BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE:April29, 1997

CASE NO: 95-INA-619

In the Matter of:

KAREL DEVEER
Employer,

On Behalf of:

URTADO R. GUTIERREZ
Alien

Appearance: Michael Reino, Esq.
Santa Barbara, California
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Ruben Gutierrez Urtado("Alien") filed by Employer Karel Deveer("Employer") pursuant to § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On November 2, 1993, the Employer filed an application for labor certification to enable the Alien to fill the position of landscape gardener for her property management business.

The duties of the job offered were described as follows:

> Plans and executes small scale landscape operations and maintains grounds and landscape of private and business residences. Plants lawns, and plants and transplants shrubs and plants using manual and power operated equipment. Plans new and repairs established lawns. Locates, plants and maintains shrubs, trees, and flowers. sprays trees and shrubs. Applies fertilizers. Installs drain tiles and drip watering systems. Makes repairs to concrete and asphalt walks and driveways.

No education and two years experience in the job were required. Wages were $6.00 per hour. Special requirement was must be able to work weekends. (AF-23-58)

On September 21, 1994, the CO issued a NOF denying certification, finding that the Employer rejected U.S. workers for other than job related reasons in violation of 20 C.F.R. 656.21(b) and/or 656.21(j)(1)(iii) and (iv). Specifically, John Goodpasture appeared to meet the minimum requirements. The CO stated: "The employer states in part, that "We contacted Mr. Goodpasture by phone on June 20, 1994. He indicated that he was currently self employed and was looking for a part time position to supplement his income." Employer further stated that Mr. Goodpasture was seeking a position where there was possibility for rapid advancement and a higher rate of pay. Although employer has made the above statements regarding Mr. Goodpasture, the fact that he was fully informed as to the job duties, requirements and salary when he applied, indicates that he was definitely interested in this job. The applicant responded to a questionnaire sent to him stating that he was contacted by mail but was not scheduled for an interview and was not interviewed.

He further feels that he meets the requirements of the job offer." (AF-18-21)

On October 12, 1994 Employer forwarded a rebuttal stating that Mr. Goodpasture had been interviewed and was not willing or available. He was working part time and wanted another part time job and was looking for a job that provided advancement. After being told of the limited opportunity for advancement, Mr. Goodpasture terminated the interview. Employer acknowledged that applicant was qualified but would only give up his current job for $20.00 per hour with a large company. Employer further stated:"Word of mouth only produced applicants without proper documentation, which is why we entered the process in the first place." (AF-14-17)

A Final Determination was issued October 31, 1994, denying labor certification since Employer had not documented lawful rejection of U.S. worker as specifically requested. (AF-11-13)

On December 5, 1994, Employer requested review of the Final Determination by this Board. (AF-1-10).

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Employer was invited to provide documentation showing that the applicant was not willing or available to work. Rather than follow up or otherwise document applicant's unwillingness or unavailability, Employer in its rebuttal apparently merely reiterated its position. This alleged unavailability of Mr. Goodpasture seemed to be a subjective determination that did not reflect a good faith effort to recruit. Particularly, Employer alleged that Mr. Goodpasture was "overqualified and knows it". Overqualification is not grounds for rejection absent applicant's actual refusal. Moreover the tone of Employer's rebuttal indicates she may have unlawfully discouraged intentionally applicant's pursuit of the job opportunity. Noh Mask and Unfolding Futon, 89-INA-144 (February 7, 1990). A note to the files indicates that the CO's office, October 31, 1994, followed up on their previous questionaire sent to applicant Goodpasture, and confirmed again that Mr. Goodpature was still interested in the position and at the wages offered. (AF-14)

Since the CO correctly determined that a good faith recruitment effort had not been made, the denial of certification was reasonable.

ORDER

The Certifying Officer's Denial of Certification is affirmed.

For the Panel

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JOHN C. HOLMES
Administrative Law Judge

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.

BALCA VOTE SHEET

Case Name: **Alice M. Synnott**
(Claudia Olivera)

Case No. : 95-INA-235

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			

Huddleston			

Thank you,

Judge Neusner

Date: