



Issue Date: 03 September 2003

BALCA Case Nos. 2002-INA-227 and 228¹
ETA Case No. P2000-NJ-02457810

In the Matter of:

SANMAR AUTO BODY INC.,
Employer.

on behalf of

JOSE MAJFUD,
Alien.

Certifying Officer: Dolores Dehaan
New York, NY

Appearance: Leslie V. Lipton
For Employer

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 Jose Majfud (“Alien”) filed by Sanmar Auto Body, Inc. (“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

¹ Two files were received from the Certifying Officer, which were almost identical, except that in BALCA Case No. 2002-INA-228 the Index was actually the index for the case BALCA docketed as 2002-INA-223. Thus, the two Case Numbers are hereby consolidated for disposition. References to the Appeal File (“AF”) in this decision are to the Case No. 2002-INA-227 case file.

certification and the Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On January 6, 1998 the Employer filed an application for labor certification on behalf of the Alien for the position of Automobile Mechanic. (AF 68-69).

On February 1, 2002, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the ground that there was insufficient evidence that Employer conducted a good faith recruitment effort. The CO noted that the Employer allegedly attempted to contact applicants Thomas Schenke, John Gibbons, Brian Westervel and Anthony Perna. The Employer, however, did not provide any evidence of such attempts. The CO indicated that attempts to call the applicants should be reflected in telephone bills. Therefore, the CO requested copies of the telephone bills. The CO stated that if the calls to the U.S. workers were local calls, the telephone company should be able to provide a list of those calls, and that if the telephone company could not do so, the Employer should document that fact. Additionally, the CO stated that positive contact efforts include contact in writing, which should be supported by dated certified mail return receipts. The CO concluded that there was insufficient evidence that Employer's effort to contact the applicants took place. Consequently, the CO found that Employer's recruitment efforts did not show good faith effort in recruitment. The Employer was advised that the remedy to the deficiency would be to provide documented details of Employer's recruitment efforts. (AF 57-58).

On February 26, 2002, the Employer submitted its Rebuttal, arguing that in accordance with *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*) use of certified mail was not mandatory. The Employer was only required to use reasonable efforts to contact the applicants. The Employer asserted that it used reasonable efforts and in support of its position submitted an affidavit from the owner of the business, an affidavit from a former employee, and a copy of a telephone bill.

In the owner's affidavit, he asserts that due to personal reasons, he did not contact the applicants until November 3. On November 3, he made numerous calls to the applicants, but only applicant Burns was reached and he indicated that he was no longer interested because he already had a job. Messages were left with the other applicants on their answering machines, and in one instance with an applicant's wife. No return calls were received.

A former employee, in her affidavit, asserted that while employed for Employer she witnessed the owner making telephone calls in his attempt to contact U.S. workers. She also asserted that a manager of the local telephone company advised her that it was not possible to get a record of the local calls and they would not put it in writing. The telephone bill submitted reflected that three calls were made to three U.S. workers. (AF 45-52)

On March 25, 2002, the CO issued a Final Determination (FD) denying certification. (AF 70-71). The CO found that the Employer made a good faith recruitment effort in contacting Mr. Schencke, as Employer spoke with this applicant. The CO also found, however, that the Employer's rebuttal did not remedy the overall deficiency. The CO noted that an employer that does no more than make unanswered telephone calls or leave messages on an answering machine has not made reasonable efforts to contact the qualified applicants. As the Employer had the U.S. workers mailing addresses, follow up letters had to be mailed to demonstrate good faith recruitment. As Employer failed to do so its application was denied.

On April 2, 2002, Employer filed its Request for Review, where it alleged that the Employer made good faith recruitment efforts in accordance with *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*). The Employer enclosed a summary of that decision along with the previously submitted affidavits and telephone bill. (AF 72-73).

The record does not reflect that a brief was filed by Employer.

DISCUSSION

Employers bear the burden in labor certification applications both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Employer in its Recruitment Report (AF 34-35), asserted that attempts were made to contact all the applicants. This was conveyed through undated notations made under the names of the U.S. workers. The remarks were limited to a couple of words per U.S. worker. According to the Employer, the attempts to contact the applicants were unsuccessful. However, no supporting evidence regarding the recruitment efforts was provided with the recruitment report.

A recruitment report must describe the details of the employer's recruitment efforts to be sufficient. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*). A general recruitment report provides an insufficient basis upon which to conclude the employer engaged in good faith recruitment and had job-related reasons for rejecting U.S. applicants. *Nitto Denko Am., Inc.*, 1991-INA-93 (Apr. 1, 1992); *TPK Constr. Corp.*, 1991-INA-223 (June 30, 1992). In this instance, the Employer's limited recruitment report did not provide enough detail to support a finding that the Employer had lawful job related reasons for rejecting the U.S. Applicants.

Additionally, the Employer in its rebuttal had the opportunity to support its assertions by providing documentation that several telephone calls were in fact made, as the CO requested in the NOF. The Employer limited its evidence to a single telephone bill that reflects that three calls were made to three U.S. workers. No additional evidence was submitted demonstrating that other telephone calls were made. It should be noted that all three applicants, Mr. Gibbons, Mr. Westervelt and Mr. Perna, had telephone numbers with an area code different than Employer's. (AF 34-35). According to the

telephone bill submitted by Employer, (AF 52) calls to that area code would be detailed in the regular telephone bill without a special request.

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Denial of certification is proper when the Employer fails to provide reasonably requested information. *O.K. Liquor*, 1995-INA-7 (Aug. 22, 1996). Under the regulatory scheme of 20 C.F.R. §656.24, the Rebuttal following the NOF is the employer's last chance to make his case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

Employer in its Rebuttal made unsupported and self-serving statements alleging that it recruited in good faith, instead of providing evidence demonstrating that multiple telephone calls were made. Bare assertions by Employer are not sufficient to carry its burden of demonstrating good faith recruitment. *Brilliant Ideas, Inc.*, 2000-INA-46 (May 22, 2000); *Inter-World Immigration Service*, 1988-INA-490 (Sept. 1, 1989).

Furthermore, according to the Employer it limited itself to a few telephone calls to each of the applicants, and did not use alternative methods of communication. Reasonable and good faith efforts to contact potentially qualified U.S. applicants may require more than a single type of attempted contact. *Dianna Mock*, 1988-INA-255 (Apr. 9, 1990). Employer has an obligation to try an alternative means of contact should the initial attempt fail. *Jacob Breakstone*, 1994-INA-534 (Aug. 1, 1996). Employer cited *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*) in support of its argument that it made good faith efforts to recruit. In *M.N. Auto Electric Corp.* the Board held that the CO may not require the use of certified mail but Employer's overall recruitment effort should be reviewed to determine if Employer made good faith recruitment efforts. However, in *M.N. Auto Electric Corp.*, the Board went on to hold:

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 the instant case, there is no evidence that Employer attempted any alternative means of contact, by certified mail, regular mail or otherwise.

The Employer wrongly assumed that it satisfied its duty to recruit through its unsuccessful attempts to contact the applicants. This meager step shows a minimal effort, that by itself does not equate to a good faith recruitment effort. Employer's effort must show that it seriously wanted to consider the U. S. applicant for the job, not to merely go through the motions of a recruiting effort without serious intent. *Compare Dove Homes, Inc.*, 1987-INA-680 (May 25, 1988) (*en banc*) and *Suniland Music Shoppes*, 1988-INA-93 (Mar. 20, 1989) (*en banc*).

The Employer's rejection of the U. S. applicants based on Employer's inadequate recruiting effort did not support the finding that its reasons for rejecting them were lawful and job-related within the meaning of the regulations. *John & Winnie Ng*, 1990 INA 134 (Apr. 30, 1991). Accordingly, the record supports the CO's denial of alien labor certification.

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,