

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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Washington, DC 20001-8002



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**Date Issued:** March 27, 2002

**BALCA Case No. 2001-INA-157**  
[ETA No. P1998-CA-09419519/VA]

*In the Matter of:*

**JOYFUL MANOR,**  
*Employer,*

*on behalf of*

**JOSE LIM,**  
*Alien*

Certifying Officer: Martin Rios, San Francisco, CA

Appearances: Sanford Reback, Esq.  
Los Angeles, CA  
For Employer

Before: Burke, Chapman and Vittone  
Administrative Law Judges

JOHN M. VITTONI  
Chief Administrative Law Judge

**DECISION AND ORDER**

This matter 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 Residence Supervisor for an elder care home. 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 and any written arguments. 20 C.F.R. § 656.27(c).

## STATEMENT OF THE CASE

On April 25, 1997, Employer-owner, Jasmin Ilano, filed an Application for Alien Employment Certification seeking to fill the position of "Residence Supervisor" (AF 12-13, 52-53). The primary duty for the position was to oversee the activities of six elderly residents in a care home. (AF 12). Employer required two years of experience in the job offered. *Id.*

On May 28, 1988, Employer commenced the recruitment process, following the CO's instructions for posting a job notice in a prominent place and placing an advertisement in the local newspaper. (AF 30-33, 36-38). Three potential employees responded to the advertisements. (AF 26-28). Upon review of their resumes, Employer concluded that two out of the three applicants were unqualified for the position. (AF 14-15). Although Employer did not find the third candidate to be entirely suitable for the position, it nevertheless sent a letter to her, inviting her to interview for the position. (AF 17). The third candidate never contacted Employer. (AF 14-15).

On April 16, 2001, the CO issued a Notice of Findings ("NOF"), noting its intent to deny certification on the basis that Employer failed to provide evidence to show that the letter was actually mailed to the applicant or to show that any other attempt was made to contact the applicant. (AF 7-9). The CO, therefore, advised Employer "to show how [the] applicant was recruited in good faith and rejected solely for lawful, job-related reasons," by following the standard set for documentation in *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). (AF 8).

Employer filed its Rebuttal to the NOF on May 17, 2001. (AF 5). Employer argued that Employer should not be required to submit proof of mailing in the form of a certified or return receipt to support its attempt to contact the third U.S. applicant since both the recruitment notice and final documentation notice issued by the State EDD did not state such a requirement. (AF 5). Employer averred that recruitment was performed in good faith. *Id.*

On May 24, 2001, the CO issued its Final Determination ("FD"), denying the application on the grounds that Employer unlawfully rejected a U.S. worker and failed to show good faith efforts to contact and recruit one of the applicants. (AF 3-4).

On June 12, 2001, Employer filed a Request for Administrative Judicial Review of Denial of Labor Certification. (AF 1). After the case was docketed, Employer submitted a brief, once again noting that Employer was never informed that it needed to send the letter via certified mail.

## DISCUSSION

In the recent *en banc* decision, *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*), BALCA addressed issues surrounding the use of certified mail to document reasonable recruiting efforts. The *en banc* panel held that "a CO cannot require an employer to use certified mail, return receipt requested, to prove actual contact with U.S. applicants." The Board held that "an employer must be given an opportunity to prove that its overall recruitment

efforts were in good faith, even if it cannot produce certified mail return receipts to document its contacts with U.S. applicants." The Board noted, however, that the use of certified mail, return receipt requested, is a "useful device for documenting recruitment efforts." *Id.* The Board also reaffirmed the principle that an employer might have to use more than one method to contact an applicant if the first attempt fails to elicit a response.

In this case neither the CO nor the state employment agency **prior to the issuance of the Notice of Findings** provided Employer with notice that a single, unsuccessful attempt to contact a qualified U.S. applicant requires additional attempts to contact an applicant in order to demonstrate a good faith recruitment effort, nor that Employer would be expected to document his recruitment efforts with certified mail receipts.

In *M.N. Auto Electric Corp.*, the Board wrote:

[I]t is appropriate for the CO to have local job services, when providing recruitment instructions to employers, to strongly suggest use of certified mail, return receipt requested, and to remind employers that it is their burden to establish good faith efforts at recruitment. A savvy employer would take such a recommendation as well-advised. Without such documentation, an employer may have a difficult time responding to questions about date of mailing or an assertion by a U.S. applicant that he or she was never contacted. **Instructions to the employer may also include a statement describing the employer's obligation to try alternative means of contact if one type of contact does not work ....**

*M.N. Auto Electric Corp.*, USDOL/OALJ Reporter (PDF), 2000-INA-165 at 10 (emphasis added).

While BALCA may not have the authority to dictate instructions given by local employment services to permanent labor certification applicants, it would make good sense to notify an employer prior to the commencement of recruitment that it will be the employer's burden to document good faith efforts in recruitment, and to that end, recommend that the employer use techniques, such as certified mail, return receipt requested, and copies of telephone toll records, to document their efforts. Moreover, it would be beneficial for the local employment service instructions to inform employers that alternative means of contacting applicants may be required to establish good faith in recruitment in certain circumstances.

In the instant case, employer argued on review that it was blind-sided with the requirement that alternative means of contact would be required to document good faith in recruitment. *Compare Tanya Rosenberg, Inc.*, 2001-INA-76 (Mar. 22, 2002) (affirming denial of labor certification for failure to use alternative means to contact applicants where the employer did not argue that it was not provided notice of the requirement). We hold that where no notice is provided that alternative means of contact will be required to document good faith in recruitment, the denial of certification cannot be denied **solely** on that ground. In the instant case, by the time

of the NOF, it was virtually impossible for Employer to take corrective action because any attempt to call the applicant or send a second letter via certified mail would be untimely. In such a situation, an employer should be provided the option of re-advertising if all other deficiencies in the application are rebutted.

## **ORDER**

Since we find that Employer was not given adequate notice of the need to use more than one means of contacting a job candidate, we **REVERSE** and **REMAND** the CO's Final Determination denying alien labor certification for further proceedings consistent with the foregoing.<sup>1</sup>

**SO ORDERED.**

For the Panel:

JOHN M. VITTONI  
Chief Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 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 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, NW, 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

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<sup>1</sup> In the instant case, we observe that the recruitment letter sent to Ms. Johnson pointed out that Employer's facility was smaller than the facility at which Ms. Johnson was formerly employed, then invited Ms. Johnson to apply if she felt the position might fit into her career needs and objectives. (AF 17). A recruitment letter that serves to discourage a U.S. applicant may evidence a lack of good faith recruitment. Prior to permitting a new recruitment effort, the CO may consider whether Employer's letter was intended to discourage Ms. Johnson.

for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.