BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

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Date: January 26, 1998
Case Nos: 97-INA-0092

In the Matter of:

SUSIE'S DEALS
Employer

On Behalf of:

EMELIE H. MARASIGAN
Alien

Appearance: Jack Golan, Esq.
for the Employer and the Alien

Before: Holmes, Jarvis and Vittone
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, Emelie H. Marasigan ("Alien") filed by Employer Susie's Deals ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, New York denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) 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 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 arguments of the parties.

STATEMENT OF THE CASE

On November 21, 1995, the Employer filed an application for labor certification to enable the Alien to fill the position of Bookkeeper/Full Charge in Employer's retail clothing company.

The duties of the job offered were described as follows:

"Maintains records, verify, allocate & post details of business transaction; prepare payroll, statements & file reports. S/he will: apply knowledge of accounting software, lotus 123, analyze and reconcile accounts; verify and record details of transactions to reflect status of accounts based on records, invoices, sales records, costs of products, inventory records, requisitions and commission; maintain and prepare records of accounts receivable & payable, trial balances, quarterly reports, profit & loss statements, payroll and bank reconciliation."

A high school education was required and two years job experience. No special requirements. Wages were $11.21 per hour. 18 applicants were referred by the State employment service.(AF-36-155)

On April 24, 1996, the CO issued a NOF denying certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(2)(6) and/or 656.21(j)(1) and 656.24(b)(ii) in that the rejection of applicant Angela Morris was unwarranted. The CO quoted Employer's reasons for rejection of this applicant as follows: "We asked Ms. Morris job related questions. She is not knowledgeable in allocating and posting of debits and credits, she also did not do well in payroll related questions. Furthermore she was not able to figure interest rates and she can not balance a bank statement. We therefore concluded that Ms. Morris does not qualify for the offered position."

The CO listed applicant's strong background of six years experience with several companies in the bookkeeping and accounting area as well as courses taken in Accounting and Business Management at California State University. "In view of the applicant's background (Employer's) assertions that she is not knowledgeable in allocating and posting of debits and credits

are far fetched, and unreliable." Similarly, the CO found Employer's assertions that applicant did not do well in payroll related questions, was not able to figure interest rates and balance a bank statement were unreliable. Additionally, the CO noted that the job opportunity did not make reference to applicant testing, yet apparently testing was done.

Further, the EDD questionnaire indicates the applicant was given "short shrift" by Employer and that the job opportunity was presented to her in a very negative manner. "It therefore seems the employer engaged in deliberate efforts to discourage the applicant's continuing interest in the job opportunity. This means there was no good faith recruitment toward the U.S. worker." Corrective action required specific documentation of rejection at time of referral for lawful job-related reasons. (AF-31-34)

Employer, May 28, 1996, forwarded its rebuttal through counsel, alleging the applicant, Angela Morris, was rejected for lawful reasons. Employer's Controller stated that the company has approximately 350 workers and needed a bookkeeper "full charge". Employer expressed wonder why the applicant was not able to give correct answers to simple questions relating to payroll functions. He sympathized with applicant's attitude that payroll functions are tedious and boring. "Whether, Ms. Angela Morris was unable to do the work, or whether she was reluctant to do it, was immaterial. It was obvious she did not fit our structure and our needs."

Finally, Employer alleges that the case analyst engaged in a pattern of arbitrary and capricious conduct in issuing 10 separate Notice of Finding denials on the same day, all involving the same profession of bookkeeping. "It seems there is a pattern here of a preconceived intent to find fault with employers and deny cases, by any means possible. Remarkably, in all 10 cases the "fault finding" relates to a single applicant and (the Analyst) finds fault with the way the employer interviewed <u>the</u> applicant." (AF-17-30)

On June 27, 1996, the CO issued a Final Determination denying certification. The CO found that employer's reasons for rejecting applicant Morris was on "totally independent grounds" of applicant's hostility to the job requirements rather than the NOF's requirement of documentation of the job opportunity being open to U.S. workers.(AF-12-16)

On July 22, 1996, Employer filed a request for review of the Final Determination. (AF-1-11)

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. <u>Our Lady of</u>

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).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent., Inc., 87-INA-607 (1988). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 88-INA-32 (April 5, 1989) The Employer has the burden of production and persuasion on the issue of lawful rejection and must take steps to ensure that it has rejected U.S. applicants for lawful job-related reasons. Cathay Carpet Mill, Inc., 87-INA-161 (Dec. 7, 1988)(en banc).

We find the CO's determination was correct on the narrow basis that applicant's statements concerning the interview wherein she was rejected is more credible than Employer's version that she was unwilling and not knowledgeable of the requirements of the job opportunity. A CO may properly give greater weight to the applicant's statements. Jack Abbatiello Landscaping, 96-INA-00032 (June 4, 1997) In this case we accord greater weight to the applicant's statements which are consistent with her background and are credible. The evidence suggests Employer attempted to actively discourage applicant Morris from further pursuing the job opportunity.

Employer raises a legitimate concern involving alleged bias in that similar cases were initially decided by the examiner on behalf of the CO on the same day with the same basic job opportunity and with only one U.S. applicant in each case being cited as unlawfully rejected. We note in the case at hand, resumes of 18 applicants were forwarded to employer. It is entirely possible that only one was cited by the CO as an unlawful rejection since such would be more efficient and time-saving. In doing so, however, the CO does run the risk that even though the "candidate" selected may seem to be the best qualified, other matters may arise which cause certification to be mandated even where it would appear many qualified and willing U.S. workers are available for the job opportunity. Further, while Employer has the burden of persuasion, the CO should make all efforts to provide due process, even under the heavy caseload inherent in the process and to avoid even the perception of bias. Employer's allegations here, however, do not substantiate CO bias.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge