



Issue Date: 22 June 2004

BALCA Case No.: 2003-INA-117
ETA Case No.: P2002-DC-03376898

In the Matter of:

FORT MYER CONSTRUCTION CORP.,
Employer,

on behalf of

SANTOS E. GUERRERO,
Alien.

Appearances: Luis A. Gonzalez, Esquire
Falls Church, Virginia
For the Employer and the Alien

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of permanent alien labor certification for the position of Truck Driver.¹ In this case, the Employer was referred

¹ Permanent 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 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 record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

two U.S. applicants. According to the Employer's recruitment report, the applicants did not respond to the Employer's phone calls. (AF 41). The Certifying Officer issued a Notice of Findings stating that the Employer's unanswered telephone calls did not establish that its overall recruitment efforts were in good faith, and stating an intent to deny the application unless the Employer established that an attempt was also made to contact the applicants by mail. (AF 13).

In response, the Employer submitted a letter in which it admitted that it had only left a single telephone message with one of the applicants, and in which it did not discuss what efforts were made to contact the second applicant. The Employer argued that both applicants were not qualified on the face of their resumes because they did not show experience in driving a tandem dump truck of the size employed by the Employer's construction business. (AF 21-22). The Employer also stated that it would normally use the local Teamsters to obtain qualified truck drivers since it is "a closed 'union' shop."

The Employer's attorney also provided argument in response to the NOF. (AF 7-9). The attorney argued that, because of confusion over the job number, it was unclear whether the applicants who were referred were actually in response to the instant labor certification application. The attorney also pointed out that the Employer had never been provided any guidance or recommendation that the Employer needed to use more than one method of contacting applicants. The attorney contended that, pursuant to the BALCA decision in *Joyful Manor*, 2001-INA-157 (Mar. 27, 2002), the Employer should be allowed to re-advertise the position after being advised of the need for alternative means of contact with the applicants.

The CO then issued a Final Determination denying the application. (AF 4-6). The CO rejected the "unqualified on the face of the resume" rebuttal because operating a "65,000 GVW tandem dump truck" was not stated as a job requirement on the ETA Form 750A. The CO observed that there was no indication on that form that "operating a specific type of truck or a commercial license is required for this position." The CO rejected the "confusion over the job number" rebuttal because the Employer obviously

treated the two applicants as referrals for the job at issue. Finally, the CO found that the Employer had not established that its overall recruitment efforts were sufficient because "[t]he Employer has failed to make any additional attempts to contact the applicants following one unsuccessful telephone call."

DISCUSSION

In the instant case the Employer attempted to disqualify the applicants on grounds not stated on the ETA 750A. Previously undisclosed requirements cannot be used to disqualify U.S. applicants. *Fritz Garage*, 1988-INA-98 (Aug. 17, 1988) (*en banc*). We also agree with the CO that confusion over whether the applicants were referred in regard to the instant labor certification application is not a credible rebuttal where the Employer treated the applicants as referrals in this matter.

The Employer accurately cites *Joyful Manor*, 2001-INA-157 (March 27, 2002) *aff'd on recon*, *Joyful Manor*, 2001-INA-157 (June 5, 2002), for the proposition that when "no notice is provided that alternative means of contact will be required to document good faith in recruitment, the denial of certification cannot be denied solely on that ground." See also *PJM Bookkeeping & Tax Services*, 2002-INA-156 (Oct. 3, 2002), and *Walnut Home Care*, 2001-INA-156 (Oct. 3, 2002). However, *Joyful Manor* does not alter the Employer's burden of establishing overall good faith efforts to recruit. In *Norma Diamond*, 2003-INA-122 (Sept. 4, 2003), the panel limited and clarified the *Joyful Manor* line of cases:

[W]e caution that the *Joyful Manor* line of cases does not excuse any documentation lapse by the Employer. Rather, the *Joyful Manor* variety of remand is used only where the CO "blindsided" the Employer with a documentation requirement that could not reasonably have been anticipated – in that case a requirement of alternative contacts. As this panel stated when denying a motion for reconsideration by the CO of the *Joyful Manor* decision, the paramount concern that led to a remand in that case was a concern for fundamental fairness. In the instant case, it was imminently foreseeable that Employer would need to establish a timely contact of applicants, and we do not find it unfair or unreasonable for the

CO to have requested such documentation. Moreover, the EDD's "Final Documentation Notice" letter made it crystal clear that lack of timely contact could be fatal to an application, and that documentation would be needed, albeit the EDD's letter assumes that the Employer would be using mail rather than telephone to contact applicants. In such a case, an employer cannot merely provide an inexact statement of when applicants were contacted and then blame the government for its failure to produce concrete documentation. Employer evidently chose to limit its recruitment efforts to an undocumented series of phone calls. Limiting its effort in this manner made it susceptible to challenge for lack of adequate documentation. The government's having not warned about this susceptibility does not remove the Employer's ultimate evidentiary burden. We do not find the CO's documentation request under this circumstance to have been unfair.

In a slightly different context, the Board stated that "The CO is not required to provide a detailed guide to the employer on how to achieve labor certification. The burden is placed on the employer by the statute and regulations to produce enough evidence to support its application." *Miaofu Cao*, 1994-INA-53 (BALCA Mar. 14, 1996)(*en banc*) (fairness of NOF). Similarly, we did not mean to suggest in the *Joyful Manor* line of cases that a local job service must provide a roadmap for a petitioning employer. Rather, we were merely observing that the CO could have avoided being found to have blindsided the Employer with an unexpected documentation requirement if it had instructed the local job service to discuss documentation requirements in its early notices to employers. We remain concerned about unfair surprises of documentation requests after it is too late for an employer to remedy the situation. Employer's request to apply the logic of the *Joyful Manor* line of cases to the circumstances of the instant case, however, swings the pendulum too far the other way, and would make it too easy for employers to avoid deficiencies in their documentation of recruitment efforts. We limit the *Joyful Manor* line of cases to their precise factual circumstances or to compelling instances of unfairness under other circumstances. We do not find a compelling instance of unfairness in the instant case, however, and therefore affirm the CO's denial of certification.

Similarly, here the Employer's only recruitment effort appears to have been a single telephone message left on the answering machines of the two applicants. It is the Employer's burden to establish that its overall recruitment efforts were sufficient to establish good faith. We do not find, under this circumstance, that the failure of proof of good faith in recruitment is attributable in any way to inadequate instructions from the local job service or the CO. Thus, we do not find that the government blindsided this

Employer with unreasonably foreseeable documentation requirements as was the case in *Joyful Manor*.

The Employer was represented by counsel from the start of this application process. The need to do more than make a single telephone call has been established by BALCA caselaw for well over a decade. *See, e.g., Bruce A. Fjeld*, 1988-INA-333 (May 26, 1989) (*en banc*). The Employer's efforts here were minimal, and failed to document a good faith recruitment effort.

Accordingly, we do not find that the CO's denial of labor certification in this matter offends notions of fundamental fairness, and we affirm that denial.

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.