

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: February 20, 2003

BALCA Case No.: 2002-INA-55
ETA Case No.: P1999-CA-0944397665/VA

In the Matter of:

FELIX REYES CARPENTER,
Employer,

on behalf of

LUIS GARCIA-VALENCIA,
Alien.

Appearance: Leonard W. Stitz, Esquire
Santa Anna, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Felix Reyes Carpenter (Employer) filed an application for labor certification¹ on behalf of Luis Garcia-Valencia (Alien) on June 3, 1997 (AF 19).² Employer seeks to employ Alien as a carpenter (DOT Code: 860.381-022).³ *Id.* This decision is based on the record upon which the

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² In this decision, AF is an abbreviation for Appeal File.

³ In this decision, DOT is an abbreviation for the Dictionary of Occupational Titles.

Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

BACKGROUND

In its application, Employer described the duties of the position which it was seeking to fill as follows:

Cut, fit, assemble, install and repair structures and fixtures of wood, plywood, and wall board, using carpenter's hand tools and power tools such as drill press, power and hand saw, chisels, planes, sanders and hammer. Join said materials with nails, screws, staples or adhesives. Read sketches, blueprints, or building plans to determine dimensions of structure to be erected conforming to local building codes. Design and prepare layouts by using rulers, framing square, and calipers. Construct framework for structures and lay subflooring. Assemble chutes and forms for cement pouring.

(AF 19) Employer required no advanced education or specialized training, but did state that a "resume or letter of qualifications" was required. (*Id.*)

In the Notice of Findings, issued May 30, 2001, after informing Employer that the regulations issued pursuant to section 212(A)(14) of the Immigration and Nationality Act, as amended, were designed to assure that employers adequately test the United States job market for qualified U.S. workers before any labor certification is granted, the CO opined that there was insufficient evidence to document that Employer had made a good faith effort to recruit qualified U.S. workers to fill its job opening. (AF 16) In elaborating on this point, the CO stated,

The Job Service Office sent two resumes to the Employer on December 8, 1998. There is insufficient evidence that good faith efforts were made to contact the two

applicants. The Employer's recruitment results state that the Employer sent the applicants a letter which instructed them to complete and return an application. There is no convincing evidence as to the necessity of sending a letter which required the applicants to complete an application, when the applicants had already submitted resumes. The request for a completed application appears to be an effort to delay consideration of applicants.

(AF 16) Additionally, the CO pointed out that a signed and returned certified mail receipt had been included for only one of the two applicants, Mark Slivkoff, and noted that,

Positive contact efforts include both attempts in writing (supported by dated return receipts) and by telephone (supported by phone bills).

(Id.)

Noting that the Employer had not shown that it made any attempt to contact either of the two applicants by telephone, the CO stated, "The evidence in hand is not convincing to document good faith efforts were made to contact the two applicants." *(Id.)* Accordingly, the CO instructed the Employer to submit a copy of both the letter which it had sent to the two applicants, and the application which the applicants were requested to complete. The CO also informed the Employer that recruitment of potentially qualified applicants through the local labor union was required, pursuant to section 656.21(b)(4), and instructed the Employer to: "Document that the local union is unable or unwilling to refer U.S. workers who are able, qualified, willing and/or available for the job in question." Employer could accomplish such documentation, the CO stated, by submitting "a copy of the letter sent to the local labor union, and a signed statement providing specific information about responding applicants." *(Id.)*

In its rebuttal, dated July 30, 2001, the Employer submitted a copy of the letter which it had sent to the local labor union, along with proof that this letter had been sent by certified mail, and that

it had been received by the union. (AF 5-14) However, the Employer did not submit either the letter which it had sent to applicants Mark Slivkoff and James Alatorre, or a copy of the application which it had asked each of these applicants to complete, nor did it set forth any explanation for its failure to do so. Instead, through counsel, it argued that it had, in fact, submitted sufficient evidence in its rebuttal to document that it had rejected the two applicants in question for lawful, job-related reasons, and that it had therefore cured all of the deficiencies set forth by the CO in the Notice of Findings. Regarding the requirement that it contact local labor unions and inform them of the position which was available, in order to document that it had made a good faith effort to recruit qualified United States workers, the Employer stated:

Attached hereto and incorporated herein are true and correct copies of letters sent to the local labor unions concerning the job availability. We have received no response to this letter. (AF 5-14)

Concerning the documentation of its attempts to contact the two U.S. workers which had been referred by the local employment office, Employer stated:

You next take issue with the Employer's practice of requesting the job candidates to complete and return job applications. The basis for the intention to deny is set forth that the Employer did not adequately attempt to contact U.S. workers that might have been qualified for this position. You inquire as to whether the Employer attempted to contact the applicants via telephone.

As you must be aware, as part of a recruitment process, an employer makes every effort to select potential employees with motivation and a desire to work. The request that a candidate complete and return an employment application is not only standard practice for this employer, but is a universally accepted method of initiating the screening process. It is the first step in ascertaining if a candidate is interested in the job.

In this instance, the method proved fruitful. The Employer was able to contact the candidate through [the] mail. Your suggestion in your Notice of Findings that the candidates be contacted via telephone is contrary to the practice of seeking employees that are legitimately desirous of employment. The actions you suggest are extraordinary and are neither the custom nor the practice of this or any other employer.

One must understand that it is the Employer's primary concern to operate a successful business. In furtherance of this goal, it is important to obtain reliable employees. This is particularly true in time of competitive employment markets, as we have been experiencing. While it is difficult to adequately screen candidates to determine just who is interested in working, one successful method has been to contact the candidate by mail and invite a response. If the candidate makes the effort to reply, this is indicative of that candidate's interest in the position and general motivation.

The Employer has conducted a good faith and legitimate search for this position. (AF 5-14)

The CO issued the Final Determination on September 18, 2001, denying Employer's application for labor certification. (AF 3-4) In so doing, under a heading entitled "Summary and Discussion," the CO stated:

The Notice of Findings (NOF), dated May 30, 2001, advised the Employer to submit persuasive documentation to show how the Employer recruited in good faith and rejected U.S. applicants solely for lawful, job-related reasons. The NOF states that there were only two U.S. applicants, Mark Slivkoff and James Alatorre, referred to the Employer for consideration. The NOF informed the Employer to submit copies of the letter and application sent to the applicants, and to document any other attempts to contact them. The Employer failed to submit the requested

documentation.

In addition, the Employer did not provide documentation to support that other attempts to contact the applicants were made. Thus, the Employer has not established that good faith efforts were made to contact the two applicants.

The NOF advised the Employer to submit documentation to show that the local union is unable or unwilling to refer U.S. workers who are able, qualified, willing, and/or available for the job in question, and to provide specific information about responding applicants. In response to this finding, the Employer submitted a letter dated December 29, 1998, addressed to Laborer's Union Local #30, and a copy of a certified returned receipt addressed to the union. The Employer did not provide documentation to show if workers were referred by the union, and the results of that recruitment. The Employer did not comply with the NOF.

Accordingly, the CO found the Employer to be in noncompliance with 20 C.F.R. § 656.21 (b)(2)(ii), because it had failed to document that it had made a good faith effort to recruit an able, willing, and qualified U.S. worker to fill its job opening, and its application for labor certification was therefore denied. (AF 3-4)

On October 19, 2001, the Employer, through counsel, requested review by this Board, asserting that: "The Employer properly documented the lawful rejection of U.S. workers." (AF 1-2) The case was docketed by the Board on January 11, 2002, and the Employer did not file an additional brief in support of its appeal.

DISCUSSION

Under section 212(a)(5) of the Act an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified both to the Secretary of State and to the Attorney General

that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability. It is the Employer who bears the burden of proving, by presenting “clear documentation,” that all regulatory requirements have been satisfied, and this burden of proof must be met before any application for labor certification can be granted.⁴

Section 212(a)(14) of the Immigration and Nationality Act of 1952 (amended by § 212(a)(5)(A) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) was

⁴The CO found Employer to be in noncompliance with 20 C.F.R. 656.21(b)(2)(ii) and (b)(4). In relevant part, these sections state:

(b) Except for labor certification applications involving occupations designated for special handling (see Sec. 656.21a) and Schedule A occupations (see Secs. 656.10 and 656.22), the employer shall submit, as a part of every labor certification application, on the Application for Alien Employment Certification form or in attachments, as appropriate, the following clear documentation: ...

(2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. ... :

(ii) If the job opportunity involves a combination of duties, for example engineer-pilot, the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and or the combination job opportunity is based on a business necessity. ...

(4) If unions are customarily used as a recruitment source in the area or industry, the employer shall document that they were unable to refer U.S. workers.

enacted to exclude aliens competing for jobs American 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 achieve this Congressional purpose, the regulations set forth a number of provisions designed to ensure that the statutory preference favoring domestic workers is carried out whenever possible. Twenty C.F.R. § 656.2(b) quotes § 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, as follows:

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act....

The legislative history of the 1965 amendments to the Act establishes that Congress intended that the burden of proof for obtaining labor certification be on the employer who seeks an alien’s entry for permanent employment. *See* S. Rep. No. 748, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 3333-3334.

Section 656.25(e) provides that the employer’s rebuttal evidence must rebut all of the findings of the NOF, and that all findings not rebutted shall be deemed admitted. On this basis, the Board has repeatedly held that a CO’s finding which is not addressed in rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*); *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989); *Salvation Army*, 1990-INA-434 (Dec. 17, 1991). Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993); *Korean Manpower Development, Inc.*, 1993-INA-121 (Mar. 21, 1994); *Prace Fabrication Corp.*, 1993-INA-179 (Mar. 28, 1994).

The employer must provide directly relevant and reasonably obtainable documentation that

is requested by the CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification, *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 1988-INA-40 (July 5, 1988), especially where the employer does not justify its failure. *Vernon Taylor*, 1989-INA-258 (Mar. 12, 1991).

Employer failed to provide the documentation required in the NOF, which was directly relevant to the issues of whether there truly exists a full-time job opportunity to which U.S. applicants could be referred, and whether the two U.S. applicants who had been referred were required by the Employer to do more than the Alien had been required to do before he was accepted by the Employer as a qualified candidate for its job opening. Moreover, Employer failed to explain his failure to comply or to provide any evidence that such documentation was not reasonably obtainable.

Thus, we find that the CO properly raised the issue of whether Employer had put forth an adequate, good faith effort to recruit United States workers for the position being offered, and that Employer's rebuttal did not adequately rebut that issue.⁵

⁵Since we affirm the CO's determination regarding the inadequacy of Employer's recruitment effort, we need not address the other issue raised in the NOF.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

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 unless within twenty days from the date of service a party petitions for review by the full Board. 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, DC 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.