



Issue Date: 30 September 2003

BALCA Case No.: 2003-INA-85
ETA Case No.: P2001-NV-09508066/ET

In the Matter of:

CARNICERIA TRES AMIGOS,
Employer,

on behalf of

JAIME FALCON,
Alien.

Appearance: Ricardo Marquez for Employer and Alien
Las Vegas, NV

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Carniceria Tres Amigos (“Employer”) on behalf of Jaime Falcon (“Alien”) for the position of Butcher Mexican Cut. (AF 37-38). This decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as contained in the Appeal File (“AF”). 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

STATEMENT OF THE CASE

The CO issued a Notice of Findings (“NOF”), dated November 4, 2002, questioning whether Employer rejected U.S. workers for lawful, job-related reasons pursuant to 20 C.F.R. § 656.21(b)(6). (AF 34). The CO noted that U.S. applicants Hal Coulter and Joseph Reale were rejected by Employer for not responding to letters of invitation for interviews. (AF 34). However, the CO questioned whether the letters were actually sent; the CO also questioned why Employer failed to contact the applicants by telephone, as their phone numbers were included in their resumes. Based upon a review of the applicants’ resumes, the CO found applicants Coulter and Reale were qualified U.S. workers and instructed Employer to “document how each U.S. worker was rejected solely for lawful, job-related reasons.” (AF 34).

Employer filed a Rebuttal to the NOF on December 6, 2002. (AF 19-31). Employer argued that Mr. Coulter did not qualify for the position of Butcher because although he had experience in the meat industry, the position required “the ability to handle butcher’s cutlery and powered equipment.” (AF 20). Regarding Mr. Reale, Employer asserted he did not qualify for the position because although he had experience with meat, the position required “experience at powered equipment such as electric grinder & band saw as also to portion & prepare meat in cooking form.” (AF 20). Employer failed to address the deficiencies in recruitment noted by the CO, specifically, the unreliable nature of the interview letters sent and Employer’s failure to follow up with the applicants.

On December 20, 2002, the CO issued a Final Determination (“FD”) denying certification. (AF 17-18). The CO noted that Employer’s rebuttal asserted that the applicants were not qualified because they did not possess the ability or experience to handle butcher’s cutlery and powered equipment. (AF 18). The CO indicated that the NOF raised the concern that Employer failed to provide evidence that the applicants were actually contacted and further noted that Employer’s statement during the recruitment process contradicts Employer’s rebuttal. Based on the “inconsistencies and contradictory statement” given by Employer, the CO denied certification. (AF 18).

On January 22, 2003, Employer requested review by this Board and the matter was docketed in this Office on March 13, 2003. (AF 1-16). Employer included copies of interview invitation letters, including certified mail receipts, for letters sent to Mr. Reale and Mr. Coulter in January 2003. (AF 4-5). In the request for review, Employer argued that the applicants did not appear at the designated time for the interviews scheduled in January 2003 and either could not be reached by phone or were no longer interested in the position. (AF 2-3).

DISCUSSION

Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity must have been open to any qualified U.S. worker. Although the regulations do not explicitly state a “good faith” requirement in regard to post-filing recruitment, there is an implicit requirement that employers engage in a good faith effort to recruit qualified U.S. workers. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an

employer that indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from pursuing their applications are grounds for a denial of certification. *See, e.g., Eckstein Associates*, 1993-INA-134 (Mar. 31, 1994). In such circumstances, an employer has failed to prove that there are not sufficient U.S. workers who are able, willing, qualified and available to perform the work, as required under 20 C.F.R. § 656.1. An employer can only reject a qualified U.S. applicant for lawful, job-related reasons. *See* 20 C.F.R. § 656.21(b)(6).

In the NOF, the CO determined that Employer rejected applicants Coulter and Reale for not responding to letters of invitation to interview. (AF 34). Employer submitted copies of non-certified letters sent to applicants Reale and Coulter informing them of the date, time, and location of scheduled interviews in July 2001. (AF 59, 61). However, as indicated in the NOF, “there is no clear evidence that the letter[s] of invitation were actually mailed,” as the letters were sent non-certified. (AF 34). The Board has previously held “that where an employer has received no response to a non-certified letter, a good faith effort to recruit would require an additional attempt by certified mail.” *Eckstein Associates*, 1993-INA-134 (Mar. 31, 1994). Further, “an employer who does no more than making unanswered phone calls and has not followed such attempt with a certified letter has failed to make the minimally acceptable effort.” *Id.*, citing *Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991).

In Rebuttal, Employer failed to provide copies of certified mail receipts or phone bills documenting further attempts to contact the applicants. In fact, Employer failed to

address any deficiencies in his recruitment, instead stating that the applicants were not qualified for the position. Employer's rebuttal must address all the findings in the NOF or those findings will be deemed admitted. *See* 20 C.F.R. § 656.25(e); *see also* *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Because Employer failed to address the deficiency in recruitment by submitting phone bills, mail receipts, or even further clarification of the efforts to contact the applicants, the CO's finding of a lack of good faith recruitment shall be admitted.

As the CO noted in the NOF, contact with qualified U.S. applicants may require attempts by more than one method. *See* *Sierra Canyon School*, 1990-INA-410 (Jan. 16, 1992) (holding that Employer should have attempted contact by phone after the applicant failed to respond to a certified letter). Employer failed to show that he attempted any alternative means of contact after the applicants failed to appear at their interviews scheduled in 2001.

Employer attempted to cure this defect by recontacting the applicants and scheduling interviews in January 2003. Employer mailed certified letters to the applicants, scheduling interviews on January 20, 2003. (AF 4-5). This was nearly two years after Employer's receipt of the applicants' resumes. (AF 50-51). A delay of twenty to thirty days between the receipt of resumes and the contact of U.S. applicants indicates a lack of a good faith effort to recruit. *Eckstein Associates*, 1993-INA-134 (Mar. 31, 1994), citing *Midamar Corp.*, 1990-INA-454 (Mar. 31, 1992). Further, the

burden is on the employer to substantiate that it made contact promptly with potentially qualified U.S. applicants. *Flamingo Electroplating, Inc.*, 1990-INA-495 (Dec. 23, 1991).

Employer failed to promptly contact the U.S. applicants; the original contact, albeit timely, was not substantiated and Employer failed to attempt contact by another method. Employer next attempted to contact the applicants in 2003, nearly two years after the resumes were received. This is clearly untimely contact with the applicants; Employer's belated attempts to contact the applicants were insufficient.²

Employer has not satisfied his burden of proof with respect to a good faith effort to recruit. Employer's behavior indicates a lack of a good faith recruitment effort, as he has not shown that he rejected applicants for lawful, job-related reasons. Employer's statements regarding the applications of Mr. Reale and Mr. Coulter have been inconsistent, indicating a lack of good faith.

² In addition, the copies of the certified letters sent in 2003 are inconsistent with Employer's assertions in his appeal request. Employer stated that he sent Mr. Coulter a letter requesting an interview; the copy of this letter is attached to the appeal request, however, it appears to be addressed to the wrong party. Part of the letter is indecipherable, but it appears to be addressed to "...ominguez" and was signed for by "Hugh Onstat." (AF 4). Employer stated that he then called Mr. Coulter, but was informed he was no longer residing at that phone number. (AF 3). With respect to Mr. Reale, there is a copy of a certified letter addressed to him; however, the signature on the return slip is indecipherable. (AF 5). Employer asserted that he spoke with Mrs. Reale, who informed him that Mr. Reale was no longer interested in the position. (AF 3). These statements are inconsistent and unclear; the letters mailed in 2003 are inadequate to establish a good faith recruitment effort.

ORDER

The Certifying Officer'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