

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 September 2003

BALCA Case No.: 2002-INA-127
ETA Case No.: P2000-CA-09489401/JS

In the Matter of:

LE ELEN MANOR, INC.,
Employer

on behalf of

CESAR TUNGUL BOBILES,
Alien.



Appearance: Lourdes Santos Tancinco, Esquire
San Francisco, CA

Certifying Officer: Martin Rios
San Francisco, CA

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 Cesar Tungul Bobiles (“Alien”) filed by Le Elen Manor, Inc. (“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 Office (“CO”) of the United States Department of Labor, San Francisco, California, denied the application, and Employer requested review pursuant to 20 C.F.R. §656.26.

Under section 212(a)(5), an alien seeking to enter the United States for the purpose of

performing skilled or unskilled labor may receive a visa if the Secretary of Labor (“Secretary”) has determined and certified to the Secretary of State and Attorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based 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 of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On January 13, 1998, Employer, Le Elen Manor, Inc., whose business activity is “Adult residential care home,” filed an application for labor certification to enable the Alien, Cesar T. Bobiles, to fill the position of “Care Home Cook.” The Job Service classified the position under the occupational title of “Cook II” (AF 23). The job duties for the position, as stated on the application, include preparing, cooking, and serving meals for patients and employees of the employers’ care homes, as well as clean-up duties. (AF 23). The stated experience requirement is two years in the job offered (AF 23).

In a Notice of Findings ("NOF") issued on October 24, 2001, the CO proposed to deny certification on the grounds that Employer had rejected two U.S. workers for other than lawful, job-

related reasons (AF 19-21). Employer submitted its rebuttal on or about November 27, 2001 (AF 12-18). The CO found the rebuttal unpersuasive and issued a Final Determination, dated January 3, 2002, denying certification on the above grounds (AF 10-11). Employer filed a request for review of the Final Determination (AF 1-9). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. Following the issuance of a “Notice of Docketing and Order Requiring Statement of Position or Legal Brief,” dated March 28, 2002, Employer submitted a Statement of Position with accompanying documents on or about April 18, 2002.

DISCUSSION

Under 20 C.F.R. §656.21(b)(6), an employer must document that U.S. applicants were rejected solely for lawful job-related reasons. Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop 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 good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an 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, 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. Furthermore, the provisions of 20 C.F.R. §656.20(c)(8) require that the job opportunity be clearly open to any qualified U.S. worker.

The results of recruitment were set forth in a letter by Christopher Guevarra, Employer’s President, dated December 28, 1999 (AF 30-31; *See also* AF 24, Item 24). Mr. Guevarra provided reasons for rejecting three U.S. applicants. For the purpose of rendering a decision herein, however, our focus is on Employer’s rejection of U.S. applicants Raul Valencia and Leslie Marrufo, since those were the two U.S. applicants cited in the NOF and the Final Determination. In the report of

recruitment results Employer stated that he contacted Mr. Valencia by phone approximately eight days after the receipt of his resume. Employer stated that he called once and no one answered, but on his second call later that day, a woman answered. Employer claimed to leave a message with that woman, giving his name, phone number, and the purpose of his call (scheduling an interview). Mr. Valencia did not respond to Employer's message and Employer declined his application for lack of interest. (AF 30-31).

As to Ms. Marrufo, Employer stated that he called her on October 21, 1999. Employer again claimed he left a message with a woman who answered the phone. Employer then stated that he made two more calls to Ms. Marrufo in the next two days, but noone answered the phone. Ms. Marrufo did not respond to Employer's message and Employer declined her application for lack of interest. (AF 31).

In the NOF (AF 19-21), the CO reported his finding that Employer had failed to document a lawful reason for rejecting U.S. workers, and cited §656.21(b)(6) and §656.24(b)(2)(ii) of the regulations. Furthermore, the CO found that both Mr. Valencia and Ms. Marrufo were qualified and did not appear to have been rejected for lawful, job-related reasons. Specifically, as Employer had the addresses of both applicants, he could have attempted contact by mail if contact by telephone was unsuccessful. The CO noted that the applicants were rejected because they failed to return Employer's messages left "through a lady who answered the phone." (AF 20).

Employer's rebuttal consists of a letter, dated November 26, 2001, signed by Christopher Guevarra, its President (AF 13-14). In pertinent part, Mr. Guevarra stated that although Mr. Valencia indicated he had the required two years of experience as a cook, his work history was inconsistent with this statement. His work history stated only one month of experience as a cook and no experience cooking meals other than hamburgers and fries. Employer stated Mr. Valencia was rejected for lack of qualifications. As to Ms. Marrufo, Employer indicated that although she claimed to have three years experience as a cook, her work history only showed experience as a housekeeper at Timber Cove Inn. For these reasons, Employer declined her application. (AF 13-14).

In the Final Determination, the CO found that Employer's rebuttal was not persuasive. In summary, the CO stated that Employer did not rebut the finding that its efforts to contact the workers were insufficient. The CO determined that the lack of availability that Employer claimed was not shown. The CO further determined that the rebuttal did not provide documentation that either worker was not qualified. Specifically, the CO stated that it was unknown "whether there was an error in the 'dates' sections of the resumes and/or whether experience was left out of the work history section." (AF 11). The CO determined that the applicants could have been qualified, and Employer should have made a good faith attempt to contact and interview them. However, as the CO found Employer's contact efforts to be insufficient, he determined that Employer failed to overcome the findings in the NOF. (AF 11). We agree.

As set forth above, an employer must document that U.S. applicants were rejected solely for lawful job-related reasons under §656.21(b)(6). Furthermore, a good faith requirement is implicit regarding post-filing recruitment. *H.C. LaMarche Enterprises, Inc., supra*. Therefore, an employer must make a good faith recruitment effort to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants; and actions by an employer which indicate a lack of good faith recruitment effort constitute a basis for denying certification.

As suggested by the CO and Employer, the resumes of U.S. applicants Raul Valencia and Leslie F. Marrufo are ambiguous and/or conflicting. Mr. Valencia's resume states, in pertinent part: "COOK, 2 years experience" under the "Job Objective" section, but the only detailed cooking experience listed under the "Work History" section is as a "prep cook" from "6/95 to 6/95" (AF 39).

Similarly, Ms. Marrufo's resume states, in pertinent part, "COOK, 3 years experience" under the "Job Objective" section. However, it does not list any cooking experience whatsoever under the "Work History" section (AF 40).¹

Upon review, we find that the resumes of Mr. Valencia and Ms. Marrufo are ambiguous.

¹ We note that the format of both resumes is virtually identical (*Compare* AF 39, 40).

However, the resumes show at least a reasonable possibility that Mr. Valencia and/or Ms. Marrufo meet the stated requirement of two years of experience in the job offered. In such case, Employer is obligated to investigate the applicants' credentials further. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*); *A.A. Curbing, Inc.*, 1995-INA-427 (July 16, 1997).²

In fact, Employer made *some* effort to contact the U.S. applicants. As stated in Employer's report of recruitment results, Employer called Mr. Valencia twice on October 14, 1999. The first time, no one answered. The second time, Employer "left a message through a lady who answered the phone." Similarly, Employer called Ms. Marrufo on October 21, 1999, and "left a message through a lady who answered the phone." Subsequently, Employer called Ms. Marrufo twice more, but no one answered the phone (AF 30-31).

It is well settled that a third-party communication is not adequate, because it does not prove contact with the applicant. *Dove Homes, Inc.*, 1987-INA-680 (May 25, 1988)(*en banc*). Furthermore, an employer is obligated to try an alternative means of contacting a seemingly qualified U.S. applicant, such as by mail. *See, e.g., Sasan, Inc.*, 1996-INA-381 (Jan. 27, 1998); *Northeastern Lumber and Millwork*, 1994-INA-105(Feb. 13, 1995); *Jerry's Bagels*, 1993-INA-461 (June 13, 1994).

As stated by the CO in the NOF (AF 16) and reiterated in the Final Determination (AF 11), Employer's efforts to contact two potentially qualified U.S. applicants were inadequate. Therefore, Employer failed to document that the U.S. applicants were rejected solely for lawful job-related reasons, as required under §656.21(b)(6). Accordingly, we find that labor certification was properly denied.³

² Employer, through its prior actions, seemingly acknowledged that the U.S. applicants could be qualified for the position, based on their resumes. As stated above, Employer did make *some* attempt to contact them to schedule interviews. Furthermore, in its report of recruitment results, Employer did not cite Mr. Valencia or Ms. Marrufo's alleged lack of qualifications, but rather their failure to respond to Employer's telephone messages (AF 30-31).

³ We find no merit in Employer's argument that the CO had abused his discretion by purportedly not providing Employer an opportunity to rebut the insufficiency of contact issue (AF 1; Employer's Statement of Position).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF 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.

To the contrary, the CO raised the issue in the NOF (AF 20). Rather than address the issue on rebuttal, Employer sought to provide an alternative basis for rejecting the U.S. applicants by belatedly asserting that the applicants were unqualified based on their resumes alone. For the reasons outlined above, this alternative basis for rejecting the U.S. applicants was also found unacceptable.