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BALCA CASE No.: 2016-TLN-00064
ETA CASE No: H-400-16180-870998

In the Matter of:

JENSEN TUNA, INC.,
Employer.

Final Order Affirming Determination

Jensen Tuna Inc.'s efforts to recruit Americans for these 10 unskilled jobs in Houma, Louisiana are a sham. It prefers foreigners,¹ something Congress begrudgingly allows,² if an employer shows it's unable to recruit domestic workers.³

Unsuccessful, *bona fide* efforts to recruit fish trimmers domestically to process Jensen's tuna, white and brown shrimp and red snapper⁴ would allow Jensen to have foreigners

¹ Efforts to recruit foreign workers will be undertaken by Jensen's agent in Monterrey, Mexico. P106.

² The H-2B visa program the Immigration and Nationality Act (INA) establishes admits foreigners to the U.S. to do temporary service or labor when "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b), INA§ 101(a)(15)(H)(ii)(b). It is implemented by regulations now codified at 20 C.F.R. § 655.1, et seq. and first published at 80 Fed. Reg. 24108 (Apr. 29, 2015).

³ The Secretary of Labor assures USCIS (the agency within the Dep't of Homeland Security that approves H-2B visas that the State Dep't ultimately issues) of two things: 1) that U.S. workers capable of performing the services or labor are unavailable, and 2) that admission of the foreign worker(s) under the H-2A vis program will not adversely affect the wages and working conditions of similarly employed U.S. workers. *See* 8 CFR § 214.2(h)(6)(iv)(A); 80 Fed.Reg 24108, 24050 (part IV to the supplementary information to Interim Final Rule on the Secretary of Labor's role in the H-2B visa program).

⁴ Record at P104.

admitted to the United States as beneficiaries of H–2B visas issued at Jensen’s request.⁵ Jensen would employ them from October 1, 2016 to February 28, 2017.⁶ Jensen must prove it made adequate efforts to hire Americans in the labor condition application.⁷ Jensen instead manipulated its interview process to the detriment of U.S. workers.

There is nothing special about these jobs. Jensen’s job order sets neither education nor experience requirements for the work.⁸ The Dictionary of Occupational Titles (4th ed.) classifies the jobs as unskilled.⁹ The U.S. Department of Labor’s O-Net Occupational Code for this job, 51-30200, Fish Cutters,¹⁰ describes the “JobZone” for the job as One:

“Little or no previous work-related skill, knowledge, or experience is needed.” “Employees in these occupations need anywhere from a few days to a few months of training. Usually, an experienced worker could show you how to do the job.”¹¹

Jensen eliminated Americans by setting their job interviews beginning at 2:30 a.m. The first question its interviewer records on Jensen’s interview record (after memorializing the time and date Jensen designated for the interview) is this:

Applicant on time for interview? _____.¹²

⁵ See fn. 1, *supra*;

⁶ Record at P105.

⁷ See 5 U.S.C. § 556(d) (the proponent of a rule or order has the burden of proof); 20 C.F.R. §§ 655.40–655.46 (requiring certain recruitment efforts before filing a labor certification application); § 655.20(e) (job qualifications and requirements imposed on U.S. workers must not be less favorable than those the employer imposes or will impose on H-2B workers).

⁸ Record at P108; P113 at E. b. 1.

⁹ See DOT 525.684-030 FISH CLEANER (can. & preserv.; fishing & hunt.) alternate titles: dress-gang worker; fish cutter; fish dresser. With a Specific Vocational Preparation (SVP) of 2, this unskilled work requires nothing “beyond short demonstration [for] up to and including 1 month” to “to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.” DOT Appendix C II.

¹⁰ Record at P108. O-Net at <http://www.onetonline.org/link/summary/51-3022.00>

¹¹ <http://www.onetonline.org/link/details/51-3022.00>.

¹² Record at P10, P12, P14, P16, P18, P20, P22, P24, P26, P28, P30, P32, P34, P36.

Setting interviews at 2:30 a.m. is nonsense. Jensen's attempt to justify it doesn't pass the "laugh test."¹³ It argues the jobs will begin at 3:00 a.m., so the interviews should be at 2:30 a.m.¹⁴ This is a form of reasoning I am unfamiliar with. People get up at odd hours to work graveyard shifts when paid for it. Unskilled workers aren't ordinarily told to appear for their interviews (*i.e.*, before they are being paid) at 2:30 a.m.

Nothing in its labor condition application says Jensen interviewed abroad the foreigners it wants visas for at 2:30 a.m. local time.¹⁵ To expect an applicant to drag him or herself to an interview to work a graveyard shift at the hour of work would be a stretch, but Jensen stretched even that past the breaking point when it told U.S. workers they would be interviewed *earlier* than the time its jobs begin.¹⁶

Jensen argues in its motion to reconsider the Certifying Officer's denial (which it designated as its argument here at BALCA) that

If an applicant had shown anytime during Jensen Tuna's hours of operations on those days, 02:30 AM to 04:00 PM, they would have been interviewed for the position.¹⁷

Every one of the e-mails it sent to the U.S. workers who expressed an interest in the job after it had been advertised said "we may start conducting interviews starting 7/28/16 thru 7/29/16 at 2:30am each morning." None said or intimated that interviews would be available at any time other than 2:30 AM.

Small wonder that of the 14 Americans who expressed some interest after Jensen published notice of the jobs in a newspaper ad, "none showed up for the interviews."¹⁸

¹³ *Kansas v. Crane*, 534 U.S. 407, 423, 122 S. Ct. 867, 876, 151 L. Ed. 2d 856 (2002) (Scalia, J., dissenting in rejecting an argument); see generally, *U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 377 (4th Cir. 2015) (using the "red face test" to similar purpose).

¹⁴ Record at P1.

¹⁵ The regulations emphasize that "[r]ejections of any U.S. workers who applied or apply for the job must only be for lawful, job-related reasons, and those not rejected on this basis have been or will be hired 20 C.F.R. § 655.20(r).

¹⁶ Its argument reads "[W]e would expect applicants to be able to attend an interview during the normal working hours of operation for the position." Record at P1.

¹⁷ Record at P1.

¹⁸ Record at P7.

The Certifying Officer handling Jensen’s application saw through this, and determined Jensen had rejected U.S. applicants “for other than lawful, job related reasons.”¹⁹ This determination is affirmed.²⁰

The preface to the current regulations governing H–2B applications put employers on notice that any pre-employment interview of Americans interested in the work must be done fairly, giving U.S. workers “a reasonable opportunity to meet [the interview] requirement.”²¹ The preface warned employers not to “use the interview process to the disadvantage of U.S. workers.”²²

Jensen may submit a new application after it makes objectively reasonable efforts to recruit Americans to do its work. Americans may not be subjected to more onerous interview requirements than foreign workers. Setting interviews at 3:00 a.m. instead of 2:30 a.m. won’t fix the problem. Give Americans a fair shot at these jobs. Congress demands it.

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE
BOARD OF ALIEN LABOR
CERTIFICATION APPEALS

¹⁹20 C.F.R. § 655.20(r).

²⁰ 20 C.F.R. § 655.61(e)(1).

²¹ 80 Fed.Reg. at 24076 (Apr. 29, 2015).

²² *Id.*