



Issue Date: 08 June 2004

BALCA Case No.: 2003-INA-96
ETA Case No.: P2000-CA-09499022/NDL

In the Matter of:

DAVID MULYATNA,
Employer,

on behalf of

RAY SWEE,
Alien.

Appearances: Joe C. Ortega, Esquire
Los Angeles, 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 certification¹ filed by a private household for the position of Child Monitor/Housekeeper. (AF 52-53).² The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF").

¹ 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.

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

STATEMENT OF THE CASE

On April 14, 1998, the Employer, David Mulyatna, filed an application for alien employment certification on behalf of the Alien, Ray Swee, to fill the position of Child Monitor/Housekeeper. Minimum requirements for the position were listed as availability for evening and weekend work and the ability to provide character references. The Employer also stated a preference for someone who speaks Indonesian and can cook Indonesian-Chinese food. (AF 52-53).

A Notice of Findings (“NOF”) was issued by the CO on February 20, 2002, proposing to deny certification based upon a finding that the Employer’s requirements of ability to speak Indonesian and cook Indonesian-Chinese food were considered unduly restrictive. (AF 47-50). In response, the Employer stated a willingness to delete the requirements and to retest the labor market, and the matter was remanded to the local office for a new labor market test. (AF 34-41).

The Employer received two applicant referrals in response to its recruitment efforts, both of whom the Employer reported were rejected as unavailable for the position based upon their failure to return calls placed by the Employer. The Employer reported that he left messages at the applicants’ homes and spoke to a friend or relative, but did not speak to the applicants themselves. (AF 20).

A Supplemental Notice of Findings (“SNOF”) was issued by the CO on October 18, 2002, proposing to deny labor certification based upon a finding that the Employer had rejected these two apparently qualified U.S. workers for other than lawful, job-related reasons. The CO questioned the Employer’s good faith efforts in contacting and recruiting both of these U.S. workers, noting that the Employer had spoken with someone other than the applicant in both cases, and could not be assured that the applicants ever received his message. The CO requested further documentation of a good faith effort to contact and recruit these qualified U.S. applicants. (AF 14-16).

In Rebuttal, the Employer reiterated the fact that he had spoken with someone in each of the applicants' homes who assured the Employer that they would give the applicants the message. The Employer further stated that because the applicants did not reply, he fairly assumed they were uninterested or unavailable for the position. (AF 10-13).

A Final Determination ("FD") denying labor certification was issued by the CO on December 11, 2002, based upon a finding that the Employer had failed to demonstrate a good faith effort to contact and recruit qualified and available U.S. workers. In denying certification, the CO observed that an employer attempting to recruit qualified U.S. workers could not rely solely on third party conversations, especially when there were only two applicant responses to the job opportunity. (AF 5-6).

The Employer filed a Request for Review on January 8, 2003, and a Statement of Position dated January 28, 2003. The matter was referred to this Office and docketed on March 13, 2003. (AF 1-4).

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 application for 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.

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. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*). What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the facts of the particular case. 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, the Employer’s reported basis for rejection of both of the U.S. workers who applied was their failure to respond to messages left with third parties. The Employer did not represent that he had made additional efforts to contact the applicants directly by phone or that he had tried any alternative means of contact. We find, as previously held by the Board in *Dove Homes, Inc.*, 1987-INA-680 (May 25, 1988)(*en banc*) and *Diceon Electronics, Inc.*, 1988-INA-253 (Apr. 18, 1989)(*en banc*), that it is unacceptable for an employer to assume that a U.S. applicant is not interested based solely on a phone conversation with a third party. Leaving a message with a third party

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 Pizzazz Industries*, 1990-INA-260 (Dec. 5, 1991); *Gambino’s Restaurant*, 1990-INA-320 (Sept. 17, 1991); *Sierra Canyon School*, 1990-INA-410 (Jan. 16, 1992); *Zephr Grill Restaurant*, 1996-INA-269 (May 7, 1998); *S. Balian Designs*, 1989-INA-299 (Sep. 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).

does not relieve an employer's burden to attempt to contact the applicant directly. "[A]n employer who wants to consider an applicant seriously must go further than merely speaking to[a third party] by telephone." *Switch, U.S.A., Inc.*, 1988-INA-164 (Apr. 19, 1989)(*en banc*).

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.