U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 December 2007

BALCA Case No.: 2007-INA-00010
ETA Case No.: P-05013-23497

In the Matter of:

EL JALISCO MEXICAN RESTAURANT,
Employer,

on behalf of

JOSE LUIS VERA,
Alien.

Appearance: P. Matthew Carruthers, Jr., Esquire
Greenville, South Carolina
For the Employer and the Alien

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center

Before: Chapman, Wood and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the U.S. Department of Labor Certifying Officer's ("CO") denial of its application for labor certification. Permanent alien labor certification is governed by section 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.").[1]

STATEMENT OF THE CASE

On April 24, 2001, the Employer filed an application for labor certification to enable the Alien to fill the position of "Restaurant Manager." (AF 107). The Employer required two years of experience in the job offered. The job duties were stated to be:

> MANAGE RESTAURANT OPERATIONS. MAINTAIN HIGH QUALITY OF FOOD SERVICE. SUPERVISE EMPLOYEES INCLUDING CHEFS, WAITERS, AND CLEANERS. SET WORK SCHEDULES. PREPARE BUDGETS AND OPERATIONAL REPORTS. ASSIST WITH MARKETING AND GOODWILL EVENTS.

On March 2, 2004, the State Workforce Agency supplied the Employer with the applications of five U.S. workers whose resumes suggested that they met the minimum qualifications for the position. (AF 65). The Employer's recruitment report indicated that it interviewed three of the applicants, and that none were hired. (AF 113). Two applicants were not interviewed. The report stated in regard to the first applicant who was not interviewed ("Applicant 1"): "Tried to reach 6 times with no luck; Based on resume, applicant has no experience managing or working in restaurants." (AF 112). In regard to the second applicant who was not interviewed ("Applicant 2"), the report, which in the Appeal File is partially obscured, appears to state that the Employer tried to reach him six times. The part of the report that is not obscured clearly states "did not respond." (AF 112) The report appears to include a rejection based on the applicant's

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

resume for failure to show experience in preparing budget and operational reports. (AF 112).

On May 23, 2006, the CO issued a Notice of Findings ("NOF") proposing to deny certification based on violations of 20 C.F.R. §656.20(c)(8) and 20 C.F.R. 656.21(b). (AF 55-56). After the U.S. Postal Service returned mail sent to the Employer as undeliverable, the CO's office was unable to verify the Employer's existence. Thus, the NOF raised the issue of whether the Employer actually existed as an entity that could provide bona fide employment to the Alien, and directed the Employer to submit a number of documents to verify its viability, such as its most recent business tax return, copies of its last four quarterly state unemployment insurance filings, a list of its employees, and any documents -- such as Yellow Page listings or company advertisements -- which might document the Employer's existence. The CO also questioned whether U.S. applicants had been rejected for lawful job-related reasons, noting that telephone calls placed by the Employer to U.S. applicants had failed to reach the applicants, and that despite this failure, no other attempts to contact the U.S. applicants appeared to have been made.

The Employer submitted rebuttal on June 29, 2006. (AF 52). In regard to the issue of its viability as a business, the Employer stated in a cover letter that it was providing a copy of its 2005 tax return, and noted that it had had other labor certifications certified by the Department of Labor. The copy of the rebuttal submission in the Appeal File, however, does not contain a tax return. In regard to the recruitment issue, the Employer argued that the two U.S. applicants at issue, on the face of their respective applications, did not have the minimum required experience for the job of Restaurant Manager. Moreover, the Employer contended that six attempts had been made to contact those applicants by cell phone. The Employer stated it had requested copies of the telephone records and would forward them upon receipt. By correspondence dated

August 22, 2006, the Employer submitted telephone records for March 7 and 8, 2004. (AF 50).

A Final Determination denying certification was issued on September 18, 2006. (AF 44). The CO found that the cell phone record showed only that a single phone call was placed to each of the two applicants at issue, with each call lasting at most one minute. The CO pointed out that this evidence contradicted the Employer's earlier statements that it had attempted to reach each of these applicants on at least six occasions. Furthermore, given the length of the telephone calls, the CO questioned whether the Employer even left a message for each of the applicants. With regard to the issue of the Employer's existence, the CO stated that the Employer had failed to provide the documentation requested. The CO stated that while Employer had indicated it was providing a copy of its tax return, none was submitted. The CO also pointed out that the NOF sent to the Employer's address was returned as undeliverable, with no explanation having been provided by the Employer that it had changed locations. Accordingly, labor certification was denied.[2]

The Employer filed a Request for Review by the Board on October 26, 2006. (AF 1). The Employer attached an affidavit from its General Manager, a copy of the ETA 750, company tax returns for 2005, and copies of other documentation relevant to the employer-existence issue. The General Manager attested that he attempted to contact the applicants on his cellular phone and on the Employer's office telephone; that he tried to make contact "about six times;" and that the cellular phone records that were sent were all that could be obtained. The General Manager argued that the applicants were not qualified or did not have further interest in the job.

[2] The CO also found a violation of 20 C.F.R. §656.21(a), inasmuch as Employer failed to return, in rebuttal of the NOF, the ETA 750, Parts A and B and supporting documentation which accompanied the NOF.

Following docketing of this matter by the Board, the Employer filed a Statement of Position in which it contends that the CO erred because it did, in fact, send its 2005 tax returns, W-2s, a list of employees, and a copy of its Yellow Page listing. As to the rejection of U.S. applicants, the Employer contends that the two U.S. applicants at issue were rejected for lawful reasons, as on the face of their applications these applicants did not have the minimum required experience for the job. The Employer also argues that the telephone records were not inconsistent with its statement that it tried to contact the applicants on six occasions, contending that the telephone records only show the date that the Employer actually contacted the applicants. The Employer argues that during these telephone interviews it was determined that the applicants were not qualified, and the applicants stated that they were not interested in the job.

DISCUSSION

Rejection of U.S. applicants

Initially, we consider the Employer's argument that the two applicants at issue were not qualified based on their resumes. The Board has held where a U.S. applicant's resume indicates that he or she meets the broad range of experience, education, and training required for the job, thus raising the reasonable prospect that he or she meets all of the Employer's stated actual requirements, the Employer has a duty to make a further inquiry, by interview or other means, into whether the applicant meets all of the actual requirements. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (en banc). In the instant case, Applicant 1 had over seven years of experience as a "Head Trainer, Fill-In Manager, Waitress," and six months of experience as an "Assistant Manager." (AF 93). Applicant 2 had 11 months of experience as the owner of a "sub" company, almost four years of experience as a "Kitchen Manager" for a café, about 14 years of experience as the owner of a corporation consisting of three restaurants, and almost 17 years of experience as the store manager of a K-Mart. We find that these

resumes showed sufficiently reasonable prospects for qualification for the job, such that they could not be rejected solely on the basis of their resumes.

Next, we consider the Employer's argument that it engaged in good faith efforts to contact the applicants. In *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (en banc), the Board described what constitutes adequate documentation of good faith efforts to contact and recruit U.S. workers:

> What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the particular facts of the case under consideration. Where an employer establishes timely, actual contact, *ipso facto*, a reasonable effort is proved. *HRT Clinical Laboratory*,1997-INA-362 (March 10, 1998). In some circumstances it requires more than a single type of attempted contact. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*). An employer who does no more than make unanswered phone calls or leave a message on an answering machine has not made a reasonable effort to contact the U.S. worker, where the addresses were available for applicants; in such a case the employer should follow up with a letter – which may be certified mail, return receipt requested. *Any Phototype, Inc.,* 1990-INA-63 (May 22, 1991); *Gambino's Restaurant,* 1990-INA-320 (Sept. 17, 1991).

M.N. Auto Electric Corp., *supra*, USDOL/OALJ Reporter at 10-11.

The Employer's argument in the instant case is inconsistent and lacks credibility. The Employer's recruitment report clearly states that six attempts were made to contact the two applicants at issue, and that neither was actually contacted. The initial rebuttal similarly states that six unsuccessful attempts were made to call the applicants on a cell phone. As the CO found, the phone records submitted as a supplement to the rebuttal show only a single call to each applicant for a duration of one minute or less.[3] Yet on appeal, the Employer's attorney asserts that the Employer actually spoke to the applicants

[3] We note that the phone records show several calls with other parties lasting much longer than one minute. (AF 50).

on the date that the phone records show a call, and that it was in telephone interviews that it was determined that the applicants were not qualified and that they stated that they were not interested in the job.

We concur with the CO that the evidence of one minute or less for telephone contact with the applicants is inadequate to establish good faith efforts to recruit. If the Employer actually spoke to the applicants, it is not credible to believe that one minute was enough time to introduce the reason for the call, determine that the applicants did not have the requisite experience, and receive a statement from the applicants that they were not interested in the position. If the Employer's attorney misunderstood the facts of the case in the appellate brief, and the Employer never actually talked to the applicants, then the absence of any attempt to follow up the phone calls with a letter exhibits a lack of good faith effort by the Employer to contact and consider these potentially qualified U.S. applicants. On this basis, we affirm the CO's denial of certification.

Failure to timely submit rebuttal evidence on the employer- existence issue

An employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc). Thus, upon a request by the CO, a petitioner must provide documentation to prove the existence of an on-going business and job opening. *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991).

In the instant case, the CO reasonably requested relevant documentation to establish that the Employer actually existed as a viable business. Although the Employer's rebuttal cover letter stated that it was providing a copy of its 2005 business tax return, the CO did not find such documentation in the rebuttal submission.

In the Employer's appellate brief, the Employer's attorney asserts that his office provided the CO with the 2005 tax returns, and W-2s, a list of employees, and a copy of the Yellow Page listing for the Employer. However, there is no indication in the cover letter to the rebuttal that the Employer was submitting anything other than the 2005 tax return on the employer-viability issue. If the Employer had provided the Yellow Page listing, the CO would have had no reason to observe that the NOF mailed to the Employer had been returned as undeliverable. Moreover, as illustrated by the appellate brief's argument that the Employer actually spoke to the applicants (which is directly contradictory to the Employer's own statements), it appears that the Employer's attorney did not have a clear understanding of the facts of this case when he filed his appellate brief.

We find, based on the record before us, that the Employer did not submit documentation regarding its viability as a business until the time of its request for review.[4] Thus, we find that the Employer failed to provide, at the time of its rebuttal, directly relevant and reasonably obtainable documentation specifically requested by the CO to prove the existence of an on-going business and job opening. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) ("Under the regulatory scheme of 20 C.F.R. [Part 656], rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued.")

[4] The Board's scope of review is limited to the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. §§ 656.26(b)(4) and 656.27(c). Thus, evidence first submitted with the request for review is not considered by the Board. *Import S.H.K. Enterprises, Inc.,* 1988-INA-52 (Feb. 21, 1989) (*en banc*).

ORDER

Based on the foregoing, the Final Determination of the Certifying Officer denying labor certification is hereby AFFIRMED.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

PAMELA LAKES WOOD, Administrative Law Judge, concurring.

I concur in the result based upon the Employer's failure to submit timely rebuttal evidence.

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, N.W.
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 typewritten pages. Upon the granting of a petition the Board may order briefs.