

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 September 2003

BALCA Case No.: 2003-INA-102
ETA Case No.: P2001-NV-09508067/ET

In the Matter of:

KACEY'S SOFA GALLERY,
Employer,

on behalf of

ARTURO COBOS,
Alien.

Appearance: Ricardo Marquez
Las Vegas, Nevada
For the Employer

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arises from an application for labor certification¹ filed by Kacey's Sofa Gallery, Gerald Casto, ("Employer") on behalf of Arturo Cobos ("Alien") for the position of furniture upholsterer. 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"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

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.

STATEMENT OF THE CASE

On February 1, 2001, Employer filed an application for alien employment certification on behalf of the Alien, Arturo Cobos, to fill the position of furniture upholsterer. (AF 22). The job duties are described as

Repairs and rebuilds upholstered furniture, using handtools and knowledge of fabrics and upholstery methods. Removes covering, webbing, and padding from seat, arms, back, and sides of workpiece, using tack puller, chisel, and mallet.

(AF 22). Two years of experience in the position offered was required.

The CO issued a Notice of Findings (“NOF”) on November 4, 2002, indicating his intent to deny the certification application. (AF 17-19). The CO found that Employer had unlawfully rejected three U.S. workers. The CO stated that Employer had not shown that he contacted U.S. applicants Calvin Ward and Gerald Dombrowski upon receipt of their applications. In addition, U.S. applicant Francisco Ramos was rejected for being over-qualified for the position. (AF 19).

Employer submitted its Rebuttal by letter dated December 5, 2002. (AF 4). Employer stated that the three applicants were rejected because their qualifications did not match Employer’s requirements or they did not have the requisite two years of experience. (AF 8). Employer did not address the issue of his contact of the applicants.

The CO issued a Final Determination (“FD”) denying certification on December 23, 2002. (AF 2-3). The CO stated that Employer’s statements in his Rebuttal were contradictory to his earlier statements regarding the U.S. applicants. Specifically, Employer previously indicated the reason for rejection of U.S. applicants Ward and Dombrowski was because they failed to appear for their scheduled interviews. However, in Rebuttal, Employer argued that they were unqualified for the position based on the qualifications listed on their applications. Employer also stated that U.S. applicant Ramos was not qualified because he lacked the requisite experience with custom designed

furniture. Employer failed to address the issue of the contact of the applicants. The CO found the Rebuttal to be inconsistent and contradictory to Employer's previous statements and certification was denied on this basis. (AF 3).

By letter dated December 31, 2002, Employer filed a Request for Review and the matter was docketed in this office on February 19, 2003. (AF 1). Employer filed a Statement of Position on April 7, 2003 and attached copies of invitations to interview sent to the three U.S. applicants in question in 2001.

DISCUSSION

If a U.S. applicant applies for the position, the CO should consider the applicant able and qualified for the job opportunity if the applicant, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. 20 C.F.R. § 656.24(b)(2)(ii). If the U.S. applicant is able and qualified, the employer must document that the applicant was rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Certification is properly denied for the unlawful rejection of even one U.S. worker. *See Richco Management, Inc.*, 1988-INA-509 (Nov. 21, 1989).

An employer carries the burden of proof to establish a good faith effort to recruit available U.S. workers. Upon receipt of resumes and/or applications from U.S. workers, the employer must make a timely effort to contact the applicants. Failure to do so can result in denial of certification due to rejection of U.S. workers not based on valid, job-related reasons. 20 C.F.R. § 656.21(b)(6).

The CO found, in the NOF, that Employer had failed to establish timely contact with U.S. applicants Ward and Dombrowski. (AF 19). Employer mailed the two applicants letters inviting them to interview for the position and scheduling an interview for a set date and time. Copies of these letters are included but no certified mail receipts are attached. (AF 34, 37). Employer stated,

in his letter to the Nevada Employer Service Office dated August 20, 2001, that applicants Ward and Dombrowski had been contacted by mail, but failed to appear on the date in question for their interviews. (AF 29). Based on this, Employer determined that they were not interested in the position and were rejected.

In *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*), the Board held that "What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the particular facts of the case under consideration. . . . In some circumstances it requires more than a single type of attempted contact. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*). . . . Whether the mailing of the letter in and of itself constitutes a reasonable effort to contact a qualified U.S. applicant depends on the facts of the case. It has been held that 'Where there are a small number of applicants, sending a letter may not be enough to demonstrate good faith, especially when the employer is provided with telephone numbers to contact applicants. *Diana Mock*, [19]88-INA-255 (April 9, 1990).' *American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999). It has also been 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).

Employer failed to contact applicants Ward and Dombrowski by any method other than the original letter sent. Employer acknowledged in his Statement of Position that he was not aware of the requirement of certified mail at the time he sent the letters; however, he failed to state when or how he sent the original letters.² The only indication that he did in fact contact these two applicants is his statement that they failed to appear for the interviews and his copies of letters allegedly mailed to the applicants. Employer did not contact the applicants by telephone, even though he had phone

² In *M.N. Auto*, *supra*, the Board held that a CO cannot require an employer to use certified mail, return receipt requested, to prove actual contact with U.S. applicants. Nonetheless, the Board also observed that "an employer who fails to [use certified mail] runs the risk of not being able to prove its good faith efforts at contact and recruitment of U.S. workers." Moreover, the Board noted that "a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof." Thus, even if certified mail was not used, an Employer should be prepared to provide supporting documentation to establish its timely contacts with applicants.

numbers for both applicants. (AF 35: resumes of applicants showing phone numbers). Employer has not demonstrated a good faith effort to recruit based on this failure to timely contact the applicants.

Based on the Rebuttal, Employer has acknowledged that his original attempts to contact the applicants were insufficient. Section 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. On this basis, 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*). When an employer fails to rebut the CO's finding that it had rejected U.S. applicants for other than job-related reasons, certification is properly denied. *Sousa & Faria, Inc.*, 1994-INA-426 (Oct. 3, 1995). Employer has failed to rebut the finding that he failed to demonstrate timely contact of applicants Ward and Dombrowski. He did not address the failure to contact the applicants in his Rebuttal (AF 8) and as such, this finding has been deemed admitted.

In addition, as noted by the CO, Employer has made contradictory statements regarding the reasons for rejection of these applicants. (AF 3). Employer originally stated that the applicants were no longer interested in the position due to their failure to appear at the interviews. (AF 29). However, after the CO questioned the method of contact in the NOF, Employer failed to address this issue in Rebuttal. Instead, Employer argued that the applicants were not qualified because they lacked the requisite experience required for the position. (AF 8). Employer made no reference to any attempted communication with these applicants. Employer's statements are confusing and contradictory. Employer has not demonstrated a valid, job-related rejection of U.S. workers and as such, certification was properly denied on these grounds.

With respect to applicant Ramos, the CO noted in the NOF that Employer had rejected this applicant for being "over qualified" for the position. (AF 18). Employer, in Rebuttal, stated that although he had three years experience in "recovering all types of furniture, his resume doesn't mention he has experience in designed upholstery." (AF 8). Mr. Ramos' resume indicates experience in "custom upholstery," as well as furniture repair and three years of experience restyling sofas and

recovering all types of furniture. (AF 31). Mr. Ramos clearly meets the minimum requirements for the position, given his multiple years experience in furniture upholstery. If the U.S. worker meets the minimum requirements, he is considered qualified for the position. The employer must then show that the U.S. worker was rejected solely for lawful, job-related reasons. *See* 20 C.F.R. § 656.21(b)(6).

Employer originally determined that Mr. Ramos was over-qualified for the position. However, in Rebuttal, Employer stated that his experience was not directly applicable because he did not have enough experience with custom designed furniture. (AF 8). If the applicant has considerable experience in the stated job, he cannot be rejected because he is not familiar with a certain aspect of that job. *See Rafa's Roofing*, 1995-INA-287 (Dec. 19, 1996). Mr. Ramos did indicate that he has approximately one month experience with custom upholstery, in addition to his many years of experience in furniture repair and upholstery. Employer has failed to show that Mr. Ramos was rejected for valid, job-related reasons. As such, certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is **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 unless within twenty days from the date of service a party petitions for review by the full Board. 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 the Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K St., N.W.
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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.