



ETA Case No. **Issue Date: 22 January 2004** **BALCA Case No. 2002-INA-289**
P2000-CA-09498690/JB

In the Matter of:

VIP EXPRESS INC.,
Employer,

on behalf of

ISMAEL DIAZ-VALOIS,
Alien.

Appearance: David W. Williams, Esquire¹
Santa Ana, California
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial of alien labor certification for the position of Supervisor.² The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

¹ Employer and the Alien were originally represented by Jean-Pierre Karnos. The request for Board review was filed by James G. Roche, but the appellate brief was filed by David W. Williams, Esquire.

² Permanent alien labor certification is governed by § 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).

STATEMENT OF THE CASE

On January 14, 1998, VIP Express, Inc. (“Employer”) filed an application for labor certification on behalf of the Alien, Ismael Diaz-Valois, for the position of Supervisor. (AF 37). Eight years of grade school and two years experience in the position offered were required.

On January 31, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification pursuant to 20 C.F.R. §§ 656.21(b)(6) and 656.21(j)(1)(iii) and (iv), inasmuch as qualified U.S. applicants appeared to have been rejected for other than lawful job-related reasons.³ (AF 33-35). Specifically, six U.S. applicants appeared to have relevant experience in product distribution, yet none were invited for an interview. Employer was directed to provide the job title of the person who considered these applicants for employment, as well as a copy of the actual letter and the application form sent to the applicants. Employer was also directed to explain why it was necessary to have the applicants complete an application before they could be interviewed, as Employer had already reviewed their resumes. If Employer normally requested completed applications before arranging interviews, Employer was directed to provide documentation of that practice, as well as a copy of the application completed by the Alien before his interview. If the Alien did not complete an application, Employer was directed to explain why he was treated differently than the U.S. workers. (AF 35).

Employer submitted rebuttal on March 12, 2002 and included a copy of the application completed by the Alien, and a copy of the application and a blank form letter sent to the U.S. applicants. (AF 9-32). The form letter did not list Employer, but requested that the applicant fill out the enclosed application and return it to an address. (AF 24). Employer stated that the resumes were reviewed by the C.E.O. of the company. Employer sent the letters to the applicants by certified mail. Employer contended that it contacted the applicants in an effort to investigate their credentials and therefore, engaged in good faith recruitment. Employer argued that the request to complete and return an

³ Another issue raised in the NOF was successfully rebutted by Employer and will not be detailed herein.

application, verifying the truth of the contents therein and authorizing Employer to contact previous employers was “an important step in the recruitment process.” It was standard practice for this Employer and a “universally accepted method of initiating the screening process.” Employer stated that in this case, the candidates chose not to complete and return the application letter of April 13, 2001. (AF 9-11).

A Final Determination (“FD”) was issued on June 27, 2002. (AF 6-8). The CO determined that Employer remained in violation of 20 C.F.R. §§ 656.21(b)(6) and 656.21(j). The CO pointed out that Employer had failed to provide copies of the actual letters sent to the U.S. applicants, as requested, and the CO found that Employer’s explanation as to why the applicants were sent an application form was not persuasive. It was the CO’s position that the applicants expressed an interest by sending their resumes in response to the advertisement. The CO noted that Employer’s cover letter did not provide its name or address, nor did it indicate whether the applicant appeared qualified on the basis of his/her resume. Therefore, the applicants would not know to whom they were responding or why. Additionally, Employer provided no documentation verifying that it was his normal practice to send out an application after receipt of a resume. The CO concluded that the U.S. applicants were rejected for other than lawful, job-related reasons and that Employer had failed to demonstrate a good faith effort to recruit. (AF 7-8).

On July 5, 2002, Employer requested review of the denial of labor certification and the matter was docketed in this Office on September 13, 2002. (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); *Aquatec Water Systems*, 2000-INA-150 (Sept. 21, 2000). 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*). An employer should not discourage the applicant during the recruitment process. *Noh Mask and Unfolding Futon*, 1989-INA-144 (Feb. 7, 1990). Requiring an applicant to fill out an additional application after submission of a resume constitutes an additional hurdle, with a discouraging effect on applicants. *Sierra Canyon School*, 1990-INA-410 (Jan. 16, 1992).

Employer has submitted a brief arguing that it made a good faith recruitment effort. As evidence thereof, Employer pointed to the fact that it sent correspondence by certified mail and that the request that a candidate complete and return an employment application is standard practice. Employer did not contest the CO's finding that the six applicants not interviewed were potentially qualified. Employer claimed, however, that its procedure was not a deterrent and that the failure of these applicants to respond indicated a lack of interest and a lack of availability on their part, which were legitimate, job-related criteria for their rejection.

It is obvious from Employer's letter to the U.S. applicants that Employer engaged in less than good faith recruitment. The letters were not welcoming, and in fact, constituted an additional hurdle these applicants had to undergo prior to any personal contact from Employer. The resumes submitted were sufficient to advise Employer which applicants warranted interviews. The form letter sent out by Employer did not indicate that an interview would be scheduled and the letter did not even identify Employer. Accordingly, the letters sent had a chilling and discouraging effect on the U.S. applicants and therefore, Employer has not shown good faith recruitment. Certification was properly denied and the following Order shall issue:

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

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 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.