



Issue Date: 12 November 2003

BALCA Case No.: 2002-INA 152
ETA Case No.: P2000-NJ-02453172

In the Matter of:

APEX INTERIORS, INC.,
Employer,

on behalf of

BIREN KRISHNAKANT PARIKH,
Alien.

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

ORDER GRANTING RECONSIDERATION

The Certifying Officer's ("CO") denial of labor certification was affirmed by a panel decision of the Board on September 4, 2003. On September 24, 2003, the Board received Employer's petition for en banc review. The Board has denied en banc review. While reviewing the petition, however, a factual error in the Decision and Order was noted. As such, the Panel that originally issued the Decision and Order will consider the petition for en banc review as a Motion for Reconsideration.

On page three, paragraph four of the Decision and Order, a reference is made to Employer's attempt to contact the applicants by regular mail. The Panel indicated that Employer had not previously raised the argument that he contacted certain applicants by regular mail. Employer did present this evidence, including copies of letters mailed, in his Rebuttal. (AF 77-86). Employer, in his attempt to

comply with the CO's request for documentation of his recruitment efforts, also provided a spreadsheet detailing his contact with the applicants. (AF 77-78). Employer noted that he sent certain applicants letters and provided copies of these letters. Employer could not produce certified mail receipts, as the letters were sent via regular mail. The Final Determination mentions the lack of certified mail receipts; however, the Board has held that the CO cannot require the use of certified mail to prove good faith recruitment.¹ *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*).

Further, the FD was based primarily on the CO's finding that Employer failed to provide a letter from his telephone company stating that they could not issue itemized bills, in lieu of Employer's failure to submit an itemized telephone bill. (AF 87). In Rebuttal, Employer included a copy of a letter, accompanied by certified mail receipt, sent to WorldCom Wireless, requesting his telephone records. (AF 85). Employer made additional attempts to obtain these phone records to substantiate his assertions that he attempted telephone contact with the applicants.² Certification is properly denied when Employer fails to comply with the CO's reasonable request for documentation that is obtainable by reasonable efforts. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *STLO Corp.*, 1990-INA-7 (Sept. 9, 1991). Employer has attempted to comply with the CO's request for documentation; Employer's documented contact with his telephone company, requesting itemized records, establishes a valid question as to the reasonable availability of this documentation.

¹ Employer submitted copies of letters and certified mail receipts belatedly sent to the applicants in February 2002, after the FD was issued. The Board cannot consider these mailings, as they were sent after the issuance of the FD, were therefore untimely, and were not part of the record upon which certification was denied. See 20 C.F.R. § 656.27(c).

² Although the Board cannot base a reversal of the CO upon the receipt of additional evidence, it should be noted that Employer's brief indicates that Employer made a continued effort to obtain these phone records from his phone company, but was unsuccessful. The brief includes multiple letters from Employer to WorldCom requesting copies of itemized bill. Also included is a response from WorldCom dated February 12, 2002, stating that Employer's request is pending.

ORDER

In view of these particular circumstances, we find that the Panel decision should be **VACATED** and **REMANDED** to the CO to reconsider if the documentation provided was sufficient to establish good faith recruitment under the standards outlines in *M.N. Auto Electric Corp., supra.*

SO ORDERED.

Entered at the direction of the Board by:

A

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