

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 August 2003

BALCA Case No. 2002-INA-115
ETA Case No. P1998-CA-09409312/ML

In the Matter of:

HOLLYWOOD STAR'S STUDIO

Employer,

on behalf of

JORGE RECIO-NUÑEZ

Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearance: Leonard W. Stitz
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 Jorge Recio-Nuñez (“Alien”) filed by Hollywood Star’s Studio (“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 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 August 26, 1996, the Employer filed an application for labor certification on behalf of the Alien for the position of Photographer. (AF 12-13)

On June 13, 2001, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on three grounds. The first ground was that the Employer did not appear to have the ability to provide permanent full time employment to the Alien. The CO noted that according to the Job Service's records, the Employer's tax account had been inactive for two years. The Employer was advised that to remedy the deficiency, Employer should supply rebuttal evidence demonstrating its ability to provide a full time job for a U.S. applicant, including a copy of the state and federal income tax return.

As the second ground, the CO found that the two years experience requirement was unduly restrictive, since it is not a normal requirement for the successful performance of the job in the United States. The CO offered as a remedy an opportunity/option to amend the requirement and readvertise or to justify the requirement as a business necessity.

As the third ground for denial, the CO found that U.S. applicants Phillips, Batt, Esquire, Gilbert, Kless, Martinez, Robinson and Tran were qualified for the position, and did not appear to have been rejected for job related reasons. Additionally, the CO noted that there was insufficient evidence demonstrating that Employer's efforts to contact applicants took place as early as possible. The CO concluded that Employer's recruitment efforts were not made in good faith, as they were tardy and incomplete. As a remedy, the CO advised the Employer to document that it rejected the applicants for lawful job related reasons, and also to document its recruitment efforts. (AF 7-11).

On June 28, 2001, the Employer submitted its Rebuttal. (AF 4-6). To demonstrate its ability to hire the applicant, the Employer submitted copies of tax returns for the years 1999 and 2000.

The two years experience requirement was justified by supplying sample photographs depicting some photographic special effects. The Employer detailed how the pictures were achieved, and concluded that to be able to take those pictures, the photographer was required to have two years of experience. As the position was not a trainee position, the Employer expected the applicants to have two years experience.

In regards to its recruitment efforts, the Employer asserted that it received fifteen resumes and fourteen of those applicants were invited for an interview. Of those invited, only two, Mr. Doty and Mr. Gilbert, attended the scheduled interview and the others did not respond. Mr. Doty declined the job offer and Mr. Gilbert admitted he did not have experience in special effects. The Employer added that those applicants who did not respond to the invitation clearly lacked the desire or motivation for the position. Therefore, all of the applicants were rejected for job related reasons.

On September 18, 2001, The CO issued a Final Determination (FD) denying certification (AF 2-3). The CO found that the evidence presented by the Employer did not demonstrate its ability to hire a photographer on a full time basis. The CO noted that the income tax returns reflected no wage expenses and an income of \$14,000 for the year 1999. For the year 2000, the income tax return also showed no payroll expenses and an income of \$ 12,000. The CO found that as the \$30,475 salary for the position exceeded the taxable income, the Employer did not provide convincing evidence that it was able to provide permanent, full time employment at the terms and conditions stated in the labor certification application.

Additionally, the CO was unconvinced by Employer's argument about its need for the two year experience requirement. The CO found that the two photographs supplied with the Rebuttal did not show special effects that would require two years of experience to learn. Therefore, the CO found that the Employer did not justify its need for the requirement, and thereby did not comply with the regulations.

In regards to the rejection of the US applicants, the CO found that Employer's rejection of Mr. Gilbert was not for a job-related reason. The Employer did not justify the need for two years experience and Mr. Gilbert, with twenty years experience as a photographer, was qualified for the job. The CO added that the other fourteen applicants were not contacted as soon as possible, as the earliest return receipt indicated that it was signed fifteen days after the resumes were sent to the Employer.

On October 19, 2001, Employer filed its Request for Review. (AF 01). In its Request for Review, the Employer asserted that it properly documented the lawful rejection of US workers, the job requirements were reasonable, and the position was a bona fide job opportunity.

On April 1, 2002, the Employer submitted its brief. The Employer alleged that the CO unreasonably rejected Employer's argument in support of its need of a photographer with two years experience, because the CO simply ignored Employer's statements. The Employer reasserted that its business specializes in special effects and described what is required to create such photos. The Employer concluded that in order for a photographer to create special effects, a photographer must have two years of experience.

The Employer also argued that the good faith recruitment issue could not be raised by the CO in the FD, as it was not raised in the NOF. Therefore, it cannot be the basis for denial. However, Employer asserted that it engaged in good faith recruitment, as it invited fourteen of the fifteen applicants for an interview. Of the two that attended, one declined the job offer, and the other was not qualified. Additionally, the Employer asserted that the Board previously held that an Employer's attempt to contact applicants by certified mail was sufficient evidence of good faith recruitment. The Employer cited *Light Fire Iron Works*, 1990-INA-2 (Nov. 20, 1990) in support of its argument that the Employer was justified in rejecting applicants who did not respond to its certified letters.

The Employer concluded that the CO disregarded the Employer's response, and it was clear that the CO had no intention of granting the application, notwithstanding the legitimate and

appropriate efforts by the Employer.

DISCUSSION

20 C.F.R. § 656.3 defines employment as “permanent full-time work by an employee for an employer other than oneself.” An employer bears the burden of proving that the position is permanent and full-time, and if an employer fails to meet this burden, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

The CO in the NOF noted that since the Employer’s tax account had been inactive for the last two years, the Employer did not appear to have the ability to provide full time employment to a U.S. applicant. To remedy the deficiency, the CO in the NOF advised the Employer that it had to provide rebuttal evidence demonstrating that it was able to provide permanent full time employment to a U.S. worker at the terms stated in the ETA 750 A.

Implicit in offering full time employment is the ability to pay full time wages. *Alva Lefevre*, 1997-INA-490 (Mar. 11, 1998). An application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. 20 C.F.R. § 656.20(c)(1). Certification shall be denied where an employer fails to meet its burden of proving the sufficiency of funds to pay the alien's salary. *Foothill Division Karate Club*, 1993-INA-494 (Oct. 11, 1994).

In reviewing the Employer’s income tax returns we note that the Employer had a taxable income of \$14,654 for the year 1999 (AF 32) and \$13,890 for the year 2000 (AF 25). However, if the \$ 30,472¹ salary were paid for those two years, the Employer’s taxable income would show a

¹ The hourly rate of pay is \$14.65 (AF12) and it amounts to \$30,472 a year. We get this total by multiplying \$14.65 by 40 hours a week for 52 weeks.

deficit of \$15,818² and \$ 16,582³ for the years 1999 and 2000, respectively⁴.

The intent of 20 C.F.R §656.20(c)(1) is to ascertain that there is an actual job opportunity, as without the financial means to pay the wages, the job does not truly exist. In the instant case, the CO found, and we agree, that the Employer did not meet its burden. Therefore, since the Employer failed to demonstrate its ability to pay the wages being offered, we find that the denial of labor certification was proper⁵. Accordingly, the following Order shall enter⁶:

² \$30,472 (salary) minus \$14,654 (taxable income for the year 1999) equals a deficit of \$15,818.

³ \$30,472 (salary) minus \$13,890 (taxable income for the year 2000) equals a deficit of \$16,582.

⁴ The CO in the FD notes that the Employer paid \$16,000 to photographers and proposes to pay \$30,475 for the position. (AF 3). The CO concludes that \$30,475 exceeds the amount earned by Employer. The CO's conclusion, as well as ours, is accurate, yet somewhat misleading, as the analysis should not stop at reviewing the amount reflected as taxable income in the income tax return. The analysis requires that we add back to the taxable income the amount paid to photographers, as these expenses should no longer be incurred by the Employer. When we add back \$18,392 in photographer's expenses (AF 33) we find that for the year 1999, the Employer's income would be \$33,046 and for the year 2000 would be \$32,282. Our analysis requires us to then subtract \$30,475 in salary from the taxable income, which gives the Employer a taxable income of \$2,571 and \$1,807 for the years 1999 and 2000 respectively. However, the estimated taxable income would not demonstrate Employer's ability to pay, as it would be counterintuitive for an employer to earn \$2,571 a year, while his sole employee earns \$30,475 a year. Therefore, using this alternative analysis, we find that the Employer does not have the ability to pay for the position's full time salary.

⁵ Since a denial is warranted solely on our finding that the Employer is unable to provide full time employment to the Alien, we will not review the issues of good faith recruiting and unduly restrictive requirement raised by the CO.

⁶ In Applications for Alien Employment Certification, the employer bears the burden of proving all aspects of the application, 20 C.F.R. § 656.2(b). 20 C.F.R § 656.25(e) provides that an employer's rebuttal evidence must rebut all of the findings in the Notice of Findings and that all findings not rebutted shall be deemed admitted. The CO in the NOF found that the Employer did not have the ability to provide full time employment. The Employer in its rebuttal did not make a single argument in support of its financial ability to pay the salary, although the income tax returns reflected an income well below the position's yearly salary. In the Rebuttal, it was the Employer's burden to rebut the CO's finding, as he was on notice that it appeared that its financial circumstances did not convey ability to pay the salary. Its burden was not met by providing only the income tax return. This Board has held that a CO's finding which is not addressed in the

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, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (en banc). Further, failure to address a deficiency noted in the Notice of Findings supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993); *Ray Department Stores, Inc.*, 1993-INA-183 (Sept. 23, 1994). Therefore, Employer's failure to address the CO's finding that Employer was unable to provide for a full time salary, is another ground for denial and was by itself sufficient to deny Employer's application.