

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 September 2004

BALCA Case No.: 2003-INA-291
ETA Case No.: P2002-MA-01322533

In the Matter of:

ECONO LODGE,
Employer,

on behalf of

DINESHBHAI PATEL,
Alien.

Appearance: Harry Patel, Esquire
Houston, Texas
For the Employer and the Alien

Certifying Officer: Raimundo Lopez
Boston, Massachusetts

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent 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 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 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. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 27, 2001, the Employer, Econo Lodge, applied for labor certification to enable the Alien, Dineshbhai Patel, to fill the position of Manager. (AF 207-208). The job requirements were listed as a high school diploma, one year of college, and two years of experience as a manager or assistant manager. (AF 207).

On April 22, 2003, the CO issued a Notice of Findings (“NOF”) proposing to deny certification pursuant to 20 C.F.R. § 656.21(b)(6). The CO noted that eleven U.S. workers applied for the job and three of them declined to take the position. (AF 116). The CO noted that the Employer’s recruitment report indicated that its recruitment efforts were not conducted in good faith because it claimed that all applicants failed to meet the minimum job requirements, regardless of their education and experience. The CO acknowledged that some applicants did not have managerial experience in the hotel industry, but their resumes nonetheless demonstrated that they had successfully transitioned from one industry to another during their careers. Accordingly, the Employer was advised to document lawful, job-related reasons for its rejection of seven U.S. workers whose resumes indicated that they possessed the requisite experience. Moreover, the CO observed that the recruitment report did not indicate that the Employer had attempted to obtain additional information about the applicants to determine if they were truly qualified. The CO concluded that the Employer was inclined to reject the applicants instead of considering them for the position because the Employer indicated in the letters to the applicants that the failure to appear for the interview without notice would force the Employer to conclude that the applicant was no longer interested in the job and the applicant would be rejected for a “job related reason.” (AF 116).

The CO also stated that he had learned that some applicants were dissuaded from taking the position because they had been informed that the quality and integrity of the establishment was questionable and other applicants claimed that they had not received letters inviting them to the interviews. The Employer was instructed to provide “convincing documentation to justify the rejection of these U.S. applicants.” (AF 116). The CO informed the Employer that it was obligated to investigate an applicant’s

credentials when the applicant's resume indicated that he or she was qualified for the position, either by interviewing the applicant or obtaining other information to determine whether the applicant was truly qualified. (AF 117). Finally, the Employer was directed not to contact or re-contact the U.S. applicants. (AF 116-117).

On May 21, 2003, the Employer submitted its rebuttal. Despite the language in the NOF informing the Employer not to contact or re-contact the applicants, the Employer scheduled seven interviews with the applicants named in the NOF. (AF 96-97). The Employer's rebuttal consisted of a cover letter, a three page recruitment report describing the results of the "re-scheduled interviews," copies of the form letter the Employer sent to the applicants for the re-scheduled interviews, and copies of certified mail receipts for these letters. (AF 94-113).

On June 17, 2003, a Final Determination ("FD") was issued in which the CO denied certification. The CO noted that the Employer contacted the applicants named in the NOF, even though it was specifically instructed not to do so. The CO noted that the Employer did not address whether the applicants were capable of performing the job or specify how they did not meet the minimum requirements. (AF 92-93). The CO also determined that the Employer lacked credibility because it did not support its assertions regarding the applicants' qualifications and some applicants stated that their interactions with the Employer had dissuaded them from pursuing the position. (AF 93). The CO concluded that qualified U.S. workers were available when referred to the Employer and that they were rejected for unlawful reasons. On August 11, 2003, the Employer requested review of the denial of labor certification by BALCA. (AF 2).

DISCUSSION

The Employer's request for review argues that it rebutted the NOF with the results of the re-scheduled job interviews because this gave the applicants an opportunity to correct any deficiencies in their initial applications or interviews. (AF 2). The Employer submits that the results and documentation of the second interview are convincing documentation that the U.S. workers were unqualified to perform the job.

(AF 2). The Request for Review also contains a questionnaire that was allegedly completed by the interviewer and signed by two applicants on the day of their interviews. (AF 11-12, 19-20). This information was not previously submitted to the CO and cannot be considered by the Board because it was not part of the record upon which the denial of certification was based. *See* 20 C.F.R. §§ 656.26(b)(4); 656.27(c); *24 Hour Fuel Corp.*, 1990-INA-589 (Aug. 31, 1992). Evidence first submitted with a Request for Review will not be considered. *La Prairie Mining, Ltd.*, 1995-INA-11 (April 4, 1997).

An employer is required to document that U.S. workers who apply for a job opportunity offered to an alien are rejected only for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). The regulations imply an obligation of good faith recruitment. *H.C. LaMarche Ent. Inc.*, 1987-INA-607 (Oct. 27, 1988). This requirement applies not only to an employer's formal rejection of an applicant, but also to rejections that are a result of actions taken by the employer. *Corazon Giron*, 2002-INA-92 (June 12, 2003). Actions by an employer that indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§ 656.1, 656.2(b). An employer bears the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*).

The Employer's recruitment report contained an entry that indicated that the reasons for rejecting the seven applicants named in the NOF were their failure to appear for the interview, their disinterest, a poor work reference, or failure to meet the minimum requirements. (AF 131-133). However, the Employer's recruitment report also had an entry entitled "Employer Remark" under each applicant's name. This entry contained the statement that the applicant did not satisfy the minimum requirements for the job offered and was rejected based exclusively on job-related reasons. (AF 131-133).

All of these applicants had extensive managerial experience. When an applicant's resume raises a reasonable possibility that he or she is qualified for the job, an employer bears the burden of further investigating the applicant's credentials. *Corazon Giron*, *supra*. However, the employer cannot place unnecessary burdens on the recruitment

process, be dilatory in nature, or otherwise have the effect of discouraging U.S. applicants from pursuing the job opportunity. *Ryan, Inc.*, 1994-INA-606 (Sept. 12, 1995). The Employer's letters to the applicants sternly stated that their failure to appear at the interview without advance notice or good cause would be considered grounds for rejecting the applicant. Notably, the Employer scheduled these interviews without consulting with the applicants. In addition, the Employer listed a poor job reference for one applicant but did not document this reference. Indeed, the Employer does not even provide the name of the person who gave the poor reference. Likewise, the Employer does not explain how it concluded that another applicant was not interested in the position. In fact, the CO stated that this applicant informed the Department that she was still interested in the position one year after the interview. (AF 93). Instead, the Employer offered bare assertions in its recruitment report, rebuttal, and request for review. An employer's stated reason for rejection is insufficient to establish a lawful ground for rejection of a U.S. applicant when it is a mere assertion. *Marnic Realty*, 1990-INA-48 (Nov. 21, 1990); *Quality Products of America Inc.*, 1987-INA-703 (Jan. 31, 1989). Therefore, the Employer has failed to demonstrate that its recruitment efforts were conducted in good faith, and the CO properly denied certification.

ORDER

The CO's final determination denying labor certification is 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 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.