



Date issued: May 20, 2003

BALCA Case No.: 2002-IN~~90~~
ETA Case No.: P1999-CA-09442532/ML

In the Matter of:

ASD ENGINEERING AND MANUFACTURING CO.,
Employer,

on behalf of

MAJID YAHYATE,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Joel G. Schwartz, Esquire
San Jose, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a machine shop for the position of Prototype Machinist. (AF 22-23).² The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. ("AF").

¹ 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 20 C.F.R. Part 656.

² "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On May 30, 1997, Employer, ASD Engineering and Manufacturing Co., filed an application for alien employment certification on behalf of the Alien, Majid Yahyate, to fill the position of Prototype Machinist. Minimum requirements for the position were listed as five years experience in the job offered. The job to be performed was described as follows:

Set up and operate machine tools; make, fit and assemble parts to fabricate mechanisms, and machines for experimental and prototype purposes. Analyzes written specifications, drawings, rough sketches and verbal instructions to plan layout and determine sequence of operations. Selects metal stock and lays out design according to dimensions computed from scale drawings. Above duties include use of CNC and protrac programs; grinder, lathe and NC milling machines.

(AF 22).

Employer received 41 applicant referrals in response to its recruitment efforts, all of whom were rejected as either unqualified, disinterested and/or unavailable for the position. (AF29-38).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on May 31, 2001, proposing to deny labor certification based upon a finding that Employer had rejected numerous apparently qualified U.S. workers for other than lawful, job-related reasons. (AF 18-20). The CO questioned the rejection of one group of 15 applicants for lack of a requirement not disclosed on the Form ETA 750A and a second group of 21 applicants for inadequate consideration for the position. In recruiting U.S. applicants, Employer sent a letter of contact requiring that before scheduling an interview the applicants “MAIL me proof of at least five(5) years of work experience as a Machinist,

such as job verification letter(s) to the above address.”(emphasis original). (AF 325). Noting that the applicants had sent sufficient proof already in the form of resumes and cover letters, the CO concluded that Employer’s “demand letter” appeared to be an effort to deter rather than recruit prospective applicants, and thus challenged Employer’s good faith recruitment effort.

In Rebuttal, Employer stated that the challenged requirement was an inherent part of the duties described, and that the verification of work experience was deemed necessary, given the large number of applicants, to ensure that those interviewed had the proper and sufficient amount of work experience. (AF 13-17).

A Final Determination denying labor certification was issued by the CO on August 29, 2001, based upon a finding that Employer had failed to adequately document lawful rejection of many of the U.S. workers who applied for the job. (AF 11-12). The CO found Employer had failed to adequately document how some of the workers interviewed would not be able to perform the job duties, and had failed to adequately justify lack of consideration of numerous other cited workers who appeared qualified. In denying certification, the CO observed “[e]very one of their resumes showed a good deal more than basic qualification for this position and more than enough to warrant a personal interview.”

Employer filed a Request for Review by letter dated October 2, 2001, and the matter was referred to this Office and docketed on February 21, 2002. (AF 1-10). Employer filed an Appeal Brief on March 14, 2002.

DISCUSSION

Congress enacted Section 212(a)(14) of the Immigration and Nationality Act of 1952 (as amended by Section 212(a)(5) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to “protect the American labor market from an influx

of both skilled and unskilled foreign labor.” *Cheung v. District Director, INS*, 641 F.2d. 666, 669 (9th Cir., 1981); *Wang v. INS*, 602 F.2d 211, 213 (9th Cir. 1979). To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Consequently, the burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b).

Federal regulations at 20 C.F.R. § 656.21(b)(6) state that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may be rejected solely for lawful job related reasons. This regulation applies not only to an employer’s formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are “able, willing, qualified and available” to perform the work. 20 C.F.R. § 656.1.

The Board has repeatedly held that where an applicant’s resume raises a reasonable possibility that he/she is qualified for the job, an employer bears the burden of further investigating the applicant’s credentials. *See, i.e., Ceylion Shipping, Inc.*, 1992-INA-322 (Aug. 30, 1993); *Executive Protective Serv., Inc.*, 1992-INA-392 (July 30, 1993); *Messina Music, Inc.*, 1992-INA-357 (July 20, 1993); *M.S.O. Dev. Corp.*, 1992-INA-326 (July 30, 1993). The employer’s responsibility to investigate can be accomplished by interview or other means. Under certain circumstances, such other means may include sending the applicant a written request for clarifying information.

However, whatever means are utilized by the employer, they many not place unnecessary burdens on the recruitment process, be dilatory in nature, or otherwise have the effect of discouraging U.S. applicants from pursuing the job opportunity. *Ryan, Inc.*, 1994-INA-606 (Sept. 12, 1995)(holding that employer failed to recruit workers in good faith where it sent follow-up letters to applicants requiring the applicants to submit excessive information).

In the instant case, we conclude that Employer failed to recruit workers in good faith. Requiring that an applicant “mail proof” of his or her work experience, “such as job verification letter(s)” before interviewing or even speaking with the applicant, had a chilling effect, which discouraged U.S. applicants from continuing to pursue this position. Employer reported that 21 (more than half) of the 41 applicants referred failed to respond to Employer’s letter/demand for “proof” of five years experience. As was noted by the CO, each of these applicants had sent proof already in the form of resumes and cover letters. Employer’s “demand letter” appears to be more of an effort to deter rather than recruit prospective applicants. On this basis, we conclude Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity, and accordingly, determine that labor certification was properly denied.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

Entered at the direction of the panel by:

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.