

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date issued: **May 20, 2003**

BALCA Case No.: **2002-INA-147**
ETA Case No.: P2001-MD-03361558

In the Matter of

PAYNE & ASSOCIATES,
Employer,

on behalf of

KAREN MICHELLE LAWRENCE,
Alien.

Certifying Officer: Richard E. Panati
Philadelphia, Pennsylvania

Appearance: Tushinde C. Cooper
International Organization for Humanitarian Services
For Employer and Alien

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

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Karen Michelle Lawrence (“Alien”) filed by Payne & Associates (“Employer”) pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the “Act”) and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26. The following decision is based 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 of the parties.

STATEMENT OF THE CASE

On February 20, 2001, Employer, a company that provides safety inspections on vertical transportation units, filed an application for labor certification on behalf of the Alien for the position of Data Entry Clerk. (AF 26). The only requirements for the job were one month of experience as a data entry clerk and three months of training. *Id.* A September 16, 2001 newspaper advertisement produced seven U.S. applicants. Employer's recruitment report states: "None of the individuals appeared for the interview. When they were telephoned to confirm interest in the position, all of them stated they were not interested in the position." (AF 18). Attached to the recruitment report is a chart of the applicants, with handwritten notations indicating "another job," "[illegible] to report," or "not interested." (AF 20).

The CO issued a Notice of Findings on January 10, 2002, proposing to deny labor certification under 20 C.F.R. §§ 656.21(b)(6) and 656.20(c)(8), on the ground that "[a]lthough telephone calls were unsuccessfully placed to U.S. applicants, no certified mailing or other attempts to contact the applicants were made. An employer who does no more than place unanswered telephone calls without making additional attempts to contact the applicants has failed to make the minimally acceptable effort. ... A telephone call is insufficient largely because it cannot be documented. An employer must prove that its overall recruitment efforts were in good faith." (AF 16-17).

Employer filed a rebuttal on February 20, 2002. (AF 10-15). Employer stated that it did not intend to recruit in contradiction of the CO's interpretation of the regulations. In an attempt to remedy the deficiencies cited by the CO, Employer reported that it sent letters to two of the applicants on January 14, 2002, asking that they attend an interview, but that the applicants did not show up. Employer stated in regard to the other applicants that they had not shown up for the previously scheduled interviews – they had either gotten other jobs or were no longer interested in the position. Attached to the rebuttal was a copy of the interview letters sent to the two applicants following the NOF, with associated Certified Mail receipts. (AF 15). One of the letters was returned as unclaimed. (AF 14).

The CO issued a Final Determination denying certification on February 22, 2002. (AF 8-9). The CO found that Employer's rebuttal did not cure the deficiencies because an attempted contact of applicants during the rebuttal period, months after the initial recruitment, does not cure a failure to recruit in good faith during the initial recruitment. Moreover, the CO noted that the Employer had attempted to contact only two of the applicants.

Employer requested BALCA review on March 21, 2002. (AF 1-5). In its request, Employer argued that an implicit good faith recruitment requirement is, by its nature, subjective, and therefore must be based on the circumstances of the case. Employer argued that under the circumstances it had in fact recruited in good faith. Employer stated that it contacted all seven applicants by telephone within a month of receiving the referral from the state employment service. Employer stated that four applicants were no longer interested in the job, one had already found another job, and two failed to respond to messages.

The Board issued a Notice of Docketing on April 22, 2002, and Employer did not file any additional brief or statement of position. On May 3, 2002, a facsimile transmission to the Chief of the Division of Labor Certification of the Employment and Training Administration was forwarded to the Board. This fax asserted that the instant labor certification application is fraudulent. Pursuant to 20 C.F.R. § 656.31, the Chief Administrative Law Judge referred the matter to the Immigration and Naturalization Service Enforcement Office in Baltimore for investigation, with copies to the Employer, Alien, and Department of Labor, Office of Inspector General. To date, the Chief Judge has received no response to the referral. Under the regulation at section 656.31, "[i]f 90 days pass without the filing of a criminal indictment or information, the Certifying Officer shall continue to process the application." Although by its terms this regulation applies to the CO's obligations if possible fraud or misrepresentation is discovered, by implication it also applies to BALCA, as BALCA is not an investigatory or prosecutorial agency. Accordingly, the Board will proceed to decide this appeal, without consideration of the allegation of fraud.

DISCUSSION

What constitutes good faith efforts to recruit U.S. applicants has been addressed many times by BALCA. In *M.N. Auto Electric Corp.*, 2000-INA-165 (BALCA Aug. 8, 2001) (*en banc*), the full Board summarized the law. In pertinent part, the Board wrote:

What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the particular facts of the case under consideration. Where an employer establishes timely, actual contact, *ipso facto*, a reasonable effort is proved. *HRT Clinical Laboratory*, 1997-INA-362 (March 10, 1998). In some circumstances it requires more than a single type of attempted contact. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*). An employer who does no more than make unanswered phone calls or leave a message on an answering machine has not made a reasonable effort to contact the U.S. worker, where the addresses were available for applicants; in such a case the employer should follow up with a letter -- which may be certified mail, return receipt requested. *Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991); *Gambino's Restaurant*, 1990-INA-320 (Sept. 17, 1991).

In its request for review, Employer admits that its telephone calls to two of the applicants were not returned. Accordingly, under well-established BALCA caselaw, the Employer was obliged to follow up the unsuccessful telephone contacts with a letter.

In the instant case, Employer did not attempt that follow up until after the NOF had been issued. Again, it is well-established by BALCA caselaw that if an employer attempts to contact an applicant after the CO alleges that the applicant was not contacted or interviewed, or was rejected, the fact that the employer shows that the applicant is now unavailable does not cure the initial violation. *Bruce A. Fjeld*, 1988-INA-333 (May 26, 1989) (*en banc*); *Suniland Music Shoppes*, 1988-INA-93 (Mar. 20, 1989) (*en banc*); *Custom Card*, 1988-INA-212 (Mar. 16, 1989) (*en banc*); *Amritsar Academy*, 1988-INA-34 (Mar. 13, 1989) (*en banc*); *O'Malley Glass & Millwork Co.*,

1988-INA-49 (Mar. 13, 1989) (*en banc*); *Done-Rite, Inc.*, 1988-INA-341 (Mar. 2, 1989) (*en banc*);
Dove Homes, Inc., 1987-INA-680 (May 25, 1988) (*en banc*).

Accordingly, the CO correctly denied labor certification in this matter.

ORDER

The CO's denial of labor certification in this matter 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 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.