



Issue Date: 16 June 2004

BALCA Case No.: 2003-INA-19
ETA Case No.: P2000-CA-09508169/ML

In the Matter of:

EMPSON DENTAL LABORATORY,
Employer,

on behalf of

LUIS E. MORFIN-ESCALANTE,
Alien.

Appearance: James G. Roche, 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. This case arose from an application for labor certification on behalf of Luis E. Morfin-Escalante (“the Alien”) filed by Empson Dental Laboratory (“the Employer”) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (“the Act”), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based 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 of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 14, 1998, the Employer, Empson Dental Laboratory, filed an application for labor certification to enable the Alien, Luis E. Morfin-Escalante, to fill the position of "Dental Laboratory Technician." The job duties for the position included repair of dental appliances and mounting replacement teeth. The only stated requirement was two years of experience in the job offered. (AF 11).

In a Notice of Findings ("NOF") issued on June 27, 2002, the CO proposed to deny certification on the grounds that the Employer had rejected two qualified U.S. applicants for other than lawful job-related reasons. (AF 7-9). The Employer submitted its rebuttal on July 17, 2002. (AF 4-6). The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated August 27, 2002, denying certification on the same basis. (AF 2-3). On September 18, 2002, the Employer requested review and the matter was docketed in this Office on October 29, 2002. (AF 1). The Employer filed a Statement of Position.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stopped short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C.*

LaMarche Ent., Inc., 1987-INA-607 (Oct. 27, 1988); *Tilden Car Care Center*, 1995-INA-88 (Jan. 27, 1997). 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 report of recruitment results, dated August 10, 2000, which was signed by the Employer’s former counsel, Jean-Pierre Karnos, and its owner, Leticia Lopez, stated that the two U.S. applicants were sent employment applications, which were to be filled out and returned. Neither applicant returned the application and the Employer rejected the applicants. The Employer stated that the applications were mailed via certified mail and enclosed the certified mail receipts. (AF 23-24).

In the NOF, the CO stated that the applicants’ resumes showed their qualifications and the Employer did not provide justification for requiring further information. The CO found that the Employer did not submit a copy of the letter mailed to the applicants and noted that the reply card was not addressed to the Employer, but to “ALC Processing.” (AF 8).

The Employer’s rebuttal consisted of a letter, signed by “David W. Williams, Attorney for Petitioner” and “Leticia Lopez, Owner,” dated July 17, 2002. (AF 4). The Employer stated that it had complied with its obligation to contact and to investigate the credentials of applicants whose resumes suggested they were qualified, as provided in *Gorchev v. Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*). Accordingly, the Employer asserted that it had “engaged in a good faith and legitimate recruitment process.” Pursuant to the CO’s request, the Employer provided copies of the letters it had sent to the two U.S. applicants. (AF 14-15). The Employer stated that the use of “ALC Processing” on the postal receipts was simply to assist the Employer in complying with EDD and DOL requirements. The Employer contended that the request for a candidate to complete and return an employment application is “not only standard

practice for this employer, but is a universally accepted method of initiating the screening process.” The Employer claimed that the application was “the first step in ascertaining if a candidate is interested in the job.” Finally, the Employer stated that the job application is useful because it must be signed by the prospective employee to verify the truth of its contents and to contact references. (AF 4-6).

In the FD, the CO found the Employer’s rebuttal unpersuasive, stating that the Employer submitted no documentation to support the assertion that an application is part of the screening process. The Employer did not give any reason why the applicants’ resumes showed a lack of qualifications. The CO noted that the contact letters submitted in rebuttal did not identify the Employer. The CO determined that the tone of the letter would likely discourage applicants from pursuing the job opportunity. (AF 3).

Where a U.S. applicant’s resume indicates a reasonable possibility that he/she meets the stated job requirement, an employer is obligated to further investigate such applicant’s credentials (by interview or otherwise). Accordingly, in such case, an employer may not summarily reject a seemingly qualified U.S. applicant based on the resume alone. *Gorchev v. Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*); *Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993)(*en banc*); *A.A. Curbing, Inc.*, 1995-INA-427 (July 16, 1997).

The Employer contends that it complied with *Gorchev, supra*, by contacting the two seemingly qualified U.S. applicants and instructing them to complete an application for employment. The resumes of the two U.S. applicants indicated that they both have more than two years of experience as dental laboratory technicians. (AF 25-28). Furthermore, Applicant #1’s cover letter expressly states: “I would welcome the opportunity for a personal interview so we may discuss my qualifications in detail.” (AF 29). Rather than schedule interviews with the two applicants, the Employer sent them an unsigned letter, which failed to include the name of the Employer, the name of a contact person, and/or a telephone number. Instead, the letter demanded that the applicants

complete and sign an application for employment and send it to an unknown address. (AF 14-15).

The purpose of the recruitment process is to determine whether there are qualified U.S. workers available, not to hide the identity of the Employer or to discourage contact by failing to disclose a name and telephone number. The Employer's rationale for rejecting the two qualified U.S. applicants is without merit. The Employer did not recruit in good faith by deeming the U.S. applicants unavailable simply because they did not respond to a letter from an unknown employer. (AF 23-24). Rather than make a good faith effort to further investigate the U.S. applicants' credentials, it is clear that the Employer's actions discouraged them from pursuing the job opportunity. *See, e.g., Budget Iron Work*, 1988-INA-393 (Mar. 21, 1989)(*en banc*). Accordingly, the Employer has failed to document valid, lawful, job-related reasons for rejecting the two qualified U.S. applicants, in violation of 20 C.F.R. § 656.21(b)(6). In view of the foregoing, we find that 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.