

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 September 2003

BALCA Case No.: 2002-INA-173
ETA Case No.: P2000-CA-09492560/ML

In the Matter of:

CLEANMORE BUILDING MAINTENANCE CO.,
Employer,

on behalf of

CESAR LEMUS,
Alien



Appearance: Roger J. Gleckman, Esquire
Los Angeles, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER
OF REMAND

Cleanmore Building Maintenance Co. ("Employer") has filed an application for labor certification on behalf of Cesar Lemus ("Alien").¹ In December of 2001, the Certifying Officer (CO)

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 based on his finding that Employer had failed to respond to the Notice of Findings. This appeal followed.

STATEMENT OF THE CASE

On January 9, 1998, Employer, Cleanmore Building Maintenance Co., filed an application for labor certification on behalf of the alien, Cesar Lemus, for the position of Painter. (AF 12) Two years of experience in the job offered were required. (AF 12)

The California Employment Development Department, Alien Labor Certification Office ("EDD") provided a "Recruitment Notice" to the Employer on November 8, 1999. (AF 81-82).

Employer placed a newspaper advertisement for the position in the LOS ANGELES TIMES on November 29, 30 and December 1, 1999. (AF 74-77) It wrote a letter to a local Painter's Union on or about November 29, 1999, informing it of the job opening. (AF 73) A job listing was entered into the "CalJOBS" system on October 30, 1999, with a job listing opening date of November 17, 1999, and a close date of December 18, 1999. (AF 78-79).

Employer mailed the tear sheets to the EDD. The cover letter to the transmittal bears the date December 14, 1999. (AF 74) The Appeal File, however, contains no evidence of the actual date of mailing.

The EDD sent Employer's attorney an "Applicant Referral Notice" with the names and phone numbers of 11 U.S. applicants by transmittal dated January 7, 2000. (AF 71-72) The Appeal File, however, contains no evidence of the actual date of mailing of this referral. The EDD sent Employer a "Final Documentation Notice" by letter dated January 10, 2000. (AF 20-21) Again, the Appeal File contains no evidence of the actual date of mailing of this notice.

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).

Employer sent letters to the applicants by certified mail, return receipt requested, asking that the applicants contact its office about the job opening. The Appeal File establishes that these letters were placed in the mail on January 13, 2000 – a date which is verified by the postmarks on the receipts for certified mail. (AF 22-70)

In a letter dated February 11, 2000, Employer provided the EDD with a recruitment report. (AF 16-18) Employer reported that the union had indicated that they would not be referring applicants, and that it had received the eleven applicant referrals as a result of the print advertisement and no referrals from the Job Service. The foregoing paraphrases, in pertinent part, the report:

Applicant 1: Spoke on the telephone on January 19, 2000. Applicant wanted a part-time job.

Applicant 2: When applicant did not respond to recruitment letter, a secretary attempted to contact him on January 18, 20 and 27, 2000 leaving messages each time. Applicant called on January 28, 2000. Applicant had worked at a painting company, but not as a painter.

Applicant 3: Applicant called in asking whether the job offered was part-time, and declined the job stating that he was not interested in a part-time job.

Applicant 4: Applicant did not respond to recruitment letter. Secretary made phone calls to applicant on January 17 and 21, 2000, leaving messages. Applicant never called back.

Applicant 5: Applicant called, but did not want job in San Fernando Valley.

Applicant 6: Applicant did not respond to recruitment letter. Secretary made phone calls to applicant on January 21, 27, 28 and 31, 2000, leaving messages. Applicant

never called back.

Applicant 7: Applicant did not respond to recruitment letter. Secretary made phone calls to applicant on January 21, 27, 28 and 31, 2000, leaving messages. Applicant never called back.

Applicant 8: Applicant did not respond to recruitment letter. Secretary made phone calls to applicant on January 27, 28 and 31, 2000, leaving messages. Applicant never called back.

Applicant 9: Applicant did not respond to recruitment letter. Secretary made phone calls to applicant on January 20, 21, 24 and February 1, 2000, leaving messages. Applicant never called back.

Applicant 10: Applicant called to discuss job, but indicated lack of interest because Employer's benefits package and salary did not match those of his current employer.

Applicant 11: Applicant did not respond to recruitment letter. A telephone number was not available to make follow-up phone contact.²

In a Notice of Findings dated November 16, 2001, the CO found that Employer had not made a timely contact of U.S. applicants because it did not send the tear sheets to the EDD "until 12 days after the ads ran, which resulted in them not sending resumes to you until 7 January 2000." The CO concluded that eight of the applicants had lost interest in the position as a result of the delay. The CO also faulted Employer for not documenting efforts at telephone contact with telephone bills. Accordingly, the CO requested Employer to submit a rebuttal addressing the issues raised and giving

² The EDD's applicant referral notice also indicates that a telephone number was not available for this applicant.

details about the attempted interview of the U.S. applicants. (AF 8-10) In bold print, the NOF stated: "**NOTE: Rebuttals not signed by the employer-of-record shall be considered non-responsive to the Notice of Findings (see regulations 20 CFR 656.25(d)(1)).**" (AF 9)

Employer, through counsel, submitted a rebuttal dated December 18, 2001 in which it was argued that the delay in contacting the applicants was not attributable to its delay in submitting advertisements to the EDD, but was due to the EDD's three week delay in sending resumes to Employer. Employer noted that it mailed letters to all applicants within five days of receipt of the resumes from the EDD, and referred to its recruitment report for the details of the results of the interview attempts. (AF 6-7) Employer submitted its rebuttal without Employer's signature, but only that of Employer's counsel.

On December 28, 2001, the CO issued a determination letter denying labor certification. (AF 5)³ This determination was made solely on the grounds that "the employer-of-record, Richard Johns⁴ failed to sign the rebuttal to the [NOF] dated November 16 [2001] within the allotted 35 days." The CO asserted, "the Notice of Findings automatically becomes the FINAL decision of the Secretary of Labor DENYING certification." (AF 5)

Employer requested review by this Board on January 29, 2002. (AF 3) The Board received the Appeal File in April 2002, and Employer filed a brief in support of the appeal on May 28, 2002. The brief contains argument to the effect that the CO's denial of certification on the ground of untimely contact was in error, and cites the Board decision in *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 25, 1991), for the proposition that a delay in contact may be excused and certification granted. The brief includes factual assertions about the dates that certain items were received and transmitted, and includes documents in support of those assertions. The brief does not contain any argument relating

³ This document was not in the form of a "Final Determination" evidently because the CO took the view that the absence of Employer's signature was tantamount to no rebuttal having been filed. See 20 C.F.R. § 656.25(e)(2) and (e)(3) (untimely rebuttal constitutes failure to exhaust administrative remedies).

⁴ Richard Johns is the "Owner" of Cleanmore Maintenance Co., who signed the Application for Labor Certification. (AF 12-13)

to the ground on which the CO actually denied certification – the lack of a signature by Employer itself on the rebuttal. Nor does the brief address the NOF's telephone records citation.

DISCUSSION

New evidence and argument

Section 656.26(b)(4) provides that the request for administrative-judicial review "shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." Section 656.27(c) provides that the Board "shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made, the request for review, and any Statements of Position or legal briefs submitted." Thus, to the extent that Employer's brief on appeal presents evidence and argument not presented before the CO, such will not be considered by this panel. *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988).

Lack of Employer's signature on rebuttal

Employer failed to address the "lack of Employer's signature" issue in either its request for review or the appellate brief. We find as a matter of law, however, that the CO's denial of labor certification on this ground was in error. The NOF instructions cite the regulation at 20 C.F.R. 656.25(d)(1) as authority for requiring such a signature. That regulation, however, states: "(d) Written rebuttal arguments and evidence may be submitted; (1) By the employer; and (2) By the alien, but only if the employer also has submitted a rebuttal." Thus, there is no regulatory requirement of a signature by an employer on a rebuttal. Moreover, although an attorney or authorized agent certainly cannot provide testimonial evidence in lieu of an employer's own statement, *see, e.g., Modular Container Systems*, 1989-INA-228 (July 16, 1991) (*en banc*), an authorized agent of an employer may submit rebuttal evidence and argument on behalf the employer. *Ideal Employee Management, Inc.*, 2002-INA-120 (July 1, 2003); *Environmental Maintenance Co.*, 2000-INA-72

(May 31, 2001); *La Roma Pizza*, 1993-INA-229 (April 8, 1994) (employer's counsel represents the employer in the labor certification and is entitled to present argument and evidence on the employer's behalf in response to the NOF).

In the instant case, Employer's rebuttal merely argues that the delay in contacting U.S. applicants is attributable to EDD's delay. It in no way represents a statement unique to Employer's knowledge or expertise. In fact, the documentation of record indicates that EDD notices and transmittals were directed to Employer's attorney, which indicates that counsel had first-hand knowledge of the fact being asserted – that EDD delayed for three weeks in transmitting resumes and applicant referrals to Employer. (*see* AF 20-72) It would have been better if counsel had obtained a signed statement from Employer attesting to the date it received the resumes from EDD, but given that the documentation of record bears out counsel's factual assertion of a delay by EDD in transmitting the resumes, we find that the absence of Employer's signature on the rebuttal is of no consequence. *Compare Yaron Development Co., Inc.* 1989-INA-178 (*en banc*) (factual theory presented by counsel in a brief cannot serve as evidence of material facts). Accordingly, the CO's denial on this ground is reversed. However, the original grounds for denial raised in the CO's NOF must be reached. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) (Board would not rule out affirming a denial of labor certification even in the absence of a fully reasoned Final Determination if the NOF provided adequate notice, and the employer's documentation was so lacking in persuasiveness that labor certification necessarily would be precluded).

Timely contact of U.S. applicants

1. Was Employer responsible for the delay in transmittal of resumes from the EDD?

Section 656.20(c)(8) requires that a job for which alien labor certification is sought "has been and is clearly open to any qualified U.S. worker." An employer must contact potentially qualified U.S. applicants as soon as possible after it receives resumes or applications so that the applicants will know that the job is clearly open to them – otherwise, the U.S. applicants may lose interest in the position.

Loma Linda Foods, Inc. 1989-INA-289 (Nov. 26, 1991) (*en banc*). Failure to timely contact the U.S. applicants indicates a failure to recruit in "good faith." *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991) (*en banc*); *Creative Cabinet and Store Fixture*, 1989-INA-181 (Jan. 24, 1990) (*en banc*) (delay of up to one month occurred between the receipt of a resume and contact with the applicant)." Although stated in terms of "good faith," the proper focus is not on the employer's intent, but on the probable effect on U.S. applicants of the passage of time. *Loma Linda Foods, Inc.*, *supra*. The "as soon as possible" standard does not embody a specific time limit. It turns on how long an employer requires for a reasonable examination of the applicants' credentials, including but not limited to the follow factors: (a) whether the position requires extensive or minimal credentials; (b) whether recruitment is local; and (c) whether many or only a few persons applied for the position. *Id.*

In the instant case, two extended delays occurred. First, Employer did not send the tear sheets from the print advertisement to the EDD until on or about December 14, 1999,⁵ although the last day of the advertisement was December 1, 1999. The second occurred because the EDD did not send the resumes to Employer until on or about January 10, 2000. We note that Employer presented mail receipts establishing that recruitment letters were mailed on January 13, 2000. However, this is approximately six weeks after the advertisement last ran, and it is not surprising that a number of the applicants did not respond to Employer's attempts to contact them by letter and telephone.

Employer's argument on appeal is essentially that the delay in mailing the tear sheets to the EDD did not prevent EDD from forwarding resumes to Employer. Thus, the true cause of the delay was EDD's failure to transmit the resumes to Employer until January 10, 2000.

Nothing in the Appeal File explains how the date of receipt of tear sheets by a state employment service relates to the date that resumes are transmitted to an employer. If the CO had provided an explanation – such as that EDD cannot transmit resumes until all documentation is

⁵ Although the Appeal File does not identify actual mailing dates for some documents, there is no evidence indicating that those documents were not mailed on the date shown on the face of the document or within a short time thereafter.

received from an employer – we might be inclined to find that Employer's delay contributed to the delay and therefore it bore some responsibility for the evident loss of interest in the position by a large percentage of the U.S. applicants. However, the record presented indicates that the lion's share of the delay was on the part of the EDD and that such delay cannot necessarily be linked to the Employer's delay in transmitting the tear sheets.

2. *Was the failure to provide telephone records a ground for dismissal?*

In *M.N. Auto Electric Corp.*, 2000-INA-165 (BALCA Aug. 8, 2001) (*en banc*), the Board reviewed what documentation is adequate to establish good faith efforts at recruitment. In reference specifically to telephone contacts, the Board wrote:

To document initial or follow-up telephone conversations, 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.

M.N. Auto Electric Corp., *supra* (footnote omitted). The Board indicated that if an employer asserts that records of local phone calls are not available upon request from the telephone company, it should be prepared to document that assertion.

A longstanding principle established by BALCA caselaw is that if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). In the instant case, the CO faulted Employer in the NOF for not documenting efforts at telephone contact with telephone bills. The CO directed that Employer address this issue, but did not expressly direct that such records

be provided. Moreover, the CO's determination letter denying labor certification was based, not on failure to provide telephone bills, but lack of a signature by Employer on the rebuttal.

Employer's rebuttal does not expressly address the telephone records issue, but merely makes reference to its original recruitment report. Nor does it address the issue in the request for review or in its appellate brief, despite addressing the principle issue of timely contact. Nonetheless, we observe that Employer's recruitment report does meet the minimal documentation requirements laid out in *M.N. Auto Electric Corp.* – *i.e.*, details such as when the calls were attempted, whether there was a successful contact with the applicant, and the substance of the conversation.

Given that the CO did not expressly direct the submission of telephone records, that Employer's recruitment report provides at least a minimally acceptable recounting of its attempts at telephone contacts, and that the CO did not reach this issue in the determination letter denying labor certification, we decline to affirm the denial of labor certification for failure to provide the telephone records. Nonetheless, we also decline to order the grant of labor certification because the CO requested that Employer address this issue on rebuttal – which Employer did not do. Although the CO did not expressly direct the submission of telephone records, it should have been obvious that a rebuttal needed to either present telephone records or establish why they were not available and present argument and/or alternative evidence to bolster the accuracy of its recruitment report vis-a-vis telephone contacts.

We are cognizant that the recruitment in this case took place several years ago and that documentation on telephone contacts may now be difficult to produce. Nonetheless, a request for documentation of when telephone calls were actually attempted is within a CO's prerogative, and we remand this case for issuance of a supplemental NOF, should the CO choose not to accept Employer's existing recruitment report as adequate documentation of attempts at telephone contacts, to permit Employer an opportunity to present whatever documentation may be available on this issue.

ORDER

Accordingly, the Certifying Officer's denial of alien labor certification is hereby **VACATED** and this matter **REMANDED** for further proceeding consistent with the above.

For the panel:

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JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.