

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 September 2003

BALCA Case No.: 2002-INA-152
ETA Case No.: P2000-NJ-02453172

In the Matter of:

APEX INTERIORS, INC.,
Employer,

on behalf of

BIREN KRISHNAKANT PARIKH.
Alien.

Appearance: J.M. Shah, Esq.
Old Bridge, New Jersey

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "accountant."¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R.

¹ Permanent 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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision 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. 20 C.F.R. §656.27(c).

§656.26.

STATEMENT OF THE CASE

On June 4, 1997, Apex Interiors, Inc. ("Employer") filed an application for labor certification to enable Biren Krishnakant Parikh ("Alien") to fill the position of "accountant." (AF 76). Five years of experience in the job offered and a B.A. in accounting and auditing, business management or economics were required.

The Certifying Officer ("CO") issued a Notice of Findings ("NOF") on November 27, 2001, proposing to deny certification. (AF 71). Specifically, the CO determined that ten U.S. applicants appeared to have been rejected for other than lawful job-related reasons. (AF 70). The CO rejected Employer's claims as stated in its recruitment report, and pointed out that the report failed to state how each applicant was contacted, and did not provide any evidence that they were contacted in a timely manner. (AF 69). Employer was directed to provide proof of contact, including documentation of attempts to contact by telephone and by mail. If attempts to contact by telephone were not successful, Employer needed to furnish evidence showing that an effort to contact applicants by certified mail, return receipt requested was made. Employer was advised that the telephone company would issue itemized telephone bills for local areas if requested. If Employer's telephone carrier could not issue itemized bills, Employer was directed to have the carrier submit a statement to that effect. Alternatively, Employer could document why it was unable to contact applicants by telephone and by mail. If an applicant was rejected on the basis of an interview, Employer was directed to document the lawful job-related reasons for that rejection, or, if the rejection had been based solely on a review of a resume, why this occurred without benefit of an interview. Finally, if an applicant was rejected without an interview or a resume review, Employer was required to explain why. (AF 69).

Employer's counsel submitted a rebuttal letter on December 26, 2001, reiterating the previously stated reasons for the rejection of the U.S. applicants. (AF 80) Employer's counsel

enclosed a spread sheet (AF 77-78) “giving information as required of the Employment exercise of the employer and the response of the applicants,” as well as copies of letters addressed to the applicants who did not respond to the telephone calls for an interview. (AF 79). By letter dated December 28, 2001, Employer’s president filed a response to the NOF, stating that he personally called all the applicants and interviewed those who responded. (AF 86). Employer’s president attached a letter he wrote to Employer’s telephone carrier, dated December 26, 2001, requesting a copy of its telephone bill. (AF 85).

A Final Determination was issued on January 16, 2002. (AF 96). The CO denied certification on the ground that Employer had failed to provide evidence that it had contacted any of the applicants listed in the NOF, inasmuch as it failed to submit telephone bills or a letter from its telephone carrier that it could not issue itemized telephone bills, as had been requested in the NOF. (AF 95).

On February 7, 2002, Employer requested review of the denial of certification by the Board of Alien Labor Certification Appeals (“Board” or “BALCA”). (AF 97).

DISCUSSION

In its Brief filed on appeal, Employer reiterates that it contacted the applicants by telephone, and now asserts, for the first time, that it sent the applicants letters by regular mail, which Employer argues is the normal practice in this matter. In addition, Employer claims that it made one more effort and sent letters by certified mail. Employer includes evidence thereof with its brief, as well as evidence of further attempts to notify its telephone company to request itemized telephone bills, and argues that the evidence submitted with its brief provides the evidence to establish good faith recruitment efforts.

Employer is now belatedly attempting to submit the documentation requested by the CO in her NOF. This Board will not consider the material submitted with the request for review, as our review is to be based on the record upon which the denial of labor certification was made, the request

for review, and any statement of position or legal briefs. 20 C.F.R. 656.27(c); *see also* 20 C.F.R. § 656.26(b)(4). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992).

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). In the instant case, Employer was requested to provide documentation of its attempts to contact the U.S. applicants who met the qualifications for the position at issue. An employer must provide directly relevant and reasonable documentation sought by the CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). Failure to do so warrants denial of labor certification. *Rouber International*, 1991-INA-44 (March 31, 1994). Employer failed to produce the requested information. Such documentation was critical to establishing good faith recruitment. Certification was properly denied, and it is unnecessary to address the remaining issues.

ORDER

The Certifying Officer's denial of labor certification 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 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 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review 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 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.