

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 September 2003

BALCA Case No.: 2002-INA-122
ETA Case No.: P2001-CA-09512262/ML

In the Matter of:

NORMA DIAMOND,
Employer,

on behalf of

AURORA FIDEL
Alien.



Certifying Officer: Martin Rios
San Francisco, California.

Appearances: Sanford B. Reback, Esquire
Los Angeles, California
For Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Norma Diamond (“Employer”), filed an application for labor certification¹ on behalf

¹ Permanent alien labor certification is governed by section 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 records upon which the CO denied certification and Employers’ request for review, as contained in the respective appeal files and any written arguments. 20 C.F.R. 656.27(c).

of the Alien on January 11, 2001 for the position of housekeeper. (AF 10)² Following a recruitment effort overseen by the State of California Employment Development Department ("EDD"), the EDD forwarded three resumes to Employer, instructing Employer to contact all applicants within 14 days of receipt of the EDD's transmittal letter, noting that a delay in contact may result in a finding of a lack of good faith in recruitment, and directing that the recruitment report include "all correspondence sent to and from applicants; such as copies of letters to which applicants failed to respond or mail returned as undeliverable." (AF 21-22).

Employer filed a recruitment report stating that she had received three applications from U.S. workers, and that "[a]ll applicants were contacted by telephone shortly after receipt of their resumes." (AF 14). The CO issued a Notice of Findings on October 11, 2002, proposing to deny certification on the ground that Employer did not provide proof of when the applicants were contacted, and directing Employer to "submit a rebuttal addressing the issues and giving details of your attempt(s) to interview the U.S. applicants." (AF 6-8)

Employer, through counsel, submitted a rebuttal in the form of a letter on November 6, 2002. (AF 4-5). Employer did not provide any documentation of when it attempted to contact the U.S. applicants, but stated only that Employer "as previously stated immediately contacted the applicants by telephone shortly after receiving the final documentation notice." Employer also stated that local telephone calls are not reported on monthly statements, as only out-of-the-area calls are reported. Employer's rebuttal blames EDD for "blindsiding" it and failing to provide adequate guidance in recruitment and documentation thereof. Employer cites in support *Joyful Manor*, 2001-INA-157 (Mar. 27, 2002), *recon denied* (June 5, 2002), *PJM Bookkeeping & Tax Services*, 2002-INA-156 (Oct. 3, 2002), and *Walnut Home Care*, 2001-INA-156 (Oct. 3, 2002).

On December 12, 2002, the CO issued a Final Determination denying labor certification. (AF 2-3). The CO stated that the "NOF does not dispute the fact of your contact, but its timeliness; you

² "AF" refers to the Appeal File.

submit no additional evidence to show it was timely." On January 6, 2003, Employer, through counsel, requested BALCA review on the ground that it had not been "furnish[ed] any guidance as to what other evidence should be furnished." (AF 1). In response to the Board's Notice of Docketing, Employer's attorney filed a brief postmarked April 8, 2003, arguing that the case was governed by *Joyful Manor*, *PJM Bookkeeping* and *Walnut Home Care*.

DISCUSSION

An Employer must provide directly relevant and reasonable documentation sought by the CO. See *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). Failure to submit documentation reasonably requested by the CO warrants denial of labor certification. *Rouber International*, 1991-INA-44 (March 31, 1994).

It is true that in the *Joyful Manor* line of cases cited by Employer's counsel this panel remanded the applications because the CO had relied on grounds for denial that made it impossible for the Employer to rebut the NOF, and on documentation requirements that were not expressly stated in the regulations or in any timely instructions from DOL or the state job service. In particular, in these cases the CO based the denials on the grounds that Employer had not attempted alternative means of contact and/or had not documented its efforts with certified mail receipts. In *Joyful Manor*, the panel wrote:

In the recent *en banc* decision, *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*), BALCA addressed issues surrounding the use of certified mail to document reasonable recruiting efforts. The *en banc* panel held that "a CO cannot require an employer to use certified mail, return receipt requested, to prove actual contact with U.S. applicants." The Board held that "an employer must be given an opportunity to prove that its overall recruitment efforts were in good faith, even if it cannot produce certified mail return receipts to document its contacts with U.S. applicants." The Board noted, however, that the use of certified mail, return receipt requested, is a "useful device for documenting recruitment efforts." *Id.* The Board

also reaffirmed the principle that an employer might have to use more than one method to contact an applicant if the first attempt fails to elicit a response.

In this case neither the CO nor the state employment agency prior to the issuance of the Notice of Findings provided Employer with notice that a single, unsuccessful attempt to contact a qualified U.S. applicant requires additional attempts to contact an applicant in order to demonstrate a good faith recruitment effort, nor that Employer would be expected to document his recruitment efforts with certified mail receipts.

In *M.N. Auto Electric Corp.*, the Board wrote:

[I]t is appropriate for the CO to have local job services, when providing recruitment instructions to employers, to strongly suggest use of certified mail, return receipt requested, and to remind employers that it is their burden to establish good faith efforts at recruitment. A savvy employer would take such a recommendation as well-advised. Without such documentation, an employer may have a difficult time responding to questions about date of mailing or an assertion by a U.S. applicant that he or she was never contacted. Instructions to the employer may also include a statement describing the employer's obligation to try alternative means of contact if one type of contact does not work

M.N. Auto Electric Corp., USDOL/OALJ Reporter (PDF), 2000-INA-165 at 10 (emphasis added).

While BALCA may not have the authority to dictate instructions given by local employment services to permanent labor certification applicants, it would make good sense to notify an employer prior to the commencement of recruitment that it will be the employer's burden to document good faith efforts in recruitment, and to that end, recommend that the employer use techniques, such as certified mail, return receipt requested, and copies of telephone toll records, to document their efforts. Moreover, it would be beneficial for the local employment service instructions to inform employers that alternative means of contacting applicants may be required to establish good faith in recruitment in certain circumstances.

In the instant case, employer argued on review that it was blind-sided with the requirement that alternative means of contact would be required to document good faith in recruitment. *Compare Tanya Rosenberg, Inc.*, 2001-INA-76 (Mar. 22, 2002) (affirming denial of labor certification for failure to use alternative means to contact applicants where the employer did not argue that it was not provided notice of the requirement). We hold that where no notice is provided that alternative means of contact will be required to document good faith in recruitment, the denial of certification cannot be denied **solely** on that ground. In the instant case, by the time of the NOF, it was virtually impossible for Employer to take corrective action because any attempt to call the applicant or send a second letter via certified mail would be untimely. In such a situation, an employer should be provided the option of re-advertising if all other deficiencies in the application are rebutted.

In the instant case, the CO directed Employer to provide documentation showing when the U.S. applicants were contacted - not to document that alternative means were employed or that certified mail was used. Employer's only response was to state that she contacted the applicants "immediately" upon transmittal of resumes from the EDD. In *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), the Board held that "written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve." A bare assertion, however, without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Here, the CO reasonably requested documentation of when apparently qualified U.S. applicants were contacted, and Employer provided none except Employer's inexact proffer that applicants were "immediately" contacted.

Thus, we find that the instant case is distinguishable from the *Joyful Manor* line of cases. Moreover, we caution that the *Joyful Manor* line of cases does not excuse any documentation lapse by the Employer. Rather, the *Joyful Manor* variety of remand is used only where the CO "blindsided" the Employer with a documentation requirement that could not reasonably have been anticipated – in that case a requirement of alternative contacts. As this panel stated when denying a motion for reconsideration by the CO of the *Joyful Manor* decision, the paramount concern that led

to a remand in that case was a concern for fundamental fairness. In the instant case, it was imminently foreseeable that Employer would need to establish a timely contact of applicants, and we do not find it unfair or unreasonable for the CO to have requested such documentation. Moreover, the EDD's "Final Documentation Notice" letter made it crystal clear that lack of timely contact could be fatal to an application, and that documentation would be needed, albeit the EDD's letter assumes that the Employer would be using mail rather than telephone to contact applicants. In such a case, an employer cannot merely provide an inexact statement of when applicants were contacted and then blame the government for its failure to produce concrete documentation. Employer evidently chose to limit its recruitment efforts to an undocumented series of phone calls. Limiting its effort in this manner made it susceptible to challenge for lack of adequate documentation. The government's having not warned about this susceptibility does not remove the Employer's ultimate evidentiary burden. We do not find the CO's documentation request under this circumstance to have been unfair.

In a slightly different context, the Board stated that "The CO is not required to provide a detailed guide to the employer on how to achieve labor certification. The burden is placed on the employer by the statute and regulations to produce enough evidence to support its application." *Miaofu Cao*, 1994-INA-53 (BALCA Mar. 14, 1996)(*en banc*) (fairness of NOF). Similarly, we did not mean to suggest in the *Joyful Manor* line of cases that a local job service must provide a roadmap for a petitioning employer. Rather, we were merely observing that the CO could have avoided being found to have blindsided the Employer with an unexpected documentation requirement if it had instructed the local job service to discuss documentation requirements in its early notices to employers. We remain concerned about unfair surprises of documentation requests after it is too late for an employer to remedy the situation. Employer's request to apply the logic of the *Joyful Manor* line of cases to the circumstances of the instant case, however, swings the pendulum too far the other way, and would make it too easy for employers to avoid deficiencies in their documentation of recruitment efforts. We limit the *Joyful Manor* line of cases to their precise factual circumstances or to compelling instances of unfairness under other circumstances. We do not find a compelling instance of unfairness in the instant case, however, and therefore affirm the CO's denial of certification.

ORDER

The Certifying Officer's denial of labor certification in the above-captioned matter 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, 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 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.