

U.S. Department of Labor



Board of Alien Labor Certification Appeals
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Issue Date: 28 September 2004

BALCA Case No.: 2003-INA-278
ETA Case No.: P2001-CA-09511387

In the Matter of:

EVANGELINA RAMIREZ,
Employer,

on behalf of

IRMA OROZCO,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

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 United States Department of Labor Certifying Officer ("CO") of his 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 February 27, 2001, the Employer filed an application for labor certification on behalf of the Alien to fill the position of House Worker, general. (AF 22). The only job requirements were three months of experience in the position offered, and a grade school education. (AF 22).

The Employment Service sent one response to the Employer's advertisement on May 7, 2001. (AF 39-40). Thereafter the Employer sent a letter to the applicant dated May 24, 2001, inviting the applicant to interview with the Employer at 7:30 a.m. on May 29, 2001. (AF 34). The letter was sent by certified mail, return receipt requested, and was received by the applicant on May 26, 2001. (AF 33). According to the Employer, the applicant failed to attend the interview. (AF 8).

On February 24, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification pursuant to 20 C.F.R. § 656.21(b)(6) on the basis that the Employer's effort at recruiting the applicant lacked good faith. (AF 19-20). Specifically, the CO found that the 7:30 a.m interview time was not reasonable, the letter did not list the Employer's phone number, and was sent too late. (AF 19). The CO also noted that the Employer did not attempt to contact the applicant following the applicant's absence at the interview. (AF 19).

In its Rebuttal dated April 18, 2003, the Employer stated that the letter was sent with enough time for the applicant to reply. (AF 8). The Employer also stated that it was not the Employer's responsibility to contact the applicant to inquire as to the applicant's whereabouts. (AF 8).

The CO issued a Final Determination ("FD") denying certification on June 18, 2003, finding that the Employer's recruitment efforts lacked a good faith effort to contact a qualified U.S. applicant. (AF 6-7).

The Employer requested review on July 28, 2003, noting that she would be willing to contact the applicant again to interview her. (AF 1). This matter was docketed by the Board on August 19, 2003.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). An employer must therefore 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. When an employer files an application for labor certification, it is signifying that it has a *bona fide* job opportunity that is open to U.S. workers. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*). Inherent in this presumption is the notion that the employer legitimately wishes to fill the position with a U.S. applicant and will expend good faith efforts to do so. *Id.* What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the particular facts of the case under consideration. In some circumstances, a reasonable effort requires more than a single type of attempted contact. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*).

An employer must give the applicants adequate time to respond to the employer's contact concerning interviews. *Tempco Engineering, Inc.*, 1988-INA-101 (June 20, 1988). Here, the applicant received the Employer's letter on May 26, 2001, for an interview to occur three days later on May 29, 2001. (AF 33-34). Three days of time between receipt of the Employer's letter and the date of the scheduled interview is insufficient and belies a good faith effort to recruit. *See Tempco Engineering, Inc.*, 1988-INA-101 (June 20, 1988) (three days from the date of the employer's letter was insufficient, and thus the applicants' failure to respond to the request for an interview was not a ground for rejecting the applicants); *Michael Alex*, 1990-INA-414 (Dec. 9, 1991) (four days not sufficient time to respond with completed application for housekeeping position); *Galletti Brothers Food*, 1990-INA-511 to 1990-INA-516, 1990-INA-531 to 1990-INA-566 (Apr. 30, 1991) (certified letters received on March 9, 11, 17 and 19 afforded a wholly insufficient time to respond by March 11).

Furthermore, the Employer's single attempt to contact the applicant fails to show a good faith recruitment effort. The applicant's phone number was available to the Employer, as listed on her letter of qualification, and a reasonable attempt to contact her would have included an attempt to contact her by telephone. *See Diana Mock*, 1988-INA-255 (Apr. 9, 1990) (finding that where an employer has only a few applicants, it is reasonable to require it to follow up a letter with a phone call when there is no response from the applicants).

Thus, the Employer did not reject the U.S. applicant for a lawful, job-related reason and accordingly, the CO's denial of labor certification was proper.

ORDER

The CO'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.