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)

Issue Date: 19 August 2003

BALCA Case No. 2002-INA-182
ETA Case No. P2002-MD-03368006

In the Matter of:

HUFF-N-PUFF
Employer,

on behalf of

MARIA BELTRAN
Alien.

Certifying Officer: Richard E. Panati
Philadelphia, PA

Appearance: Marco Cardenas
For Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Maria Beltran ("Alien") filed by Huff-n-Puff ("Employer") pursuant to section 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 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 Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On February 19, 2001, Employer filed an application for labor certification on behalf of the Alien, for the position of Supervisor, Janitorial Services. (AF 16-17).

On February 13, 2002, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the ground that Employer failed to provide a Recruitment Report on the five applicants that the state agency referred to Employer. The CO advised Employer to submit a Recruitment Report detailing its recruitment efforts. (AF 10-11).

In its Rebuttal dated February 22, 2002, (AF 09), Employer asserted that none of the U.S. workers referred by the state agency filled out an application or sent their resumes.

On March 7, 2002 the CO issued a Second Notice of Finding (SNOF) indicating intent to deny the application on the ground that the Recruitment Report submitted by Employer failed to address any efforts by Employer to contact the U.S. workers. The CO noted that Employer had to make timely contacts with the U.S. workers referred by the state agency and failure to contact them would be construed as lack of good faith in recruitment. The CO requested that Employer document its recruitment effort in order to remedy the deficiency. (AF 6-7).

On April 2, 2002, Employer submitted its Rebuttal to the SNOF. (AF 5). Employer disagreed with the CO's basis for his intent to deny. Employer stated that it never considered contacting the U.S. workers referred. If the U.S. workers were truly interested in the position they should have contacted Employer, and not the other way around. The fact that the US workers did not contact Employer indicated their lack of interest. Employer asserted that it made a good faith effort by taking time from Employer's busy day to receive telephone calls, in case the U.S. workers would call.

On April 10, 2002, the CO issued a Final Determination (FD) denying certification. The CO found that Employer did not recruit in good faith as it failed to contact the U.S. workers referred by the state agency and consequently did not meet its burden of demonstrating that U.S. workers were not able, willing, qualified or available for the job opportunity. (AF 03-04).

On April 25, 2002, Employer filed its Request for Review. (AF 01-02). Employer reasserted its disagreement with the CO's finding. Employer also asserted that it had previously submitted applications for labor certification and it was never required to run after applicants. Employer also stated that it did not see it as its duty to chase after people to fill a position that was already filled by a very qualified individual.

The AF does not reflect that brief was filed.

DISCUSSION

An employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Since the employer is seeking the benefit of a special provision of the Immigration and Nationality Act under which an alien is to be certified to fill a job for which U.S. workers also qualify, it is the employer's responsibility to recruit in good faith and to document its efforts. A requirement of a good faith recruitment effort is implicit in the regulations. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988).

The state agency referred five applicants to Employer in October and November 2001. (See AF 13-14). The referrals included the applicants' addresses and telephone numbers. Employer asserts that it recruited in good faith because it was willing to sit passively by the telephone, waiting for the applicants to call. The regulations do not include passive recruitment as an example of good faith recruitment. On the contrary, the

regulations, as interpreted by the case law, indicate that an Employer must actively pursue all the U.S. workers who could qualify for the job opportunity. Employer's failure to establish that it made a diligent effort to contact applicants is a material defect in the recruitment effort. *Gorchev & Gorchev Graphic Design,* 1989-INA-118 (Nov. 29,1990) (*en banc*). Employers are under an affirmative duty to commence recruitment and make all reasonable attempts to contact applicants as soon as possible. *Yaron Development Co., Inc.* 1989-INA-178 (Apr. 19, 1991)(*en banc*).

Additionally, reasonable and good faith efforts to contact potentially qualified U.S. applicants may require more than a single type of attempted contact. *Dianna Mock*, 1988-INA-255 (Apr. 9, 1990). Employer has an obligation to try alternative means of contact should the initial attempt fail. *Jacob Breakstone*, 1994-INA-534 (Aug. 1, 1996). Where there are a small number of applicants, sending a letter may not be enough to demonstrate good faith, especially when the employer is provided with telephone numbers to contact the applicants. *American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999). It has also been held that where certified letters were sent to nine U.S. applicants and none responded, a reasonable effort required more than that single attempt. *Sierra Canyon School*, 1990-INA-410 (Jan. 16, 1992). Follow-up attempts to contact applicants are an essential element of the "good faith" recruitment process, and labor certification is properly denied where alternative methods of contact are not utilized and documented. *Divinia M. Encina*, 1993-INA-220 (June 15, 1994); *Damas Atlantic, Ltd.*, 1993-INA-158 (May 4, 1994).

Employer wrongly assumed that it satisfied its duty to recruit in good faith through its willingness to be contacted by U.S. applicants. This meager step does not equate to a good faith recruitment effort. Employer's effort must show that it seriously wanted to consider the U. S. applicant for the job, not merely go through the motions of a recruiting effort without serious intent. *Compare Dove Homes, Inc.*, 1987-INA-680 (May 25, 1988) (*en banc*) and *Suniland Music Shoppes*, 1988-INA-93 (March 20, 1989) (*en banc*).

Employer's failure to even attempt to contact the U.S. applicants cannot support a finding that its reasons for rejecting the U.S. applicants were lawful and job-related within the meaning of the regulations. *John & Winnie Ng,* 1990 INA 134 (Apr. 30, 1991). Accordingly, as the record is sufficient to support the CO's denial of alien labor certification and for the above stated reasons, the following order will issue:

ORDER

The CO's denial of labor certification in this matter 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.