U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 September 2004

BALCA Case No.: 2003-INA-286
ETA Case No.: P2000-CT-01297941

In the Matter of:

VINMOR POOLS, INC.,
Employer,

on behalf of

HUMBERTO PINHEIRO,
Alien.

Appearances: Deborah J. Notkin, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Raimundo A. Lopez,
Boston, Massachusetts

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 ("CO") 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. We base our decision on the record upon which the Certifying Officer 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

Vinmor Pools, Inc. ("the Employer") seeks to employ Humberto Pinheiro ("the Alien") in the position of Maintenance Mechanic. The Employer filed its application for labor certification on the Alien's behalf on January 14, 1998. (AF 94, 106-110). The CO issued a Notice of Findings ("NOF") on May 1, 2001, stating that he intended to deny certification because it appeared that U.S. applicants had been rejected for other than lawful job-related reasons in violation of 20 C.F.R. § 656.21(b)(6). (AF 21). The CO requested that the Employer submit convincing documentation to justify the rejection of the applicants. *Id.*

The Employer sent its timely rebuttal to the NOF on July 8, 2001, stating that it had contacted, conducted interviews with, and ultimately rejected twelve U.S. applicants because they were unqualified. (AF 15-16). The Employer stated that it had made a good faith effort to contact three other applicants by telephone, that these attempts failed and that its efforts to contact the three applicants by certified mail also failed. (AF 16-18).

The CO issued a Final Determination ("FD"), dated July 26, 2001, denying certification due to the Employer's rejection of U.S. applicants for other than lawful, job-related reasons. (AF 6-7). On August 27, 2001, the Employer timely filed a request for reconsideration, or alternately, judicial review of the denial of certification. (AF 2-5). The CO denied the Employer's motion for reconsideration and the matter was docketed in this Office on September 9, 2003.

DISCUSSION

In the FD, the CO denied certification because the Employer's failure to conduct a good faith effort in its recruitment of two U.S. applicants amounted to an unlawful rejection of those applicants. (AF 7). If U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6).

On appeal, the Employer first asserted that it had no obligation to contact Applicants #1 and #2 as neither U.S. applicant was sufficiently qualified for the job opportunity. An employer has the burden of further investigating an applicant's credentials where the applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that she is qualified, even if the resume does not expressly state that she meets all the job requirements. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*). Here, Applicant #1's resume indicates that he had twenty-eight years of experience as a maintenance mechanic, at least fifteen of which dealt with water treatment and plumbing, and twelve years of experience dealing with electrical and plumbing work. (AF 57-58). Though his resume did not explicitly state experience as a Machine Service Helper or Maintenance Mechanic dealing specifically with swimming pool motors, it did reveal experience and training sufficient to raise the reasonable possibility that he was qualified for the job opportunity. Applicant #2's resume revealed a twenty-two year professional history of work with electrical machinery and plumbing sufficient to place the burden of further investigation on the Employer. (AF 60).

An employer may properly reject a U.S. applicant where it has documented that the applicant is unavailable. *Lebanese Arak Corp.*, 1987-INA-683 (Apr. 24, 1989). To show that an applicant is available, the employer must document its reasonable efforts to contact qualified U.S. workers. *Churchill Cabinet Co.*, 1987-INA-539 (Feb. 17, 1988). An employer must contact potentially qualified U.S. applicants as soon as possible after it receives resumes or applications. *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991)(*en banc*). The "as soon as possible" standard is the amount of time an employer requires for a reasonable examination of the applicants' credentials, which depends on a variety of factors, including but not limited to (1) whether the position requires extensive or minimal credentials, (2) whether recruitment is local or non-local, and (3) whether many or few persons apply for the position. *Id.*

The Employer conducted its recruitment of U.S. workers to fill the position between May 17, 2000 and June 16, 2000. (AF 90). On May 26, 2000, the Connecticut Department of Labor ("CDOL") forwarded thirteen resumes to the Employer, including Applicant #2's resume, accompanied by a letter recommending that the Employer contact the applicants "within 14 days of the date of this letter." (AF 31-32). On June 2, 2000, the CDOL also forwarded Applicant #1's resume to the Employer for consideration, accompanied by a similar letter. (AF 34). The recruitment period ended on June 27, 2000 and the Employer was given forty-five days from that date to submit the results of the recruitment. (AF 31-32). The Employer submitted its report of the recruitment results to the CDOL on July 31, 2000, stating that its attempts to contact Applicants #1 and #2 "telephonically and by written correspondence" had been unsuccessful. (AF 26-27).

The Employer's rebuttal to the NOF was accompanied by copies of telephone records, showing that it had attempted to contact the applicants by telephone. (AF 9-14). These submitted telephone records indicated that the Employer attempted to call Applicant #1 three times on August 3, 2000 and once the following day, approximately two months after receiving his resume. (AF 10, 12-14). The Employer's attempts to contact this applicant so long after receiving his resume and only *after* it had submitted the results of the recruitment, coupled with its failure to call Applicant #2 at all, were unreasonable.

The Employer also submitted copies of certified mail receipts and unsigned letters dated and sent July 25, 2000, some five weeks after receiving Applicant #1's resume, and nearly two months after receiving Applicant #2's resume. (AF 9, 28-30). As the CO noted, assuming a letter would take at least two days to reach its destination, the applicants were afforded only a two day window to respond to the Employer's letter before the Employer submitted its report of the recruitment results to the CDOL five days later. (AF 7). As with the attempted telephone contacts, the Employer's delay in sending the letters and its limitation of the applicants' opportunity to respond were unreasonable.

The Employer fails to raise any kind of reasonable excuse or justification for the time spent between receipt of the applicants' resumes and its documented attempts to make contact. The Employer asserts that the recruitment coincided with a seasonal increase in the level of business activity and that the CDOL failed to provide guidance as to proper recruitment methods. Both claims are unsupported, however, and the CDOL's explicit recommendation that the Employer contact the applicants within fourteen days of receiving their resumes contradicts the assertion that it received no guidance.

Without a reasonable justification or legitimate excuse, an application for labor certification is properly denied solely on the unreasonableness of an employer's pre-contact recruitment efforts. *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991)(*en banc*). In *Loma Linda Foods*, we held that four weeks is an unreasonably long time to organize the contact of twenty-one applicants. *Id.* Here, faced with an applicant pool that did not require extensive contacts, where the recruitment was handled locally and where there was a similarly small total number of applicants, we reach the same conclusion.

ORDER

For the foregoing reasons, 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.