U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 July 2004

BALCA Case No.: 2003-INA-146
ETA Case No.: P2000-CA-09504944/JS

In the Matter of:

STORAGE & RELOCATION SERVICES,
Employer,

on behalf of

TEOFILO GARCIA,
Alien.

Appearance: W. Kenneth Teebken, Esquire
La Mirada, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

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 Teofilo Garcia ("the Alien") filed by Storage & Relocation Services ("the 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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied

certification and the 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 14, 1998, the Employer filed an application for labor certification on behalf of the Alien for the position of Cleaner, Commercial or Institutional. (AF 29-30).

On May 2, 2002, the CO issued a Notice of Findings ("NOF") indicating intent to deny the application on the grounds that the Employer's experience requirement for the position was unduly restrictive and that the Employer failed to document that it had lawfully rejected qualified U.S. workers. (AF 24-27). The CO found that the position of Cleaner, Commercial or Institutional required only one month of experience to successfully perform the position, in accordance with the Dictionary of Occupational Titles. Therefore, the Employer's requirement of two years of experience was unduly restrictive. To cure the deficiency, the Employer was advised to delete the requirement or to justify it as a business necessity. (AF 25-26).

The CO also found that the Employer failed to document that it had lawfully rejected six qualified U.S. workers referred by the state agency. Although the Employer contacted all six applicants, it delayed the scheduling of the interview for a month to six weeks after the initial contact. The CO stated that the Employer rejected all six applicants because they failed to appear for the interview. However, the CO found that the long delay in scheduling the interview may have discouraged the applicants. Additionally, the CO noted that the Employer did not show that the applicants were not available at the time of the initial contact. To remedy the deficiency, the Employer was advised to document that it rejected the six qualified U.S. workers for job-related reasons, in accordance with 20 C.F.R § 656.21(b)(6). (AF 26-27).

The Employer, in its Rebuttal dated May 28, 2002, agreed to change its experience requirement from two years to one month. The Employer indicated that it

would readvertise the job opportunity without the two year experience requirement. In regards to its recruitment efforts, the Employer asserted that it contacted all the U.S. workers within fourteen days of receiving the referrals. Consequently, the Employer demonstrated a good faith effort in recruitment, in compliance with the EDD requirements. The Employer alleged that it scheduled the interviews on June 19, 2000 due to a business necessity; the human resources director and the owner were unavailable until then. The Employer noted that it confirmed the interview date with all the applicants on June 14, 2000. The Employer asserted that it rejected the applicants because they all failed to appear for the scheduled interviews. (AF 14-15).

On July 3, 2002, the CO issued a Final Determination ("FD") denying the application. The CO found that the state agency forwarded five resumes on April 20, 2000; an additional resume was forwarded on May 16, 2000. The CO noted that the Employer did not schedule the interviews until a month to six weeks after the initial contact, on June 19, 2000. The Employer's assertion that the individuals who were in charge of the interview were not available for an earlier date could not be accepted as a valid ground for the delay. Consequently, the CO could not find that the Employer made a good faith effort to contact the applicants as soon as it was possible. Therefore, the CO determined that the Employer failed to document that the applicants were truly unavailable and the Employer remained in violation of 20 C.F.R. § 656.21(b)(6). (AF 9-10).

On August 2, 2002, the Employer filed its Request for Review/Motion for Reconsideration. (AF 2-8). In the Request for Review/Motion for Reconsideration, the Employer summarized all the developments of the case and provided a list of procedures that it asserted were required to meet the good faith recruitment requirement. As the Employer satisfied those procedures, the Employer concluded that it met the good faith recruitment requirement. (AF 2-4).

The Employer's Motion for Reconsideration was denied by the CO on January 14, 2003 and the matter was docketed in this Office on April 10, 2003. On May 27,

2003, the Employer submitted its brief. The Employer listed all the U.S. applicants, along with the comments made to the applicants when they were contacted by the Employer, and their respective responses. The Employer asserted that due to business necessity, the applicants could not be interviewed until June 19, 2000 and argued that the delay was not excessive. Additionally, the Employer stated that because the applicants were contacted a few days before the interview date, the Employer recruited in good faith.

DISCUSSION

In an application for alien employment certification, the employer bears the burden of proving all aspects of the application. 20 C.F.R. § 656.2(b). The CO, in the NOF, found that the Employer had not documented that it had rejected the six qualified U.S. workers for lawful, job-related reasons. The CO also noted that there was a scheduling delay in arranging interviews with the applicants; this delay ranged from four to six weeks. The CO added that this delay may have discouraged the applicants from pursuing the job opportunity.

In its Rebuttal, the Employer made unsupported assertions that it had not been able to schedule the applicants for an earlier date because both the director of human resources and the owner were not available until then. The CO did not find that this undocumented assertion was a justifiable reason to delay the interviews. Although the CO made reference to a delay in contacting the U.S. applicants, ranging from a month to six weeks, this delay is from the time of initial contact by the Employer to the interview date. We find the relevant time frame to be from the date the applicants were referred to the Employer on April 20, 2000[1] to the date of the scheduled interview, June 19, 2000. This indicates that the Employer needed two months to schedule an interview for a position that required only one month of experience.

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[1] As noted above, five applicants were referred on April 20, 2000 and the sixth was referred by the state agency on May 1, 2000. We are addressing the five applicants referred on April 20, 2000 because they are the majority. However, our concern about the delay is equally applicable to the sixth applicant.

The burden of proof, in the twofold sense of production and persuasion, is on the employer. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). The Employer, in its Recruitment Report, asserted that it contacted the first five applicants on May 1, 2000 and scheduled them for interviews on June 19, 2000. The remaining applicant was contacted on May 20, 2000. (AF 35). In its Rebuttal and Request for Review, the Employer added that the applicants were also contacted on June 14, 2000 to confirm the interviews on June 19, 2000. It is unclear why the Employer failed to mention this second contact in its Recruitment Report. We note that the Employer did not document the telephone contacts with any of the applicants. Written assertions which are reasonably specific and indicate their sources or bases are to be considered documentation which must be given the weight it rationally deserves. *Gencorp,* 1987-INA-659 (Jan. 13, 1988)(*en banc*). However, the Employer's general assertions do not rise to the level of documentation.

We will focus our analysis in determining if the Employer's efforts to contact the applicants coupled with the interview date six weeks after the initial contact could be characterized as "as soon as possible."

An employer is under an affirmative duty to commence recruitment and make all reasonable attempts to contact the applicants as soon as possible. *Yaron Development Co., Inc.* 1989-INA-178 (Apr. 19, 1991)(*en banc).* In *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991), the Board found that "as soon as possible" does not embody a specific time limit. It turns on how long an employer requires for a reasonable examination of the applicants' credentials. The reasonableness of the time may depend on a variety of factors, including but not limited to 1) whether the position requires extensive credentials, 2) whether the recruitment is local, and 3) whether many people applied for the position. Id. In this case, a reasonable time to examine the credentials would be almost immediately upon receipt of the resumes because the position of Cleaner, Commercial or Institutional does not require particularly extensive credentials, the recruitment was local, and only six applicants applied for the position.

The CO in the FD found that the Employer's delay of six weeks could have discouraged the U.S. applicants from pursuing the job opportunity. Making an initial timely contact with the U.S. workers does not meet the requirement of contacting the applicants "as soon as possible," if the timely contact is followed by an unwarranted delay in the actual interview of the U.S. workers. The delay also unlawfully caused a chilling effect on the interest of the applicants. By introducing an unwarranted delay, the employer has abandoned a good faith effort to locate a qualified applicant and cast doubt upon whether the position is clearly open to U.S. workers. *Creative Cabinet & Store Fixture, Co.,* 1989-INA-181 (Jan. 24, 1990)(*en banc*). In such circumstances, it is presumed that the employer's delay is designed to discourage U.S. applicants, in violation of 20 C.F.R. § 656.21(b)(7).

Consequently, the CO properly denied certification and the following order will enter:

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 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.