

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 December 2003

BALCA Case No.: 2002-INA-295
ETA Case No.: P2000-CA-09502422/VA

In the Matter of:

FACTOR'S FAMOUS DELI,
Employer,

on behalf of

REFUGIO SIERRA,
Alien.

Certifying Officer: Martin Rios
San Francisco California

Appearance: Moza Yontov, Esquire
Van Nuys, California
For Alien and Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Factor's Famous Deli ("Employer") has filed an application for labor certification¹ on behalf of Refugio Sierra ("Alien"). Employer sought to employ Alien for the position

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 records upon which the CO denied certification and Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27(c).

of Chef. (AF 29). In May of 2002, the Certifying Officer ("CO") denied certification. Minimum requirements for the position were listed as three years' experience in the job offered. In the application Employer listed the basic rate of pay as \$3220.00 per month, with "none" offered for overtime. (AF 29 at item 12).

STATEMENT OF THE CASE

On May 10 2002, the CO issued a Notice of Findings ("NOF") indicating his intention to deny labor certification based on Employer's rejection of two purportedly qualified U.S. applicants and a failure to pay overtime. Specifically, the CO found Employer's rejection of applicants Cleghome and Legge, based on Cleghome's purported lack of qualifications and Employer's inability to contact Legge, to be unlawful. The CO found that although Employer stated that applicant Cleghome lacked experience in a deli, such a qualification was not listed as a job "requirement" on the application. Furthermore, with respect to applicant Legge, Employer failed to show what attempts at contact were made. (AF 48-49). To rebut the finding of unlawful rejection, the NOF instructed Employer to submit documentation clearly showing that "each U.S. worker . . . has been recruited in good faith and rejected solely for lawful, job-related reasons." Employer was also directed to provide telephone bills to document that telephone calls were placed to applicant Legge. The CO also proposed to deny labor certification because Employer failed to offer to pay overtime at the rate of time and one half for hours worked over forty hours per week. (AF 10-13). The CO directed Employer to amend the ETA-750A to show the overtime rate and the number of overtime hours. (AF 12).

On May 30, 2002, Employer filed its timely rebuttal arguing the two U.S. applicants had not been unlawfully rejected. (AF 1- 4). While its initial recruitment report stated that applicant Cleghome lacked experience in a deli, Employer now stated on rebuttal that Cleghome was not pleased with the work schedule and that the applicant stated that he did not work in a deli. (AF 2). Employer also stated that, although it attempted to call applicant Legge several times, Employer was unable to reach him. Employer provided no documentation that phone calls were made. In response to the CO's assertion that Employer had failed to pay overtime, Employer responded that it was

unwilling to pay overtime. Specifically, Employer contended that: “[i]t is customary for us to hire people that meet our working conditions and we cannot be forced to satisfy the Department’s expectations.”

Employer requested review of the CO's Final Determination on July 23, 2002. (AF 7-8). The request reiterated Employer’s arguments on rebuttal. The CO forwarded the record to this Office for administrative-judicial review. (AF 1). Subsequently, Employer filed a brief in support of its position.

DISCUSSION

The regulations at 20 C.F.R. §§ 656.21(b)(6) and 656.21(j)(1)(iv) provide that if U.S. workers have applied for a position, an employer must document that they were rejected solely for lawful, job related reasons. An employer that fails to explain or document the U.S. applicants' lack of qualifications likewise fails to specify a lawful job related reason for rejecting the U.S. applicant. *Seaboard Farms of Athens, Inc.*, 1990-INA-383 & 1990-INA-399 (Dec. 3, 1991); *D & J Finishing, Inc.*, 1990-INA-446 (Aug. 13, 1991). An employer must establish, by convincing evidence, that the U.S. applicant is not qualified for the position. *Nationwide Baby Shops, Inc.*, 1990-INA-286 (Oct. 31, 1991).

While an employer may contemplate that certain duties specified in its job description may require specific education and/or experience, such requirements must be identified by the employer's recruiting advertisement and must be part of the description of the job to be performed as stated in ETA Form 750A of the Application. *Eldorado Coffee Dist., Ltd.*, 1993-INA-460 (Jul. 26, 1994). In the instant case, the job duties listed in Employer's application and recruiting advertisement gave no indication that work experience in a deli would be a hiring criterion for this job.(AF 29-30). The broad range of experience, education, and training apparent in Mr. Cleghome's resume raised the reasonable possibility that he was qualified, but for hiring criteria that the Employer did not disclose until the job interview. *Ceylon Shipping, Inc.*, 1992-INA-322 (Aug. 30, 1993); *Executive Protective*

Services, Inc., 1992-INA-392 (July 30, 1993).

It is well established that an employer may not reject a U.S. worker based on an unstated job requirement. *33 East Maintenance Corp./Freehold Cartage Corp.*, 1994-INA-242 (June 27, 1995); *Blue Ridge Farms*, 1994-INA-106 (Mar. 22, 1995). As the rejection of U.S. workers for not meeting unspecified requirements constitutes the unlawful rejection of qualified U.S. workers pursuant to 20 C.F.R. § 656.21(b)(7), Employer's application of such criteria in the rejection of Mr. Cleghome was contrary to law. *J. W. Manny, Inc.*, 1996-INA-416 (June 10, 1998).

An employer bears the burden of proof in labor certification proceedings. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Top Sewing, Inc. and Columbia Sportswear*, 1995-INA-563 and 1996-INA-38 (Jan. 28, 1997) (per curiam). In this case, the CO questioned whether adequate measures had been taken by Employer to reach U.S. applicant, Legge. Employer claims to have pursued applicant Legg by making repeated phone calls where no message was left. The Board has ruled that mere phone calls to an applicant are not sufficient to show a good faith recruitment effort. *Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991). Under the circumstances of the case, we find that merely making phone calls and taking no further reasonable action to contact the applicant indicates a lack of good faith in recruitment. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Furthermore, where the CO requests a document or information which has a direct bearing on the resolution of the issue and is obtainable by reasonable effort, the employer must produce it. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Because the CO found the reason for the rejection not to be credible, and Employer failed to produce documentation attesting to Employer's attempts, the CO properly found that Employer had failed to meet its burden of proof.²

² In view of the above, we do not reach the issue of Employer's failure to offer to pay overtime.

ORDER

For the foregoing reasons, the Final Determination of the Certifying Officer is **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 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.