

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 November 2003

BALCA Case No.: 2003-INA-3
ETA Case No.: P2000-CA-09507558/ML

In the Matter of:

SUN GARDEN MANOR,
Employer,

on behalf of

ANNA MARIA BALOGH,
Alien.

Appearance: Sanford B. Reback, Esq.
Los Angeles, California
For Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Cook.¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

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

STATEMENT OF THE CASE

On December 13, 1999, Sun Garden Manor ("Employer") filed an application for labor certification on behalf of Anna Maria Balogh ("Alien") for the position of Cook. (AF 12). The position required the preparation of low fat, salt free meals for twenty-eight mentally disabled patients and two staff. Two years of experience in the job offered or two years of experience as a restaurant cook were required. (AF 12).

On June 8, 2000, the California Employment Development Department ("EDD"), forwarded to Employer the resumes of four U.S. applicants. (AF 28). By letter dated July 20, 2000, Employer advised the EDD that it had attempted to contact each applicant by telephone; however, they either did not have answering machines, the answering machines were not working or the applicants did not return the message. (AF 17). With regard to U.S. applicants Yang and May, Employer stated that letters were sent to them as well, however, no responses resulted from the letters. (AF 18). Employer pointed out that it could not write U.S. applicant Lupian because his resume gave an incomplete address, making contact with him impossible. Employer noted that applicant Gomez did not provide an address on his resume. (AF 18).

The CO issued a Notice of Findings ("NOF") on June 13, 2002, proposing to deny certification based on Employer's failure to comply with the regulations at 20 C.F.R. §656.21(b)(2)(ii), inasmuch as the position combined the duties of an institutional cook with that of a dietician; and Employer's insufficient recruitment effort. (AF 8-10). With regard to the combination of duties, Employer was advised that it needed to amend the restrictive requirement or to justify the combination of duties as a business necessity. With regard to the issue of insufficient recruitment efforts, Employer was advised that it had submitted insufficient evidence of its efforts to contact U.S. applicant Lupian. Additionally, the CO determined that Employer's contact letters to U.S. applicants May and Yang were discouraging in tone and would have had a deterrent effect on their interest in the position. Employer was directed to submit rebuttal addressing these issues and detailing its

attempts to interview the U.S. applicants. Otherwise, the rejection of these U.S. workers would be considered as having been based on other than valid, job-related reasons, in violation of 20 C.F.R. § 656.21(b)(6), and the job opportunity would not be considered to be clearly open to any qualified U.S. worker, in violation of 20 C.F.R. § 656.20(c)(8). (AF 8-10).

Employer submitted a rebuttal letter dated July 15, 2002, signed by counsel and Employer. (AF 4). Therein, Employer asserted that the CO had issued over eighty certifications to employers in which the CO accepted the fact that the cooking of meals in accordance with low fat and salt free menus was not a combination of duties. Employer argued that the position did not involve a combination of duties, but required the cook to receive instructions from the patients' physicians regarding which patients should have salt free and/or low fat meals. (AF 4-7).

With regard to insufficient recruitment efforts, Employer argued that its letters to applicants Yang and May did not have a deterrent effect, given that the letters merely repeated what was stated in the applicants' letters. Yang was seeking the position of "sous chef" in an "institutional environment" and May clearly stated in his resume that he was looking for a position "to utilize his accomplishments in creative culinary cooking and management of staff in an extensive menu planning environment." (AF 5). With regard to Lupian, Employer argued that it could not send a letter because his resume listed an incomplete address. Finally, Employer indicated its willingness to re-advertise. (AF 4-7).

The CO issued a Final Determination ("FD") on August 16, 2002, finding that Employer had failed to satisfactorily rebut the NOF. (AF 2-3). The CO pointed out that Employer had failed to provide any documentation of the prescriptions the physicians gave to the cook. With regard to the insufficient recruitment effort, the CO found that Employer had hazarded an opinion regarding the applicants' career objectives without actually interviewing them. The claim that Yang only wanted to be a sous chef was not borne out by his resume. The CO found that Employer had misread May's list of accomplishments as his objectives. With regard to Lupian, there was no evidence that Employer attempted to obtain a complete address from the EDD. Accordingly, a valid, job-related

reason for rejecting these three applicants was not shown and the application was not certified. (AF 3).

By letter dated September 6, 2002, Employer requested review of the denial of labor certification by the Board of Alien Labor Certification Appeals ("BALCA" or "Board") and the matter was docketed in this Office on October 8, 2002. (AF 1).

DISCUSSION

Employer submitted a brief which reiterated the arguments made in rebuttal, stating that the physicians do not prescribe the meals to be cooked, only that the meals be low fat or salt free. With regard to the recruitment efforts, Employer reiterated that the letters sent to the U.S. applicants merely stated what the U.S. applicants had provided in their resumes, advising these applicants that Employer was unable to offer them positions meeting their respective career objectives.

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988); *Aquatec Water Systems*, 2000-INA-150 (Sept. 21, 2000). Actions by an employer which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§656.1, 656.2(b). Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*).

U.S. applicant May listed a career summary which demonstrated creative culinary skills, an ability to manage staff and extensive menu planning. (AF 21). He did not list any career objectives, and his resume indicated that he was qualified for the position at issue. Employer responded to May's resume by writing a letter noting May's accomplishments. (AF 24). Employer then went on to state that the position "would not give you the opportunity to draw on any of the above skills outlined in your resume," further asserting that if May was still interested, he should call for an interview. (AF 24).

U.S. applicant Yang submitted a resume indicating that his objective was a position as a “sous chef, production cook, (institutional) dietary cook, restaurant cook.” (AF 26). In its letter responding to the resume, Employer advised Yang that Employer understood from his resume that he was seeking a position as sous chef, and therefore, “it would not appear that [Employer] can meet with your career objectives.” (AF 25). As with May, Yang was advised to contact Employer for an interview if he was still interested.

A suspicion that the position offered does not match the long term career objectives of an applicant does not establish lawful grounds for rejection. An employer may not make unilateral assumptions about an applicant's interests. *See National Semiconductor*, 1988-INA-301 (Mar. 3, 1989) (*en banc*). An employer may not assume a U.S. applicant is not interested in a position because the career goals listed on their resume do not match the job offered. *See J.J. Appelbaum's Deli Co.*, 1990-INA-475 (Jan. 30, 1992). Employer, by indicating that the position offered was not in line with the applicants' career goals, assumed that they would not be interested in the position. Employer made this assumption before fully investigating the applicants' qualifications and goals in a personal interview. As such, Employer has failed to show a good faith recruitment effort.

In addition, an employer should not attempt to discourage an applicant in its contact with the applicant and an employer fails to engage in good faith recruiting when it attempts to discourage an applicant. *See Noh Mask & Unfolding Futon*, 1989-INA-144 (Feb. 7, 1990); *see also Golden Ross Orthopedic Manufacturing Co.*, 1993-INA-556 (Aug. 8, 1995). It is obvious from Employer's letters to U.S. applicants May and Yang that Employer engaged in less than good faith recruitment. The letters had a discouraging effect and as the CO correctly pointed out, distorted the language and intent of the resumes. Indeed, by way of example, Yang's objective clearly listed more than the position of sous chef, and included positions such as the one he was seeking with Employer. Employer's letters to these two applicants were negative in tone. It is apparent that Employer's letters were written to discourage these applicants from pursuing the position, demonstrating a lack of good faith recruitment.

As to applicant Lupian's address, Employer also raised new arguments and evidence regarding this issue in the request for review. Specifically, Employer asserted that he had contacted EDD in an attempt to obtain applicant Lupian's correct address but EDD did not have it on file. This is the first time that Employer has raised this assertion. These arguments and evidence will not be considered by the Board. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. *See* 20 C.F.R. § 656.27(c); *see also* 20 C.F.R. § 656.26(b)(4). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, as discussed in the foregoing, certification was properly denied based on a lack of a good faith recruitment effort. It is therefore unnecessary to address Employer's failure to obtain applicant Lupian's address from EDD; it is also unnecessary to address the issue of the combination of duties and/or the justification of this combination by business necessity, as certification has been properly denied on other grounds.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

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 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.