



Issue Date: 12 September 2003

BALCA Case No.: 2002-INA-219
ETA Case No.: P2001-NY-02465137

In the Matter of:

GV MOVING SYSTEMS,
Employer,

on behalf of

YIZHAO BEN SHUSHAN,
Alien.

Certifying Officer: Delores DeHaan
New York, NY

Appearance: Lawrence M. Krause, Esquire
New York, NY
For Employer and 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 Operations Manager. (AF 10-11).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 "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On January 13, 1998, Employer, GV Moving Systems, filed an application for alien employment certification on behalf of the Alien, Yizhao Ben Shushan, to fill the position of Operations Manager. Minimum requirements for the position were listed as two years experience in the job offered. The duties of the job to be performed was described as:

Direct and coordinate activities of workers engaged in crating, moving, and storing household goods, furniture, and business records. Inspect company warehouse facilities and equipment and allocate space. Purchase moving equipment such as dollies, pads, trucks, and trailers. Determine rates. Plan pickup and delivery schedules. Review and if necessary purchase and install updated communication system to maintain peak efficiency. Resolve customers' complaints. Hire and train new personnel. Develop and implement procedures for soliciting new business. Supervise and or prepare cost estimates for clients. (AF 10-11).

Employer received five applicant referrals in response to its recruitment efforts, all of whom were rejected because they failed to appear for a scheduled interview. (AF 38-39).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on February 20, 2002, proposing to deny labor certification on two bases. (AF 43-46). The CO identified four of the five applicants as qualified for the position and questioned Employer's good faith recruitment in contacting and recruiting these four qualified U.S. workers. The CO noted that the invitation to interview was sent only four days prior to the scheduled interview date, and instructed Employer to further document these applicants' lawful rejection. In addition, the CO determined that Employer's job

opportunity involved a combination of duties that was unduly restrictive, and instructed Employer to document business necessity or delete the requirement.

In Rebuttal, Employer justified its short notice prior to interview on the basis that he was anxious to interview the applicants prior to the Thanksgiving holiday. Noting that Employer's name, address and telephone number were on the interview letter, Employer further contended that the applicants were lawfully rejected because they failed to contact Employer to reschedule. (AF 47-52).

A Final Determination denying labor certification was issued by the CO on April 2, 2002, based upon a finding that Employer had failed to adequately document good-faith recruitment efforts and lawful, job-related rejection of the four qualified U.S. workers. In addition, labor certification was denied because Employer failed to address the CO's second finding regarding the combination of duties issue. (AF 53-55).

Employer filed a Request for Review by letter dated May 6, 2002, and the matter was referred to this Office and docketed on July 2, 2002. (AF 88-89). Employer filed an Appeal Brief on July 8, 2002.

DISCUSSION

Pursuant to 20 C.F.R. § 656.21(b)(6), an 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. 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. 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*).³

In the instant case, Employer received five applicant referrals under cover letter of November 6, 2000 and was instructed to contact the applicants within 14 calendar days. (AF 28). Employer's recruitment documentation reflects that Employer sent interview letters to four of the applicants by certified mail, return receipt requested, on November 20, to come for interviews on November 24. (AF 30-38) The record further reflects that none of the applicants appeared for interview and that two of the applicants did not receive the letter until after the scheduled interview date. The date of receipt for the other two applicants is illegible. (AF 49-51).

³ 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).

The Board in *M.N. Auto Electric, supra*, noted that since actual contact is not required, evidence of timely mailing to numerous applicants of a letter which does not tend to discourage or contain onerous requirements and allows sufficient time for U.S. applicants to attend an interview may constitute a reasonable effort **where there is a significant response to the letter.** (*emphasis added*). Citing *H.S. LaMarche, Ent. Inc.*, 1987-INA-607 (Oct. 27, 1988); *Gem Sound Corp.*, 1989-INA-290 (Oct. 29, 1990); *cf.*, *Bada Apparel*, 1987-INA-712 (April 13, 1988). Here, none of the applicants who were sent interview letters appeared for the interview. The Board previously has held that where certified letters were sent to nine U.S. applicants and none responded, a reasonable effort required more than that single attempt. *Sierra Canyon School*, 1990-INA-410 (Jan. 16, 1992); *see also Johnny Air Cargo*, 1997-INA-123 (mar. 4, 1998); *Therapy Connection*, 1993-INA-129 (June 30, 1994). We similarly conclude in the instant case that the lack of response from any of the four applicants obliged Employer to attempt to contact the applicants using an alternative method. 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.

In addition, we note that Employer in the instant case failed to address, in any way whatsoever, the combination of duties issue raised by the CO in the NOF. Section 656.25(e) provides that the employer's evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. Employer was specifically advised of this requirement to rebut in the cover letter of the NOF. (AF 46). The Board has repeatedly held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989)(*en banc*); *J.J. Concrete Cutting*, 1994-INA-229 (Apr. 13, 1995); *Hagopian & Sons, Inc.*, 1994-INA-178 (May 4, 1995); *Gemmel and Associates*, 1993-INA-482 (June 3, 1994); *E. Davis, Inc.*, 1992-INA-277 (Aug. 4, 1993). Inasmuch as Employer entirely failed to address this issue, labor certification was properly denied on this basis as well.

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.