

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 September 2003

BALCA Case No.: 2002-INA-00098
ETA Case No.: P2001-NJ-02465791



In the Matter of:

PISCATAWAY AUTO BODY, INC.,
Employer,

on behalf of

MARIAN PROKOP,
Alien.

Appearance: Ira L. Mazer, Esq.
Philadelphia, PA

Certifying Officer: Delores DeHaan
New York, NY

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Piscataway Autobody, Inc. (“Employer”) filed an application for labor certification¹ on behalf of Marian Prokop (“Alien”) on January 27, 1998. (AF 14).² Employer seeks to employ the Alien as an automotive painter (DOT Code: 845.281-014). We base our decision on the record

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² In this decision, AF is an abbreviation for Appeal File.

upon which the Certifying Officer (“CO”) denied certification, Employer's request for review, and any written arguments. 20 C.F.R. 656.27(c).

STATEMENT OF THE CASE

On January 14, 1998, Employer filed an application for alien labor certification on behalf of the Alien to fill the position of automotive painter. (AF 11-12). Two years experience was required. The CO issued a Notice of Findings (“NOF”) on August 8, 2001, indicating the CO’s intent to deny the certification application. (AF 32-34). The CO determined that two applicants, Mr. Phillip Hosie and Mr. James DeCamp, were qualified for the position but were rejected by Employer. The CO stated that although Employer indicated he contacted both applicants, he failed to submit phone logs or certified mail receipts. The CO requested phone logs or further documentation of contact with the applicants and a showing that these applicants were rejected for lawful, job-related reasons. (AF 33).

Employer submitted a rebuttal letter, dated August 31, 2001, which stated:

Please be advised that I have *contacted* Mr. Philip Hosie, Jr. on December 12, 2000 in the evening, ... and left a message to his wife. Mr. Hosie called the next day, i.e. December 13th, 2001 at 1:35 (enclosed is a note I made on his resume) and told me he was not interested in this position because : "Piscataway is too far to travel" However I asked him to come and fill the employment application; he was supposed to call me again but he never did. Also I called P&J Auto Services, Fords, NJ.... to reach Mr. Hosie at daytime, and I found out that Mr. Philip Hosie, Jr. stopped working for them "long ago" (in his resume he stated otherwise).

Also I contacted Mr. James J.De Campon 12.13.2001 immediately after I spoke to Mr. Hosie, i.e 1:38pm. I spoke to Mr. James J. DeCamp's brother (it was his phone number) and I asked him to leave a message for James. Mr. James J. DeCamp called back on December 14 and set up for appointment at 11:00 the next day, 12.15 (again I made a note - enclosed), but he did not show up. I called his brother again and found out that James J. DeCamp will not take this position as he works for police.

As I informed you in my letter of January 24, 2001 both applicants were not interested in taking the advertised by me position of a Painter, Automotive. Therefore

this is to verify that my statement was right.

(AF 40-41).

The CO issued the Final Determination (“FD”) on September 25, 2001, denying Employer’s application for labor certification. (AF 42-43). In so doing, the CO determined that Employer had failed to adequately rebut the finding that U.S. applicants DeCamp and Hosie were unlawfully rejected. The CO stated that he found applicants DeCamp and Hosie to be qualified based on their resumes. Employer indicated that he had contacted both applicants by phone and both applicants were no longer interested in the position. (AF 40). However, Employer failed to submit any documentation confirming these assertions, such as phone logs. The CO thus denied certification. (AF 43).

By letter dated January 23, 2002, Employer requested review by this Board, stating:

...This matter was handled for Piscataway Auto Body by a non-attorney to who inadequately advised Piscataway Auto Body about the appropriate response which was necessary to provide in its rebuttal requested by the Department of Labor. The Department of Labor merely asked for proof that the employer had contacted two (2) United States citizen applicants. The Notice of Intent to Deny requested phone logs from the employer providing proof of the contact. The employer provided a detailed letter in response regarding his efforts at contact but was not advised to provide phone records.

These phone records do exist and the employer has provided them to current counsel recently. It is hoped that the Department of Labor will consider these submissions, even though they are provided outside the thirty-five day review, and grant the Department of Labor Certification Application of Piscataway Auto Body.

(AF 57). With the request, Employer included a portion of a Verizon phone bill showing calls placed in December 2000. (AF 53). The CO forwarded the request for review to the Board; however, the CO made a memo to the file discussing the merits of Employer’s request, specifically the phone bill. (AF 57). The case was docketed by the Board on February 21, 2002, and Employer did not file an additional brief in support of its appeal.

DISCUSSION

By letter dated January 22, 2002, Employer filed a Request for Review, along with additional evidence to support his Rebuttal. (AF 53-56). The CO reviewed the new evidence, specifically a phone log indicating attempts to contact U.S. applicants. The CO recorded it as a Request for Review and forwarded the file to this Office. (AF 57). In addition, the CO enclosed a memo to the file discussing Employer's new evidence, the phone log included with the Request for Review. The CO noted that the phone log did not confirm Employer's attempt to contact both applicants, as one of the numbers Employer indicated on the phone log did not actually belong to the applicant. (AF 57).

A request for review must be filed within thirty-five calendar days of the date specified on the FD. 20 C.F.R. § 656.26(b)(1); *see also Superseal Manufacturing Co.*, 1990-INA-296 (Aug. 13, 1991). If a request for review is not mailed within the thirty-five day period, the FD becomes the final determination of the Secretary of Labor. 20 C.F.R. §§ 656.25(g)(2)(iv), 656.26(b)(1). Furthermore, the CO does not have the authority to rule on whether a request for administrative-judicial review was timely filed. *Delmar Family Dental Center*, 1988-INA-132 (Sept. 26, 1988) (*en banc*).

If a request for review is mailed after the thirty-five day period, it is untimely and will result in a dismissal of the appeal. *Ana F. Pla, M.D.*, 1992-INA-415 (Mar. 18, 1994); *Israel Hotel Representatives, Inc.*, 1992-INA-310 (Aug. 11, 1993). However, the late filing may not be fatal if the employer demonstrates excusable neglect. *Soccer Exports, Ltd.*, 1989-INA-226 (Mar. 29, 1990). The excusable neglect standard requires the demonstration of a legitimate reason why a timely request could not have been made. *Charleedane Industries*, 1988-INA-69 (Apr. 9, 1990).

Employer filed the request for review nearly four months after the Final Determination was issued; this clearly exceeds the thirty-five day period in which Employer may appeal the FD. (AF 55-56). Employer acknowledged the tardiness of the request, but failed to provide a legitimate reason as to why a timely request could not have been made. The only explanation Employer gave was that

the previous representative was not an attorney and therefore failed to advise Employer to supply phone records per the CO's request. (AF 56). This excuse fails to explain why Employer did not file a timely request for review. The FD clearly states that such a request must be filed within thirty-five days of the issuance of the FD. (AF 43). As such, Employer has failed to file a timely request for review and has failed to demonstrate excusable neglect for this late filing. The appeal is therefore dismissed.

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 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.