



**Issue Date: 16 June 2004**

**BALCA Case No.: 2003-INA-107**  
ETA Case No.: P2000-CA-09508812/ML

*In the Matter of:*

**STAFFING SERVICES, INC.,**  
*Employer,*

*on behalf of*

**ANA ROSA HERNANDEZ,**  
*Alien.*

Appearances: W. Kenneth Teebken, Esquire  
La Mirada, California  
For the Employer and the Alien

Certifying Officer: Martin Rios  
San Francisco, California

Before: Burke, Chapman and Vittone  
Administrative Law Judges

### **DECISION AND ORDER**

**PER CURIAM.** This case arises from an application for labor certification<sup>1</sup> filed by a staffing services company for the position of Shipping Clerk. (AF 31-32).<sup>2</sup> The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification, together with the Employer’s request for review, as contained in the Appeal File (“AF”) and written arguments of the parties. 20 C.F.R. § 656.27(c).

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<sup>1</sup> Alien labor certification is governed by § 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.

<sup>2</sup>“AF” is an abbreviation for “Appeal File.”

## **STATEMENT OF THE CASE**

On December 28, 1999, the Employer, Staffing Services, Inc., filed an application for alien employment certification on behalf of the Alien, Ana Rosa Hernandez, to fill the position of Shipping Clerk. Minimum requirements for the position were listed as two years experience in the job offered. (AF 31-32).

The Employer received sixty-two applicant referrals in response to its recruitment efforts, all of whom were rejected as either unqualified or unavailable for the position. The Employer's reported basis for rejection of thirty-seven of the sixty-two applicants was failure to appear for or to reschedule a previously confirmed interview. (AF 39-46).

A Notice of Findings ("NOF") was issued by the CO on July 30, 2002, proposing to deny labor certification based upon findings of restrictive requirements and an insufficient recruitment effort. (AF 26-29). The CO found the Employer's experience requirement excessive in light of the corresponding Specific Vocational Preparation ("SVP") time, six to twelve months, for the occupation of Shipping and Receiving Clerk, DOT Code 222.387.030. The Employer was instructed either to amend the restrictive requirement or to justify its business necessity. The CO further found that the Employer had failed to submit documentation of its telephone contact efforts (i.e. phone bills) of the sixty-two qualified U.S. applicants and instructed the Employer to submit details of its attempt(s) to interview the U.S. applicants. (AF 27-28).

In Rebuttal, the Employer submitted that its two year experience requirement was justified because of the level of responsibility required, but stated that if necessary, it would delete the requirement and re-advertise. With respect to the recruitment effort issue, the Employer detailed its contact of each applicant and reported that thirty-seven of the sixty-two applicants had confirmed their appointments but then failed to appear for the interview. (AF 18-25).

A Final Determination (“FD”) denying labor certification was issued by the CO on October 31, 2002, based upon a finding that the Employer had failed to adequately respond to both the restrictive requirement and insufficient recruitment report findings. (AF 11-12). The CO found that the Employer’s argument that the level of responsibility required two years experience was insufficient to rebut the findings, and noted that the Employer failed to provide the amendment letter reducing the experience requirement. The CO found that the Employer’s rebuttal with respect to the insufficient recruitment effort was lacking; the Employer did not adequately document a timely, good-faith recruitment effort of the sixty-two qualified applicants, despite the CO’s request for documentation to support its allegation of contact.

The Employer filed a Request for Review by letter dated November 15, 2002, and the matter was referred to this Office and docketed on February 20, 2003. (AF 1-10). The Employer filed an Appeal Brief on July 8, 2003.

## **DISCUSSION**

Twenty C.F.R. § 656.21(b)(6) states that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may be rejected solely for lawful job related reasons. This regulation applies not only to an employer’s formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. Twenty C.F.R. § 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 the Employer's good faith recruitment of U.S. workers. The burden of proof is on the 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 the 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.

Although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*); *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). 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. Pre-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.

The Board further noted that although records of local phone calls may not always be available upon request from the telephone company, an employer should be prepared to document that it had requested these records from the phone company in a timely fashion. *Id.*

In the instant case, the Employer reported that thirty-seven applicants purportedly contacted by the Employer confirmed their interviews, yet failed to appear at the scheduled times. In light of this fact, the CO requested that the Employer provide documentation of contact, specifically, telephone bills. The Employer made no effort to provide further documentation, and instead simply resubmitted the information stated in the recruitment report. The Employer made bare allegations that he had contacted the U.S. applicants; however, these allegations were not supported by phone bills or records or any evidence that the Employer had attempted to procure such documentation. The

Employer made no effort to substantiate his alleged contact with the applicants and failed to comply with the CO's request for documentation. *See, e.g., Medical Designs, Inc., 1988-INA-159 (Dec. 19, 1988)(en banc)(inadequacy of such documentation).*

On this basis, the 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, labor certification was properly denied.

## **ORDER**

The Certifying Officer's denial of labor certification 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 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, 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 typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.