U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: (2/19/99)

Case No.: **1998 INA 185**

In the Matter of:

R. A. KELLY CONTRACTING, Employer,

on behalf of

JOAN WILLIAMS, Alien.

Appearance: C. D. Yates, Esq., of Rockville, Maryland, for the Employer and Alien
Certifying Officer: R. E. Panati, Region III.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of JOAN WILLIAMS ("Alien") by R. A. KELLY CONTRACTING ("Employer") under § 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 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

An alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa under § 212(a)(5) of the Act, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not

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[1]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). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

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

STATEMENT OF THE CASE

Application. On February 26, 1997, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Bookkeeper" in its Residential & Commercial Construction business. The position was classified as "Bookkeeper" under DOT Occupational Code No. 210.382-014[2]. Employer described the Job Duties as follows:

> Keep records of financial transactions for construction company, using calculator and computer. Verifies, allocates, and posts details of business transactions to subsidiary accounts in journals or computer files. Obtains and organizes information from sales slips, receipts, check stubs, and computer printouts. Reconciles and balances accounts. Calculate employee wages from time sheets, and prepare checks to pay wages. Calculate withholdings, social Security, and other taxes to be withheld.

AF 13.[3] The Employer's qualifications two years of "training" or bookkeeping, plus two years of experience in the Job Offered or in the Related Occupation of "accountant, bookkeeper, account clerk." This was a forty hour a week job from 9:00 AM to 5:00 PM, at a salary of $14.15 per hour with overtime, "as needed," at time and a half. *Id*. Although several U.S. workers applied

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[2] 210.382-014, **BOOKKEEPER** (Clerical) Keeps records of financial transactions for establishment, using calculator and computer: Verifies, allocates, and posts details of business transactions to subsidiary accounts in journals of computer files from documents, such as sales slips, invoices, receipts, check stubs, and computer printouts. Summarizes details in separate ledgers or computer files and transfers data to general ledger, using calculator or computer. Reconciles and balances accounts. May compile reports to show statistics, such as cash receipts and expenditures, accounts payable and receivable, profit and loss, and other items pertinent to operation of business. May calculate employee wages from plant records or time cards and prepare checks for payment of wages. May prepare withholding, Social Security, and other tax reports. May compute, type, and mail monthly statements to customers. May be designated according to kind of records of financial transactions kept, such as Accounts-Receivable Bookkeeper (clerical), and Accounts-Payable Bookkeeper (clerical). May complete records to or through trial balance. GOE: 07.02.01 STRENGTH: S GED: R4 M4 L3 SVP: 5 DLU:77

[3] The Alien is a National of Trinidad & Tobago, where she was born 1953. She attended high school and a completed other programs in secretarial studies from 1968 through 1975. In 1989 and 1990 she also took training in Montessori teaching and in word processing. During 1976 she worked as an account clerk for an insurance company. From 1976 to 1984 she worked in a clerical position in the Police Department of Port of Spain. During 1989 and 1990 she was a teacher at a Montessori Preschool, after which she was unemployed and remained at home until mid-1991. From Mid 1991 to the date of application she was self-employed operating a babysitting service in the U.S.

for the job, the Employer did not hire any of the candidates.

Notice of Findings. On December 24, 1997, the Certifying Officer (CO) issued a Notice of Findings ("NOF") proposing to deny certification. AF 09-11. The CO found the application failed to comply with 20 CFR §§ 656.20(c)(8), 656.20(g)(3), and 656.21(b)(6), and concluded that it failed to conduct a good faith recruitment effort under the Act and regulations. (1) The NOF found that the application did not contain proof that the notice filed or the dates it was posted under 20 CFR § 656.20(g)(3). Employer was directed to file evidence that it had complied with this regulation. (2) Alluding to the applications and resumes of Mr. Miller and Ms. Kessler, the NOF said both candidates were apparently qualified for the position offered the Alien but were rejected by the Employer for reasons that were neither lawful nor job related under 20 CFR §§ 656.20(c)(8) and 656.21(b)(6). (3) Citing 20 CFR §§ 656.20(c)(8) and 656.21(b)(6), the NOF said the Employer also had rejected Ms. Smith and Mr. Fitzgerald because it was unable to contact them by telephone. The CO explained,

> When the employer has the addresses and telephone numbers of applicants, the employer cannot simply state that he/she was unable to contact the applicant via telephone. An initial attempt at phone contact, and, if unsuccessful, following-up with a certified letter, is a minimally acceptable effort. A failure to contact applicants at all is essentially considered an untimely contact. The actions also indicate lack of a "good faith" recruitment effort.

AF 10-11.

Rebuttal. The Employer's rebuttal was filed on January 20, 1998. AF 07-08. The rebuttal consisted of a letter by the Employer, whose argument explained and contested the NOF findings. (1) The rebuttal enclosed a completed copy of the posting notice. (2) The rebuttal offered an explanation of the rejection of the qualified U. S. workers. The Employer said it rejected Mr. Miller "because a reference phone was not in service, and because his references were old." The Employer rejected Ms. Kessler "because from the discussion with T. Brady, I was left with the impression that her computer skills would not be adequate for the position" as advertised, and the other references were not satisfactory. (3) The rebuttal also offered an explanation of the Employer's rejection of other U. S. workers. Employer said, "In the case of Brenda Smith and Zeb Fitzgerald, my inability to contact them by phone disqualifies them for the Position." Employer said, "Ms. Smith should be disqualified because she did not keep her phone connected. If she cannot arrange to pay her own bills on time, or to leave accurate forwarding information, how can I expect her to keep track of the business accounts, payrolls, tax transactions and cashflow." It continued, "If Mr. Fizgerald cannot give an accurate phone number, how can I expect him to keep track of the various accounts, receipts, and transactions that are part of our financial records." As to a third U. S. applicant the Employer said, "Mr. Hayden did contact me, but never appeared for his interview, nor did he make arrangements for a more convenient date. I believe that he no longer was interested in the position." AF 07-08.

Final Determination. The CO's Final Determination of February 4, 1998, denied alien labor certification. AF 03-06. (1) The CO reviewed the record and concluded that the Employer's rebuttal evidence cured the cited violations of 20 CFR § 656.20(g)(3). (2) The CO discussed the rebuttal of NOF findings that Employer rejected qualified U. S. workers, Kessler and Miller, in violation of 20 CFR §§ 656.20(c)(8) and 656.21(b)(6), concluding that Employer's response sustained its burden of proof as to these cited violations, as well.

(3) After reviewing the NOF and the rebuttal the CO addressed the rebuttal's reasoning in discussing the connection between the Employer's violation of 20 CFR §§ 656.20(c)(8) and 656.21(b)(6) and its rejection of Ms. Smith and Mr. Fitzgerald:

> This response does not successfully rebut the violations cited in the Notice. As stated in the Notice of Findings, when the employer has the addresses and telephone numbers of applicants, the employer cannot simply state that he/she was unable to contact the applicant via telephone. An initial attempt at phone contact, and, if unsuccessful, following-up with a certified letter, is a minimally acceptable effort. Your rebuttal response clearly shows that you made no efforts to contact these two (2) applicants via certified mail after you were unsuccessful at contacting them by telephone. As stated in the Notice of Findings, the burden of proof is on the employer to show that U.S. workers are not able, willing, qualified or available for this job opportunity. You, the employer, bear the burden of providing evidence that the applicants are (1) not able to perform the job duties; (2) not willing to accept the job; (3) not qualified for the job opportunity; and/or (4) not available for the job opportunity. If you are unable to contact an applicant via the telephone, then following-up with a certified letter is a minimally acceptable effort. Additionally, by you failing to contact or attempt to contact them by sending a certified letter, you have no proof that you made a good-faith effort to contact and consider them. You have, therefore, not met the burden of proof showing the U.S. workers are not able, willing, qualified or available for the job opportunity. Therefore, your failure to contact these applicants via certified letter is essentially considered an untimely contact and your actions also indicate lack of a 'good faith' recruitment effort.

(Quoted verbatim without change or correction.) Concluding that the Employer's application was in violation of 20 CFR §§ 656.20(c)(8) and 656.21(b)(6), the CO denied certification. AF 03-06.

Appeal. By its letter of February 23, 1998, the Employer appealed to BALCA, contending that it met its burden of proof by showing that the applicants Smith and Fitzgerald were not able to perform the job duties and were not qualified for the position, and repeated the arguments in its rebuttal as to its violation of 20 CFR §§ 656.20(c)(8) and 656.21(b)(6).

Discussion

Burden of proof. As the CO's denial of alien labor certification was based on the Employer's failure to sustain its burden of proof, the Panel observes that labor certification is a

privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... .[4]

Moreover, since the Employer applied for alien labor certification under this exception to the broad limits of the Immigration and Nationality Act on immigration into the United States, which Congress adopted in the 1965 amendments, the Panel's deliberations concerning the award of alien labor certification are subject to the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

Issue. As an employer must sustain the burden of proof as to all issues arising in the application, to establish entitlement to certification under the Act, the Employer in this case was required to show that its response to the referral of workers for this position was consistent with the requirement that it acted in good faith in the recruitment process. As a consequence, the issue referred to BALCA is whether the evidence of record supported the CO's finding that the Employer failed to sustain its burden of proving that it made a sufficient effort to contact the U. S. workers whom the state employment security agency referred for the Job Offered.

Analysis and Conclusion. The Employer's violation of 20 CFR §§ 656.20(c)(8) and 656.21(b)(6) was based on its rejection of Ms. Smith and Mr. Fitzgerald for the sole reason that it could not reach them by telephone. AF 10-11. Notwithstanding its argument on appeal, the Employer's rebuttal said, "[M]y inability to contact them by phone disqualifies them for the Position." The Employer said that if Ms. Smith "cannot arrange to pay her own bills on time, or to leave accurate forwarding information, how can I expect her to keep track of the business accounts, payrolls, tax transactions and cashflow," and if Mr. Fizgerald "cannot give an accurate phone number, how can I expect him to keep track of the various accounts, receipts, and transactions that are part of our financial records." *Cf supra*. The Employer's appellate argument concluded that these applicants were rejected because they did not meet its hiring criteria for

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[4] The legislative history of the 1965 amendments to the Immigration and Nationality Act clearly shows that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

these reasons.

Other than the characteristics discussed above, the Employer's recruitment report, rebuttal, and appellate argument did not identify any job requirement in its Application that these two U.S. workers did not satisfy. Consequently, this appeal turns on whether the lack of such qualifications is a lawful, job related reason for rejecting these applicants within the meaning of 20 CFR §§ 656.20(c)(8) and 656.21(b)(6). First, Employer's application did not set forth the attributes of diligence and character on which the Employer's rebuttal relied in justifying its rejection of Ms. Smith and Mr. Fitzgerald. As the Alien's qualifications do not suggest that she acquired such qualifications in her work experience, there is no reason to include them among the Employer's actual minimum job requirements under 20 CFR §§ 656.21(b)(5) and (6). This argument lacks credibility because it is based on the imposition of an inherently subjective criterion that cannot be measured, and its validity is otherwise unsupported. Finally, the Employer's rebuttal failed to address the NOF finding that it had the addresses and telephone numbers of these applicants, simply stating that it was unable to contact these applicants by telephone. The CO found that upon the failure of the Employer's initial attempt at phone contact its obligation was to follow-up with a certified letter as "a minimally acceptable effort. The Employer's failure to establish that it made a diligent effort to contact these applicants is a material defect in the recruitment process. **Gorchev & Gorchev Graphic Design**, 89 INA 118 (Nov. 29, 1990)(*en banc*); **The First Boston Corp.**, 90 INA 059 (Jun. 28, 1991).

Observing that the failure to contact job applicants is considered an untimely contact, the CO said Employer's total failure to attempt to reach Ms. Smith and Mr. Fitzgerald by any other form of business communication indicated lack of a "good faith" recruitment effort. Since the Employer failed to establish that it made a good faith effort to contact Ms. Smith and Mr. Fitzgerald, its rejection of them for the sole reason that it was unable to reach them by telephone violated 20 CFR § 656.21(b)(7); it indicated that the job opportunity was not open to any qualified U. S. worker under 20 CFR § 656.20(c)(8); and it supported the inference that the Employer failed to recruit in good faith. As it is well established that a presumption that the employer is required to recruit in good faith is implicit in the regulations, **H. C. LaMarche Enterprises**, 87 INA 607(Oct. 27, 1988), certification was properly denied. **Spellman High Voltage Electronic Corp.**, 93 INA 273 (Jun. 27, 1994). The CO's denial of certification is affirmed for the reasons discussed above.

Accordingly, the following order will enter.

Order

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

For the panel:

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FREDERICK D. NEUSNER
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.

SERVICE SHEET

Case No.: 98 INA 185
R. A. KELLY CONTRACTING, Employer,
JOAN WILLIAMS, Alien.

Title : Decision and Order

I certify that on , 1998, the above-named document was mailed to the last known address of each of the following parties and their representatives:

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BALCA VOTE SHEET

Case No.: 98 INA 185
R. A. KELLY CONTRACTING, Employer,
JOAN WILLIAMS, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner
Date: November 24, 1998