U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 12 January 2005

BALCA CASE No.: 2004-INA-111
ETA Case No.: P2002-CA-09531359/ML

In the Matter of:

NEWPORT RIB COMPANY,
Employer,

on behalf of

JOSE JIMENEZ,
Alien.

Appearance: Walter Burrier, Esquire
Santa Ana, 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. Newport Rib Company ("the Employer") filed an application for labor certification[1] on behalf of Jose Jimenez ("the Alien") on March 30, 2001. (AF 41).[2] The Employer sought to employ the Alien as a Cook, Restaurant. This 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 AF. 20 C.F.R. § 656.27(c).

---

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

The Employer described the job duties as paring, cleaning, seasoning, and preparing meat, vegetables, soups, and desserts. The Employer required no advanced education, but did require two years of experience in the job offered. (AF 41).

In the Notice of Findings ("NOF"), issued September 12, 2003, the CO found that the Employer did not demonstrate lawful, job-related reasons for rejecting five U.S. applicants, in violation of 20 C.F.R. § 656.21(b)(6). These applicants were considered qualified because their resumes indicated that they had the experience required. The CO noted that the Employer rejected the five U.S. applicants for not responding to a certified mailed letter, which instructed the applicants to complete and return an employment application to the Employer. The CO concluded that this additional step could have discouraged the applicants from responding and it indicated a lack of good faith effort to recruit U.S. workers. In addition, the CO stated that the Employer did not establish that any other attempts were made to contact these applicants. (AF 37-39).

In its rebuttal, dated October 16, 2003, the Employer stated that the failure of the U.S. applicants to respond to the simple request demonstrated that they were not interested in the job. The Employer argued that by using certified mail, it proved it acted in good faith and the US applicants were rejected because they were not available. (AF 16-36).

The CO issued the Final Determination ("FD") on October 23, 2003, denying the Employer's application for labor certification. (AF 14-15). The CO found that the Employer failed to submit evidence of good faith efforts to contact and recruit U.S. applicants. Specifically, the CO noted that the Employer's requirement for U.S. applicants to send in an application when the Employer had the resumes, with telephone numbers, does not show good faith efforts were made to recruit U.S. applicants. (AF 14-15).

By letter dated November 20, 2003, the Employer requested review by this Board, arguing that it had demonstrated good faith by sending evidence of recruitment. (AF 3). The case was docketed by the Board on April 5, 2004.

DISCUSSION

The Employer has not documented good faith recruitment. While the certified return receipts were submitted, no copy of the letters sent to the U.S. applicants was included in the record. Thus, there is no basis to support the Employer's allegation that any letter was included in the envelopes sent by return-receipt certified mail, that the letter directed the applicants to return the employment application or that the letter scheduled an interview with the qualified applicants. 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*). Thus, we find no support for the Employer's assertion that the U.S. applicants failed to respond to a simple request to submit the employment applications.

In addition, we agree with the CO that the Employer's requirement that the applicants who had already submitted resumes submit an employment application before an interview was scheduled does not demonstrate good faith recruitment. An employer who by its actions has made it sufficiently difficult for the applicants to obtain an interview and thus has discouraged them from pursuing the job opportunity has not shown a good faith effort to recruit U.S. workers and has not established lawful, job-related reasons for rejecting U.S. workers. *Budget Iron Works***,** 1988-INA-393 (Mar. 21, 1989) (*en banc*).

In its request for review, the Employer submitted a copy of a letter sent to applicants. Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant,* 1990-INA-480 (Jan. 7, 1992). However, even if this letter were considered, it would raise additional questions about the Employer's rejection of U.S. workers. The letter requests that the applicant bring the letter with him to the

scheduled interview, rather than return the application by mail. In addition, the interview was scheduled for ten weeks after the date of the letter. The letter failed to include a telephone number for the Employer, not allowing the U.S. applicant any alternative method of contacting the Employer.

In the light of the foregoing, we agree with the CO that the Employer's rejection of the U.S. applicants for their failure to respond to an undocumented letter from the Employer requiring the submission of an additional employment application did not demonstrate good faith. Accordingly, 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 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 Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 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.