



Issue Date: 16 June 2004

BALCA Case No.: 2003-INA-132
ETA Case No.: P2001-VA-03367428

In the Matter of:

DON BEYER VOLVO,
Employer,

on behalf of

SERGIO ANTONIO URIA,
Alien.

Appearances: Michael E.K. Mpras, Esquire
Annandale, Virginia
For 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 alien labor certification for the position of Service Writer.¹ The CO denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

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 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 April 18, 2001, Don Beyer Volvo (“the Employer”), filed an application for labor certification to enable Sergio Antonio Uria (“the Alien”) to fill the position of “Service Writer.” (AF 64). The Occupational Title was listed as “Automobile-Repair-Service Estimate.” Two years of experience in the position offered or in the related position of service writer helper were required.

The Virginia Employment Commission (“VEC”) provided the Employer with a list of eight referrals on May 6, 2002, advising the Employer to submit the final results of each referral. (AF 34). In the record are letters to the applicants from the Employer, dated May 10, 2002, along with “Receipt for Certified Mail” forms, which do not contain any indication that they were processed by the U.S. Postal Service. (AF 22-29). On May 1, 2002, the Employer signed a Certification of Posting, as well as a letter of that same date, indicating that as a result of all recruiting efforts, no one had applied for the position directly with the Employer. (AF 18, 21). These were forwarded to VEC by the Employer’s counsel by cover letter dated June 14, 2002. (AF 16).

On June 26, 2002, the CO issued a Notice of Findings, (“NOF”), proposing to deny certification pursuant to 20 C.F.R. §§ 656.21(b)(6) and 656.20(c)(8), inasmuch as eight U.S. workers appeared to have been rejected for other than lawful job-related reasons. (AF 12). While the Employer had indicated in his letter dated May 1, 2002, that no one had applied for the position, the applicants were not referred to the Employer until May 6, 2002. Furthermore, the Employer sent letters to the applicants on May 10, 2002, and failed to provide the results of this recruitment effort.

By cover letter dated July 23, 2002, and by way of rebuttal, counsel for the Employer forwarded copies of the ETA 750A and B, the certification of posting and the May 1, 2002, recruitment letter. (AF 9).

A Final Determination (“FD”) was issued on December 10, 2002. (AF 7). The CO pointed out that the Employer’s rebuttal consisted of the duplicate copies of the certification of posting and the letter of May 1, 2002, the latter being unacceptable given that the applicants were referred to the Employer after the date of the letter. Furthermore, the Employer failed to provide the results of the recruitment effort made when it sent the applicants the letter of May 10, 2002. The CO concluded that the U.S. applicants were rejected for other than lawful, job-related reasons.

On January 8, 2003, the Employer requested reconsideration, which the CO denied on March 8, 2003. (AF 1-2). The Employer also requested review by Board of Alien Labor Certification Appeals and the matter was docketed in this Office on March 25, 2003.

DISCUSSION

In its request for review, the Employer contends that the date on the recruitment letter, indicating that no one had applied for the position, was a clerical error. The Employer includes additional recruitment letters from the Employer, dated after the referral of the applicants from VEC. This Board will not consider that material, as 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. 20 C.F.R. § 656.27(c); *see also* 20 C.F.R. § 656.26(b)(4). Thus, 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, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

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). An 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*).

In the instant case, the evidence reveals a lack of good faith recruitment. There is no proof that the letters to the prospective applicants were ever sent, and if sent, received or rejected by the applicants. All that has been provided by the Employer is a bare assertion, in its letter of May 1, 2002, that no one had applied for the position. Even assuming, *arguendo*, that the date on that letter is in error, the information provided therein is insufficient to establish good faith recruitment. The letter fails to establish that contact actually was made with the applicants, nor does it detail, as requested in the NOF, the results of the Employer's recruitment effort of May 10, 2002. As such, 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.