

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue date: 17Jun2002**

**BALCA Case No.:** 2001-INA-125  
**ETA Case No.** P1998-CA-09062954/ML

*In the Matter of:*

**EDITH MUNK,**  
*Employer,*

*on behalf of*

**EMILIA CERVANTE-CUETLACH,**  
*Alien.*

Appearance: Susan Jeanette, Esq.  
Del Mar, California  
For the Employer

Certifying Officer: Martin Rios  
San Francisco, California

Before: Chapman, Holmes and Vittone  
Administrative Law Judges

JOHN C. HOLMES  
Administrative Law Judge

**DECISION AND ORDER**

This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook.<sup>1</sup> The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

**STATEMENT OF THE CASE**

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<sup>1</sup> 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."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

On June 28, 1996, Employer, Edith Munk, filed an application for labor certification to enable the Alien, Emilia Cervantes-Cuetlach, to fill the position of "Domestic Cook." (AF 271). Two years of experience in the job offered was required.

On October 18, 2000, the CO issued a Notice of Findings, ("NOF"), proposing to deny certification. (AF 266). Specifically, the CO found that the application contained insufficient information to determine whether the position of Domestic Cook actually existed in the household or whether the position was created solely for the purpose of qualifying the Alien as a skilled worker under current immigration law.<sup>2</sup> Employer was directed to provide rebuttal which explained why the position should be considered a bona fide job opportunity rather than a job opportunity created solely for the purpose of qualifying the Alien as a skilled worker. The information, at a minimum, needed to include responses to the eight questions set forth in the NOF.

The CO also found that there had been an insufficient recruitment effort in violation of 20 C.F.R. §656.21(b)(6) and §656.20(c)(8). In this respect, the State of California's Employment Development Department ("EDD") had sent fourteen resumes to Employer, and according to the CO, there was insufficient evidence of Employer's good faith efforts to recruit those U.S. workers. With regard to one applicant, Loclear[sic], it was determined that Employer's comment that Loclear was not planning "to be with us long" was indicative of a lack of good faith recruitment. Employer was requested to provide details of her attempts to interview the U.S. applicants, such evidence to include attempts made in writing (supported by return receipts) and by telephone (supported by telephone bills). The evidence in hand was not convincing that Employer's efforts to contact applicants took place at all, or "as early as possible" as Employer had been directed to do by EDD.

By cover letter dated December 1, 2000, Employer submitted rebuttal. (AF 7).<sup>3</sup> With regard to the question raised in the NOF regarding whether Employer had employed a domestic cook in the past, Employer responded that due to her physical debilitation, dietary recommendations of her physicians and the age of her spouse (eighty years of age), coupled with their extensive entertainment schedule, the full-time services of a domestic cook were required.

On the issue of recruitment of U.S. workers, Employer stated that applicants Villa, Dopulos, and Lottes were telephoned on October 26, 1997, and that a certified mailing was made to each one of them on October 25, 1997. None of them appeared for their interviews, and

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<sup>2</sup>As the CO pointed out, there is no visa waiting period for skilled workers, while the visa waiting period for unskilled workers is very lengthy, making such visas virtually unavailable for unskilled workers.

<sup>3</sup>Given that the CO found that Employer successfully responded to seven of the eight questions raised in the NOF with regard to the position of domestic cook in the household, only that question not successfully rebutted will be set forth herein.

therefore, according to Employer, they were rejected due to lack of interest and/or availability. U.S. applicant Locklear was telephoned on October 7, 1997 and interviewed on November 3, 1997. During the interview Locklear advised that he was not interested in a permanent position because he had applied and was sure to be accepted into the Napa Cooking School. Given that the offered position was permanent and the applicant's disinterest in the job, he was lawfully rejected, according to Employer.

U.S. applicants Hernandez, Winters and Lenkowski were telephoned on October 20, 1997, and a certified letter was sent to each one. None of them appeared for their interviews, and therefore, they were rejected due to a lack of interest and/or availability. U.S. applicant Fenik was telephoned on October 29, 1997, and advised that the certified mailing of the invitation to interview might not reach her prior to the scheduled interview date of November 3, 1997 at 7:00 a.m. Fenik was interviewed and stated that she was not interested in a permanent position within the context of a domestic setting. Therefore, she was rejected due to her lack of interest and/or availability. U.S. applicant Fernandez was telephoned on October 10, 1997, an interview was scheduled and he did not appear. Therefore he was rejected due to his lack of interest and/or availability.

A Final Determination was issued on February 15, 2001. (AF 5). Employer's rebuttal was not accepted, as the CO determined that Employer had failed to adequately respond to the questions regarding the circumstances leading to the hiring of a cook, and she had failed to document good faith efforts to recruit U.S. workers. In this respect, the CO found that Employer had submitted insufficient documentation, pointing out that no certified mail receipts for applicants Fenick or Lottes were provided and that the other applicants received their certified mailings regarding invitations to interview two or more weeks after their resumes were sent to Employer. While Employer claimed to have telephoned all nine applicants, no telephone bills were submitted as directed.

On March 4, 2001, Employer requested reconsideration and/or review of the denial of labor certification by the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). (AF 2). The request for reconsideration was denied on March 28, 2001, and this matter was forwarded to BALCA. (AF 1).

### **DISCUSSION**

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§656.1, 656.2(b). Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(en banc).

In the instant case, Employer's counsel argues in the request for reconsideration that

Employer's sworn account of the specific efforts made to timely contact qualified U.S. workers should be accorded weight and indicia of reliability and veracity. Employer further contends that her narrative satisfies the documentary standard enunciated by the Board in *Gencorp*, 1987-INA-659 (Jan. 13 1988) (*en banc*). With regard to applicants Fenick and Lottes, Employer contends that copies of the letters mailed were provided, and her inability to produce return receipts evidenced the failure of these two applicants to pickup their invitation letters from the U.S. postal service.<sup>4</sup>

In a statement submitted by Employer on appeal, Employer goes into detail regarding her need for a cook. With regard to the issue of the contact made with the U.S. applicants, Employer contends that she was never told to keep her telephone bills, and would be able to provide the telephone bills by June 30, 2001.

As a preliminary matter, we will not consider the material submitted by the Employer in connection with the request for review. Our review is to be based on 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. 656.27(c). *See also* 20 C.F.R. 656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

In the instant case, Employer has provided the alleged reasons nine candidates determined they did not want the position or were otherwise rejected. Her documentation in this respect consists of her own bare assertions. She has failed, despite a request for same in the NOF, to provide proof of telephone contact.

An employer's stated reason for rejection is insufficient to establish a lawful ground for rejection of a U.S. applicant where it is a mere assertion. *Marnic Realty*, 1990-INA-48 (Nov. 21, 1990); *Quality Products of America, Inc.*, 1987-INA-703 (Jan. 31, 1989). Although a written assertion constitutes documentation that must be considered under *Gencorp, supra*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. The credibility of Employer's recruitment report was an issue clearly raised in the NOF, as was the means by which Employer could rebut the NOF. The request for proof of telephone contact was clearly made in the NOF, and ignored by Employer.

Where the CO requests a document or information which has a direct bearing on the resolution of an issue and is obtainable by reasonable effort, the employer must produce it. *Gencorp, supra*. An employer also has the burden to satisfactorily respond to or rebut all findings in the NOF. *Belha Corp.*, 1988-INA-24 (May 5, 1989)(*en banc*). Employer's failure to produce

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<sup>4</sup>This Board notes, however, that unclaimed certified mailings are routinely returned to the sender by the U.S. Postal Service.

the documentation requested in the NOF not only puts her credibility into question, but is a basis for denial of certification. Failure to submit documentation reasonably requested by the CO warrants denial of labor certification. *Rouber International*, 91-INA-44 (March 31, 1994). The instant case dictates the same result. Employer failed to produce the requested documentation which Employer concedes existed, and which she belatedly offers to provide in her appeal.

Based upon Employer's failure to provide documentation reasonably requested by the CO, we find that certification was properly denied. This being the case, the remaining issues need not be addressed, and the following order shall issue.

### **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

**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.