



Issue Date: 16 June 2004

BALCA Case No.: 2003-INA-129
ETA Case No.: P2001-CA-09509942/VA

In the Matter of:

STAFFING SERVICES, INC.,
Employer,

on behalf of

JOSE HERNANDEZ-SUASTE,
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 certification¹ filed by a staffing services company for the position of Warehouse Stacker. (AF 40-41).² 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).

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 July 6, 2000, the Employer, Staffing Services, Inc., filed an application for alien employment certification on behalf of the Alien, Jose Antonio Hernandez-Suaste, to fill the position of Warehouse Stacker. Minimum requirements for the position were listed as two years experience in the job offered. (AF 40-41).

The Employer received forty-five 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 twenty-two of the forty-five applicants was their failure to appear for or to reschedule a previously confirmed interview. (AF 30-34).

A Notice of Findings ("NOF") was issued by the CO on November 6, 2002, proposing to deny labor certification based upon a finding of unlawful rejection of U.S. workers. (AF 36-38). The CO noted that the Employer's recruitment report stated that twenty-two of the forty-five U.S. applicants referred for employment consideration were rejected because they did not appear for a scheduled interview, and that the applicants that appeared for the interview either did not want the job or had found other employment. The CO found that the Employer's statement was insufficient evidence to show that each of the applicants was contacted. The Employer was instructed to submit rebuttal evidence documenting contact, including "telephone bills to document that telephone calls were placed to all the applicants."

In Rebuttal, the Employer reiterated the recruitment report, stating that the applicants were contacted and either failed to attend the scheduled interview or were no longer interested in the position. (AF 23-35).

A Final Determination ("FD") denying labor certification was issued by the CO on December 23, 2002, based upon a finding that the Employer had failed to adequately document contact of the U.S. applicants. (AF 21-22). Citing the Employer's failure to

provide telephone bills to document that the applicants were contacted, the CO again found the Employer's rebuttal statements insufficient.

The Employer filed a Request for Review by letter dated January 15, 2003, and the matter was referred to this Office and docketed on March 6, 2003. (AF 1-20). The Employer filed an Appeal Brief on May 7, 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.

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.

In this case, all of the applicants were rejected by the Employer because they were unavailable; twenty-two applicants were rejected because they did not appear for a scheduled interview, while the remaining twenty-three applicants were rejected because they were not interested in the job. The Employer was specifically instructed in the NOF to document its contact of these applicants. In rebuttal, the Employer presented no further documentation of actual contact, despite the CO's specific request to provide telephone records.

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 twenty-two applicants purportedly contacted by the Employer failed to appear for their scheduled interviews. The Employer reported that the remaining twenty-three applicants were not interested in the job. 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 did not submit any telephone bills or records or any documentation that same had been requested from the telephone company and relied solely on its

unsupported assertions of attempted contact. *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.