

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 22Apr2002

Case No: 2002-INA-00083

In the Matter of:

INTERNATIONAL HOUSE OF PANCAKES
Employer

On Behalf of:

JULAIN MEZA-GALLEGOS
Alien

Appearance: James Roche, Esq.
for the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Julian Meza-Gallecos ("Alien") filed by Employer, International House of Pancakes ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of

State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, 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.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On August 8, 1997, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Cook-Continental Specialty, in its restaurant.

The duties of the job offered were described as follows:

"Cook, season and prepare a variety of continental dishes including chicken parmigiana, london broil and sauteed fish. Various specialty entrees and salads including chicken caesar salad and cobb salad as well as an assorted variety of dressings on a daily basis. Responsible for food and quality control. Use a variety of kitchen equipment and utensils in addition to measuring and mixing various ingredients according to prescribed recipes."

An 8th grade education and two years experience in the job was required. Wages were \$11.29 per hour. The applicant supervises 0 employees and reports to the Manager. (AF-20-76)

On September 12, 2000, the CO issued a NOF denying certification. The CO citing Section 656.21(b)(6) and/or 656.21(j)(1)(iii) and(iv) found that rejection of U.S. workers

lacked specificity. Specifically, U.S. applicants Pervenanze, May, Claes and Grosso were reported by the employer as overqualified although they had chef experience. The CO stated that over qualification is not a valid basis for rejection. "Without further documentation there is no evidence that the applicants were contacted. It appears that they may have been dissuaded from the job." Corrective action was to explain with specificity the lawful job-related reasons for rejecting each applicant and the job title of the person who considered them for employment. (AF-16-18)

On September 12, 2000, Employer forwarded its rebuttal through counsel contending that: "The DOL has improperly focused on the overqualified argument of the employer. The applicant's over qualification appears consistent with their response to the proffered position. Each U.S. applicant was left a message to contact the employer for an interview; however, each applicant failed to contact the employer to arrange an interview and pursue such position. That the U.S. applicants failed to contact the employer supports the employer's assertion that the U.S. applicants were overqualified. Moreover, the fact that U.S. applicants failed to contact the employer to arrange an interview demonstrates that such applicants were clearly and lawfully rejected as being unavailable and uninterested in the proffered position." (AF-6,7)

On March 23, 2001 the CO issued a Final Determination denying certification, stating that the employer did not provide the requested documentation to support rejection of the U.S. applicants. The CO further stated: "The employer forwarded no evidence to show proof that any or all of the applicants had been contacted. The employer infers that since the applicants were overqualified, they were therefore not interested in the position. This is fallacious reasoning. The employer provided no proof of attempted contact with the job applicants, and his reasoning is that since they were overqualified they were therefore uninterested. The employer has rejected applicants who were qualified, available, able and willing to meet minimum job requirements and fill the job vacancy. When qualified job applicants are rejected, labor certification cannot be granted." (AF-4,5)

On April 15, 2001, the Employer requested review of the denial of labor certification. (AF-1-3)

DISCUSSION

The employer has the burden of persuasion on the issue of lawful rejection of U.S. workers. Cathay Carpet Mill, Inc., 1987-INA- 161 (Dec. 7, 1988)(en banc). Although written assertions constitute documentation that must be considered under Gencorp, 1987-INA-659 (January 13, 1988)(en banc), bare assertions without supporting evidence are generally insufficient to carry an employer's burden of proof. (Sang Chung Insurance Agency, 2000-INA-259 (January 11, 2001). The good faith requirement in recruiting efforts is not set forth in the regulations, but is implicit. H.C. LaMarche Enterprises, Inc. 1987-INA-607 (Oct. 27, 1988)

Clearly, Employer here did not provide the documentation required by the CO to demonstrate that a good faith effort was made to recruit U.S. applicants. As stated by the CO, over qualification is not a valid reason for rejection. Given the number of apparently available U.S. workers who answered the job advertisement, Employer had an obligation to demonstrate that he had properly and timely followed up with those applicants. This Employer failed to adequately do. The CO acted reasonably in denying certification.

ORDER

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

For the Panel:

A
JOHN C. HOLMES
Administrative Law Judge

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, N.W.
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 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.

