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: 29 September 2004

BALCA Case No.: 2003-INA-275
ETA Case No.: P2002-NJ-02488787

In the Matter of:

PLATON INTERIORS, INC.,
Employer,

on behalf of

JAVIER ROJAS,
Alien.

Appearance: Joseph A. Raia, Esquire
Englewood, New Jersey
For the Employer and the Alien

Certifying Officer: Delores DeHaan
New York, New York

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 United States Department of Labor Certifying Officer ("CO") of his 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 19, 2001, the Employer filed an application for labor certification on behalf of the Alien to fill the position of Cabinet Maker. The position required a high school education and at least three years of experience in the position offered. The duties of the position were described as "the design and manufacture [sic] custom cabinetry, architectural [sic] woodwork and custom make wood furniture and kitchens, bathroom vanities and home entertainment centers." (AF 63). The Employer received nine applicant referrals in response to its recruitment efforts, five of whom were rejected because they lacked cabinet maker experience. (AF 11-28, 36).

On January 23, 2003, the CO issued a Notice of Findings ("NOF"), proposing to deny labor certification. (AF 43-45). The CO identified three of the nine applicants as qualified for the position and concluded that the Employer's rejection of them on the basis of inexperience did not arise from lawful job-related reasons. (AF 44). The CO instructed the Employer to document specific lawful job-related reasons for rejecting each applicant, and to furnish documentation of contact with them through telephone logs and signed certified mail return receipts. (AF 44).

In Rebuttal, the Employer asserted that he contacted each of the three applicants by telephone and certified mail in February 2003. (AF 46-56).

On April 2, 2003, the CO issued a Final Determination ("FD") denying labor certification based on the Employer's failure to document its contacts with the three applicants and its failure to provide specific lawful job-related reasons for rejecting each applicant. (AF 57-58).

On May 16, 2003, the Employer requested review of the denial of labor certification and the matter was docketed by the Board on August 12, 2003. (AF 64-73). The Employer filed an Appeal Brief on September 17, 2003.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). An employer must therefore 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 expend good faith efforts to do so. *Id.* What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the particular facts of the case under consideration. In some circumstances, a reasonable effort requires more than a single type of attempted contact. *Yaron Development Co., Inc.,* 1989-INA-178 (Apr. 19, 1991) (*en banc*).

An employer's rejection of a U.S. worker who satisfies the minimum requirements specified on the labor certification is unlawful. *American Café,* 1990-INA-26 (Jan. 24, 1991). In the instant case, the Employer rejected three U.S. applicants on the basis that they lacked experience. (AF 24-28). The CO found that the three applicants were qualified for the position based on information contained in their resumes which reflected five, fourteen and eight years experience in the cabinetmaking business, respectively. (AF 44). Notably, in its Rebuttal, the Employer did not contest the finding that the applicants were qualified for the position; rather, the Employer's sole assertion is that it attempted to contact these applicants in February 2003. (AF 54-55). The Board has repeatedly held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*); *Salvation Army*, 1990-INA-434 (Dec. 17, 1991); *Michael's Foods, Inc.*, 1990-INA-411 (Nov. 14, 1991). Accordingly, because the Employer failed to explain or document the three applicants' alleged lack of qualifications, the Employer has not provided a lawful, job-related reason for rejecting these applicants. *See Seaboard Farms of Athens, Inc.,* 1990-INA-383 (Dec. 3, 1991); *D & J Finishing, Inc.,* 1990-INA-446 (Aug. 13, 1991); *Poquito Mas,* 1988-INA-486 (Feb. 26, 1990).

Furthermore, the Employer's recruitment report, stating only that the applicants were telephoned and then denied the position because of their lack of experience, is insufficient to establish lawful, job related reasons for their rejection. (AF 24-28). *See Lolly International, Inc.,* 1988-INA-237 (March 28, 1990) (employer unlawfully rejected a U.S. applicant where the employer had failed to report the content of the telephone conversation and state why the candidate felt he was not qualified); *Our Lady of Guadalupe School,* 1988-INA-313 (June 2, 1989) (a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof). That the Employer attempted to contact the three applicants again in February 2003 is also insufficient, because belated, unsuccessful attempts to contact the applicants again will not cure the improper rejection. *See The Oyster Point,* 1991-INA-257 (Aug. 5, 1992).

The Employer's argument, as raised in its Appeal Brief, that a "true craftsman is a very difficult position to fill" and that Alien has demonstrated "that he possesses the qualifications, the know-how, and the insight to create and deliver some of the finest woodworking in the New York metropolitan area," is without merit. Even though the Alien may appear to be well qualified for the job and may even be better qualified for the position than any of the U.S. applicants, it is well settled that an employer cannot reject U.S. applicants on that basis. *K Super KQ 1540-A.M.,* 1988-INA-397 (Apr. 3, 1989) (*en banc*); *Morris Teitel,* 1988-INA-9 (Mar. 13, 1989) (*en banc*). For the foregoing reasons, we find that the CO's denial was proper.

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. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.