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Issue Date: 13 September 2004

BALCA Case No.: 2003-INA-201
ETA Case No.: P1998-CA-09434291/ML

In the Matter of:

SURE SHINE SERVICES,
Employer,

on behalf of

LUIS ESTRADA,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Konrad K. Larson, Esquire
Santa Ana, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a maintenance/janitor services company for the position of Commercial/Industrial-Maintenance/Janitor. (AF 112-113).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification, together with the Employer’s request for review, as contained in the Appeal File (“AF”) and written arguments of the parties. 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² “AF” is an abbreviation for “Appeal File.”

STATEMENT OF THE CASE

On August 18, 1997, the Employer, Sure Shine Services, filed an application for alien employment certification on behalf of the Alien, Luis Estrada, to fill the position of Commercial/Industrial – Maintenance/Janitor. Minimum requirements for the position were listed as two years of experience in the job offered. (AF 112-113).

The Employer received eleven applicant referrals in response to its recruitment efforts, all of whom the Employer reported were contacted by phone and indicated that they were either uninterested in or unavailable for the position. (AF 17-49).

A Notice of Findings (“NOF”) was issued by the CO on October 29, 2002, proposing to deny labor certification based upon a finding of unlawful rejection of U.S. workers. (AF 11-13). The CO found insufficient evidence that the Employer’s effort to contact nine qualified U.S. applicants took place. Citing documentation of contact efforts as attempts in writing, supported by dated return receipts, and by telephone, supported by phone bills, the CO instructed the Employer to submit rebuttal evidence giving details of the attempts to interview these U.S. applicants.

In Rebuttal, the Employer asserted that because the CO only questioned the recruitment effort as to nine of the candidates, and the recruitment effort utilized for all eleven applicants was identical, that the CO should consider the entire recruitment effort sufficient and satisfactory. (AF 9-10).

A Final Determination (“FD”) denying labor certification was issued by the CO on January 10, 2003, based upon a finding that the Employer had failed to adequately document contact of the cited U.S. worker applicants. (AF 7-8). The CO advised that only nine applicants were cited because they were the ones considered qualified for the position. The CO denied labor certification because the Employer submitted no further evidence of a good-faith recruitment effort.

The Employer filed a Request for Review by letter dated February 7, 2003, and the matter was docketed by the Board on May 23, 2003. (AF 1).

DISCUSSION

Twenty C.F.R. § 656.21(b)(6) states that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may be rejected solely for lawful job related reasons. This applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the 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, the 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.

In the instant case, the CO challenged the Employer's good faith recruitment of U.S. workers and the Employer made little effort to document its recruitment efforts and show it exercised good faith in finding a U.S. worker for the job. The burden of proof is on the employer in an alien labor certification. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996). Thus, it is the employer's burden to demonstrate good faith in recruitment and to show that U.S. workers are not able, willing, qualified or available for this job opportunity.

All eleven of the applicants in this case were rejected by the Employer on the basis that they were unavailable or uninterested in the job. The Employer was

specifically instructed in the NOF to document its contact of these applicants. In rebuttal, the Employer presented no further documentation of actual contact, despite the CO's specific request to provide documentation, including telephone records.

The Board in *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*), citing *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), noted that although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. To document initial or follow-up telephone conversations, the Board in *M.N. Auto Electric, supra*, instructed

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.

In the instant case, the Employer reported that all eleven applicants were not interested in the job. In light of this fact, the CO requested that the Employer provide documentation of contact. Notably, the Employer's notes of contact initially submitted with its recruitment report are not detailed and specific, lacking basic information such as the time or length of call and in one instance the date of contact/interview. The Employer made no effort to provide further documentation, and instead, simply stated that because the CO had not cited two of the eleven applicants in his NOF, the CO should consider the entire recruitment effort sufficient and satisfactory.

On this basis, we conclude that the Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity, and accordingly, labor certification was properly denied.

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 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.