,
Alien.

Appearance: Carmen DiAmore-Siah, Esquire
Honolulu, Hawaii
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 matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer of an application for alien employment certification. Permanent alien employment certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). We base our decision 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

On August 18, 1999, the Employer, a Board-certified Plastic and Reconstructive Surgery Specialist, filed an application for alien employment certification on behalf of the Alien, Lu Ping, to fill the position of Medical Researcher at the Employer's clinic. (AF 494-495).

On October 18, 2001, the CO issued a Notice of Findings ("NOF") to the Employer, proposing to deny certification if the Employer was unable to 1) submit documentation of his ability to provide permanent, full-time employment in a current job opening with his facility, and 2) conduct a second recruitment for the position. (AF 489-490). The Employer timely filed his rebuttal on November 22, 2001, in which he supplied the requested documentation showing his ability to provide permanent full-time employment at his facility and that a current job opening existed. (AF 331-487). In his rebuttal, the Employer also agreed to re-recruit for the position and submitted a draft of an advertisement to be used in the recruitment. (AF 338-339). The second recruitment was conducted from November 1, 2002 through November 30, 2002. (AF 325).

The CO issued a second NOF ("SNOF") on April 17, 2003 in which he proposed denial of the application based on the Employer's failure to 1) state with specificity his reasons for rejecting two U.S. applicants and 2) insufficient efforts to timely contact four qualified applicants. (AF 289-291). The Employer timely filed a rebuttal to the SNOF on May 19, 2003. (AF 278-280).

The CO found the rebuttal to be unpersuasive regarding both the rejection of U.S. applicants and the Employer's good-faith efforts to recruit U.S. workers and issued a Final Determination ("FD") denying labor certification, dated June 17, 2003. (AF 276-277). The Employer filed its Request for Review by the Board on July 11, 2003 and the matter was docketed by the Board on September 11, 2003. (AF 2, 270).

DISCUSSION

An employer must make efforts to contact qualified U.S. applicants in a timely fashion after the receipt of resumes from the state job service agency; failure to do so indicates a failure to recruit in good faith. *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991) (*en banc*). We have held that when an employer files an application for labor certification, an implicit "good faith" requirement exists in regard to the recruitment of U.S. workers to fill the position; actions by the employer which indicate a lack of a good faith recruitment effort are thus a basis for denying certification. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*); *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). In such circumstances, the employer has failed to show that there are not sufficient U.S. workers "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

Inherent to the requirement of a good faith recruitment effort is an employer's affirmative duty to commence recruitment and make all reasonable attempts to contact applicants "as soon as possible." *Yaran Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*). While there is no specific time limit within which an employer must contact applicants, the reasonableness of the time to contact applicants may depend on a variety of factors. *Loma Linda Foods, Inc.*, *supra*. Such factors include whether the position requires extensive credentials, whether recruitment is local, and whether many people applied for the position. *Id.*

Here, the Employer received a total of six applicant referrals in response to its posting of the job opportunity; one applicant was referred on November 12, 2002, four applicants were referred on November 22, 2002, and one applicant was referred on November 26, 2002. (AF 299, 310, 316). On more than one occasion, the Employer was instructed to contact the applicants within fourteen calendar days. (AF 294-295). The Employer's recruitment documentation reflects that no telephone contact was attempted with the some of the applicants and no attempts were made to contact any of the applicants before January 6, 2003. (AF 287-288). In its rebuttal to the SNOF, the Employer offered only a blanket assertion that the applicants were contacted sometime

between December 2 and 24, 2002. (AF 283-284). The Employer reportedly could not provide telephone bills because “these were all local calls and do not appear on [the] phone bills.” (AF 284). Even assuming this to be true, the Employer offers neither notes on the alleged conversations nor prepared checklists to document what was discussed with the applicants. The Employer’s mere assertion that it timely contacted the applicants by phone, without more, is insufficient to meet its burden of adequately documenting prompt contact with potentially qualified U.S. applicants. *See M.N. Auto Electric Corp., supra.* (providing instruction that at a minimum, an employer must keep reasonably detailed notes on the conversation); *Hopewell Co.,* 1989-INA-190 (May 23, 1990) (allegations of telephone contact are insufficient, with no support of who made the calls or what was said in the conversation); *Brilliant Ideas, Inc.,* 2000-INA-46 (May 22, 2000).

Given the minimal requirements of the position and the fact that only six individuals applied for the position, six weeks is an unreasonably long time to review the applicants’ resumes prior to contacting them. *See Loma Linda Foods, Inc., supra.; Creative Cabinet & Store Fixture Co.,* 1989-INA-181 (Jan. 24, 1990); *AKS Jewelry Mfg,* 2000-INA-49 (Dec. 11, 2001). In his rebuttal to the SNOF, the Employer asserted that the delay was reasonably justified, as he was the only person qualified to fully evaluate the applicants’ qualifications for the position and he is a practicing surgeon with a full surgery schedule. (AF 286). If an employer demonstrates that its delay was justified and reasonable under the circumstances, the case must be remanded for new recruitment. *Loma Linda Foods, Inc., supra.* Here, however, the Employer’s inclusion of his office manager in the review of the applications is contrary to the assertion that he is the sole person qualified to evaluate whether the applicants met the minimum requirements; moreover, the minimum requirements advertised for the position do not establish a complicated basis for preliminary screening of qualified applicants. Lastly, even if we assume that the Employer was the only qualified, responsible person, he has provided no evidence that he attempted to reduce the impact of his regular duties on the recruitment effort. *Id.* The Employer fails to reasonably justify the six weeks of inaction between receipt of the applications and contact of the applicants.

The Employer also contended that the delay should be excused because the recruitment period fell during the Thanksgiving and Christmas holidays and his offices were closed for portions of that time. (AF 283-284). A delay may be excused where a holiday falls within the recruitment period, but only for the duration of that holiday. *Id.* We have held that the Thanksgiving holiday may reasonably affect two or three days, and the Christmas/NewYear season may reasonably affect up to a week. *Id.* Considered alone, a ten day excuse out of a six-week delay does not prevent a finding that the Employer unreasonably delayed the contact of U.S. applicants.

For the foregoing reasons, we find that the CO's denial was proper.

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 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, D.C. 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 typed pages. Upon the granting of a petition the Board may order briefs.