

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: June 16, 2003

BALCA Case No.: 2002-INA-85
ETA Case No.: P1999-CA-09442846/ML

In the Matter of

JOSE'S FRONT END ALIGNMENT,
Employer,

on behalf of

RUDY ERWIN FLORES,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Garish Sarin, Esquire
Los Angeles, California
For the Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER OF REMAND

This case arises from an application for labor certification¹ filed by an automobile service business for the position of Mechanic Supervisor. (AF 13-14).² The following decision is based on

¹ 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 20 C.F.R. Part 656.

² "AF" is an abbreviation for "Appeal File."

the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. §656.27(c).

STATEMENT OF THE CASE

On November 8, 1996, Jose's Front End Alignment filed an application for alien employment certification on behalf of the Alien, Rudy Flores, to fill the position of Mechanic Supervisor. Minimum requirements for the position were listed as two years experience in the job offered. (AF 13-14).

Employer received seven applicant referrals in response to its recruitment efforts, all of whom were rejected by Employer as uninterested in the position on the basis that they had failed to respond to Employer's contact letter. (AF 17-18), Employer's letter of contact instructed:

Before we scheduled [sic] a personal interview please provide us with written references meeting our minimum requirements from your last employers delineating your experience as a Mechanic Supervisor.

Upon receipt of your correspondence meeting our minimum requirements we would like to schedule a personal interview please choice [sic] one date, time and attach the date and time to your letter of references as well a telephone number were [sic] we can reach [you].

December 30, 1998 at 10:00 or 10:30

December 31, 1998 at 10:00 or 10:30

(AF 24, 27, 31, 35, 41, 44).

A Notice of Findings (NOF) was issued by the CO on May 31, 2001, proposing to deny labor certification based upon a finding that Employer had unlawfully rejected U.S. workers because of

undisclosed requirements. The CO concluded that because the requirement of references was not shown on the ETA 750 Part A, lack of this requirement could not be cited as justification for finding the U.S. applicants unqualified. Employer was instructed to show that the U.S. workers who applied were not qualified based on their failure to possess the requirements set forth on the ETA 750 Part A. (AF 10-12).

In rebuttal, Employer asserted that all seven U.S. applicants were scheduled for a personal interview and did not appear; thus Employer's reason for rejection was valid as they clearly manifested an intent not to pursue the job offer. (AF 6-7).

A Final Determination denying labor certification was issued by the CO on August 29, 2001, based upon a finding that Employer had failed to adequately rebut the NOF as it did not address the issue of the undisclosed requirement. In addition, the CO further noted that the letter "supposedly" sent had no return receipt or other documentation to corroborate a timely transmittal; nor did it identify Employer as a business or give a telephone number for reply. (AF 3-4).

Employer requested Administrative-Judicial review by letter dated September 11, 2001. (AF 1-2).

DISCUSSION

In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991); *Mancillas International Ltd.*, 1988-INA-321 (Feb. 7, 1990). Thus, an employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *CCDONLINE Systems Inc.*, 1993-INA-258 (May 24, 1994); *American Café*, 1990-INA-26 (Jan 24, 1991); *Cal-Tex Management Services*, 1988-INA-492 (Sept. 19, 1990).

BALCA has held in *Bell Communications Research, Inc.*, 1988-INA-26 (Dec. 22, 1988), that the employer must state all the requirements for the job on the application form itself . Thus, rejection for requirements not stated on the form is only appropriate if they are implicit in the duties, or normally incident to recruitment. Notably, BALCA has held that the request that workers provide references and verification of work experience is implicit in the recruitment process and need not be stated on the ETA form. *Petit Jean Poultry*, 1994-INA-3 18 (Aug. 15, 1996). Accordingly, the CO's denial of certification on this basis is inappropriate in this case.

The CO in fact raised other bases for denial in the Final Determination, *i.e.*, documentation as to whether the contact letter was actually and timely sent, and the fact that the letter neither identified Employer as a business nor provided a telephone number for reply. The Final Determination may not, however, deny certification on the basis of evidence not cited in the NOF. *Shaw's Crab House*, 1987-INA-714 (Sept. 30, 1988)(*en banc*); *Marathon Hosiery Co., Inc.*, 1988-INA-420 (May 4, 1989)(*en banc*); *Clarkson Medical Group*, 1987-INA-714 (Sept. 30, 1988). If a CO bases his Final Determination on evidence not first discussed in the NOF, the matter may be remanded to the CO for clarification and the issuance of a new NOF. *Dr. Mary Zumot*, 1989-INA-35 (Nov. 4, 1991); *Western Yarns, Inc.*, 1989-INA-60 (Feb. 23, 1990).

In the instant case, Employer received seven applicant referrals, none of whom responded to the Employer's recruitment letter. The Board in *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*), held that evidence of timely mailing to numerous applicants of a letter which **does not tend to discourage or contain onerous requirements** and allows sufficient time for U.S. applicants to attend an interview may constitute a reasonable effort **where there is significant response to the letter**. Here, none of the applicant who were sent interview letters contacted Employer to schedule an interview; but Employer's letter required significant additional effort on the part of the applicant, including notifying their current employer, before he or she even knew if they were in fact being seriously considered for or were interested in the job.

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.

As the issues regarding contact and its appropriateness were not raised until the issuance of the Final Determination, it is determined that an Order of Remand is appropriate in this case.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and the matter is **REMANDED** for further consideration and findings in accordance with this decision and order.

For the panel:

JOHN M. VITTON
Chief Administrative Law Judge

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.