



Issue Date: 09 September 2003

BALCA Case No.: 2002-INA-218
ETA Case No.: P2000-CA-09499237/VA

In the Matter of:

TAMMY TAYLOR NAILS, INC.,
Employer,

on behalf of

ROMAN SANCHEZ-BARRIOS,
Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearance: Robert G. Berke, Esquire
Los Angeles, CA
For Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM: This case arises from an application for labor certification¹ filed by a restaurant for the position of Warehousing & Distributing Manager. (AF 27-28).² The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF").

¹ 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 20 C.F.R. Part 656.

² "A" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On January 16, 1998, Employer, Tammy Taylor Nails, Inc., filed an application for alien employment certification on behalf of the Alien, Roman Sanchez-Barrios, to fill the position of Warehousing & Distributing Manager. Minimum requirements for the position were listed as two years experience in the job offered. The job to be performed was described as supervising warehouse personnel, inventory control and filling orders. (AF 27-28).

Employer received 24 applicant referrals in response to its recruitment efforts, all of whom were rejected as either unqualified or unavailable for the position. Employer's basis for rejection of ten of the 24 applicants was failure "to return calls for an interview." (AF 34-35).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on March 4, 2002, questioning Employer's good faith recruitment in contacting and recruiting the ten qualified U.S. workers, and also challenging the rejection of four other U.S. workers for other than lawful, job-related reasons. Noting that Employer did not provide documentation to show when or how many times Employer attempted to contact the applicants, what message was left or who placed the telephone calls, and that it had not shown that any other attempt at contact was made, the CO questioned Employer's good faith recruitment effort. Employer was instructed to document its good faith recruitment and to provide copies of telephone records to show that calls were placed. (AF 23-25).

In Rebuttal, Employer stated that it had "contacted each person at the telephone number provided by the EDD between the dates of March 27 and April 1, 2002" and that all of the applicants "failed to show up for their interview at the time set, nor did they call." Employer indicated that the "no show" interview dates were set for March 29 and April 1. Employer also further discussed its rejection of the four other cited applicants. (AF 16-22).

A Final Determination denying labor certification was issued by the CO on April 17, 2002, based upon a finding that Employer had failed to adequately document lawful rejection of 12 of the 14 U.S. workers cited by the CO. In denying certification the CO observed that Employer's rebuttal did not provide any documentation to show the details of the contacts. Citing the fact that Employer provided no specifics such as dates, times, what message was left, how, etc., the CO concluded Employer had not shown that the applicants were contacted in good faith and were unavailable for the position.

Employer filed a Request for Review by letter dated May 18, 2002, and the matter was referred to this Office and docketed on July 2, 2002. (AF 1-13). Employer filed an Appeal Brief on July 8, 2002.

DISCUSSION

Federal regulations at 20 C.F.R. § 656.21(b)(6) state that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they were rejected solely for lawful job related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In the instant case, the CO challenged Employer's good faith recruitment of U.S. workers. The burden of proof is on Employer in an alien labor certification application. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996). Thus, it is Employer's burden to

demonstrate good faith in recruitment and to show that U.S. workers are not able, willing, qualified or available for this job opportunity.

The Board in *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*), has held that in order to establish good faith recruitment, an employer does not need to establish actual contact of applicants but only reasonable efforts to contact applicants. The Board further held that a CO may not require an employer to use certified mail, return receipt requested, when contacting U.S. applicants, but rather that an employer must be given an opportunity to prove that its overall recruitment efforts were in good faith.³ What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the facts of the particular case. As noted by the Board in *M.N. Auto*, in some circumstances reasonable effort requires more than a single type of attempted contact. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991)(*en banc*).⁴

In the instant case, Employer's reported basis for rejection of ten of the U.S. workers who applied was their failure to show for a scheduled interview. In its recruitment report Employer simply stated "[d]id not return calls for interview appointment." Employer was instructed in the NOF to submit "persuasive rebuttal" documenting good faith recruitment, including telephone records to show that calls were placed. In rebuttal, Employer offered no more than a blanket statement that each person was contacted "between the dates of March 27 and April 1" and that they did not show up for an interview.

³ The Board held that a CO may not summarily discard an employer's assertions about what efforts were made to contact applicants, but advised employers to be cognizant that although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan 13, 1998)(*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

⁴ As was noted in *M.N. Auto Electric*, *supra*, most BALCA panels have taken the position that reasonable efforts to contact qualified U.S. applicants may require more than a single type of attempted contact. See, *Diana Mock*, 1988-INA-255 (Apr. 9, 1990); *Any Phototype, Inc.* 1990-INA-63 (May 22, 1991); *C'est Pzazz Industries*, 1990-INA-260 (Dec. 5, 1991); *Gambino's Restaurant*, 1990-INA-320 (Sept. 17, 1991); *Sierra Canyon School*, 1990-INA0410 (Jan. 16, 1992); *Zephr Grill Restaurant*, 1996-INA-0269 (May 7, 1998); *S. Balian Designs*, 1989-INA-299 (Sept. 20, 1991); *Saturn Plumbing*, 1992-INA-194 (Feb 3, 1994); *Johnny Air Cargo*, 1997-INA-123 (Mar. 4, 1998); *Dr. Frank Storts, Chiropractor*, 1997-INA-330 (May 22, 1998).

To document initial or follow-up telephone conversations, the Board in *M.N. Auto Electric, supra*, instructed:

an employer must, at a minimum, keep reasonably detailed notes on the conversation (*e.g.* when the call was made, how long it lasted, whether there was a successful contact with the applicant, the substance of the conversation). Prepared checklists may be helpful in documenting what was discussed with the applicants). Where available, phone records showing the time and duration of the phone contacts should be submitted by Employer. If an employer is not successful on the first telephone call, several additional attempts should be made. It may be necessary to vary the time of day that the calls are made in order to establish that a good faith effort was made to contact the applicant.

Moreover, when efforts at contact by phone are unsuccessful, an employer who is making a genuine effort to contact these seemingly qualified applicants would try alternative means of contact. Employer fails to explain why a follow-up effort at contact was not made. 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. *M.N. Auto Electric, supra, citing Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991); *Gambino's Restaurant*, 1990-INA-320 (Sept. 17, 1991).

On this basis, we conclude Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity, and accordingly, determine that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

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.