U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Date Issued: February 4, 2002

BALCA Case No. 2001-INA-107
ETA Case No. P1999-NY-02410248

In the Matter of:

KNIT PRO, INC.,
Employer,

on behalf of

SILVESTRE LAZARO,
Alien.

Appearance: Meyer Newfield, Esq.
New York, New York

Certifying Officer: Dolores DeHaan
New York, New York

Before: Vittone, Burke and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of knitting machine mechanic.[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

[1] Permanent alien labor certification is governed by Section 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 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 June 10, 1997, Employer, Knit Pro, Inc., filed an application for labor certification to enable the Alien, Silvestre Lazaro, to fill the position of "Knitting Machine Mechanic." (AF 5). Five years of experience in the job offered was required. The rate of pay was listed as $300.00 per week. The State of New York Department of Labor advised Employer on November 13, 1998 of several deficiencies in the application, and on December 7, 1998, Employer amended its application to require four years of experience in the job offered, and to list the rate of pay as $9.11 per hour. (AF 17).

On November 16, 2000, the CO issued a Notice of Findings, ("NOF"), proposing to deny certification pursuant to 20 C.F.R. §656.24(b)(2)(ii), 20 C.F.R. §656.21(b)(6) and 20 C.F.R. §656.20(c)(8). (AF 40). Specifically, the CO noted that Employer had responses from two U.S. applicants who appeared from their resumes to be qualified for the position offered to the Alien. According to Employer, U.S. applicant Sanders had twenty-six years of experience, and was rejected because he wanted more money, while U.S. applicant Meylakh had five years of experience and was rejected because he stated he did not want the job because he was not familiar with the equipment and could not maintain or repair it. The CO rejected Employer's contention that he attempted to contact each applicant by telephone. Employer was advised he needed to provide proof of the contact, with rebuttal to include itemized telephone bills or copies of certified mail receipts accompanied by signed certified return cards.

By cover letter dated December 20, 2000, Employer's counsel submitted Employer's rebuttal letter of December 6, 2000. (AF 44). In his letter, Employer contended that he contacted each of the applicants and provided the results of that contact in his recruitment report. Employer contended that Sanders was interviewed at his place of business on February 12, 1999, and stated that he would not accept a job at less than $15.00 per hour. Meylakh was interviewed by telephone on February 9, 1999. He stated that he did not want the job because he was unfamiliar with the machinery in the factory. Employer asserted that he did not understand why proof of attempts to contact the U.S. applicants was required. It was his position that he had made good faith recruitment efforts. Employer asserted that he was able to contact each of the applicants by telephone and to conduct preliminary interviews by telephone. Employer enclosed a Board of Alien Labor Appeals ("BALCA" or "Board") decision in support of his argument that his statements should be found to be credible.

A Final Determination was issued on February 3, 2001. (AF 46). The CO determined that Employer had failed to document lawful job related reasons for the rejection of the two U.S. applicants and he had failed to provide any proof that he had contacted the two applicants. The CO pointed out that Employer chose to question the requirement of proof of contact, instead of complying with same. The CO questioned Employer's rejection of Meylakh, given that Meylakh's resume listed that he worked as a Head Mechanic from 1993 to 1998, and fixed all kinds of mechanical/electrical/electronic problems in about 200 various knitting machines. The CO found that it was not clear what machinery in Employer's factory would be unknown to this U.S. applicant.

On March 7, 2001, Employer requested review of the denial of labor certification by BALCA.

(AF 50).

DISCUSSION

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R.§§656.1, 656.2(b). Employer has 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*). Moreover, the employer must establish by convincing evidence that an applicant whose resume indicates he or she is qualified is not qualified - the employer cannot shift the burden to the CO to show that the U.S. worker is qualified. *Fritz Garage*, 1988-INA-98 (Aug. 17 1988)(*en banc*).

Employer claims that two apparently qualified U.S. applicants refused the job, one claiming that he could not repair and maintain the machinery, and the other refusing the wage being offered. Employer also contends that the applicants were actually contacted, and therefore, it did not need to prove that attempts to contact were made. Employer argues that his assertion that he had established contact with both applicants and provided specific, lawful reasons for non-hire was sufficient. In his Memorandum of Appeal, Employer argues that the CO's request for documentation of contact is "absurd as the employer had provided superior proof that he had established contact with the applicants."

An employer's stated reason for rejection is insufficient to establish a lawful ground for rejection of a U.S. applicant where it is a mere assertion. *Marnic Realty*, 1990-INA-48 (Nov. 21, 1990); *Quality Products of America, Inc.*, 1987-INA-703 (Jan. 31, 1989). Employer herein has made numerous assertions, starting with the assertion that contact was made, followed by the assertion that one candidate decided he was not qualified, and the other candidate determined that he would not accept the wage offered and advertised by Employer. When requested to provide documentation of the telephone contact made, Employer did not state that it did not exist, or that he was unable to obtain it. He plainly refused to provide it.

Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Where a fact lends itself to proof by independent documentation, the weight and sufficiency of a party's case is bolstered by such documentation. The credibility of Employer's recruitment report is at issue. Compliance with the reasonable request to provide documentation of telephone contact would have greatly bolstered Employer's case. That request was clearly made in the NOF, and refused by Employer, on the ground that he had "superior proof."

Where the CO requests a document or information which has a direct bearing on the resolution of an issue and is obtainable by reasonable effort, the employer must produce it. *Gencorp*,

supra. An employer also has the burden to satisfactorily respond to or rebut all findings in the NOF. *Belha Corp.*, 1988-INA-24 (May 5, 1989)(*en banc*). Employer never indicated it could not produce telephone records, rather it argued that it did not need to produce those records, that it had "superior proof." Employer's failure to comply with the NOF in this respect not only puts his credibility into question, but is a basis for denial of certification. Thus, failure to submit documentation reasonably requested by the CO warrants denial of labor certification. *Rouber International*, 1991-INA-44 (March 31, 1994). Employer failed to produce the requested documentation or establish why such evidence did not exist.[2]

Accordingly, based upon Employer's failure to provide documentation reasonably requested by the CO, we find that certification was properly denied. Accordingly, the following order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

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

[2] In *M.N. Auto Electric Corp*., 2000-INA-165 (BALCA Aug. 8, 2001) (*en banc*), the Board held that the standard for documenting good faith efforts to contact U.S. applicants is reasonable efforts to contact the U.S. applicants, and not proof of actual contact. Here, however, where an employer alleges actual contact, but the CO has reason to question whether that contact actually occurred (as where the employer alleges that apparently qualified U.S. applicants turned down the job), it is reasonable for the CO to request documentation to verify that the asserted contact took place. An employer's refusal to provide reasonably requested documentation is, itself, grounds for denial of certification.

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, N.W.
Suite 400 North
Washington, D.C., 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.