

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: 20 August 2003

BALCA Case No.: 2003-INA-99
ETA Case No.: P2000-CA-09509130/VA

In the Matter of:

BERVETTE DIESEL,
Employer,

on behalf of

LUCIANO GARCIA,
Alien.

Appearance: Luis Franco¹
Torrence, California
For Employer and 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 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 Manager of a Body Shop and General Repair Shop for diesels.² The CO denied the application and Employer

¹ Mr. Franco is listed as a representative on the ETA 750A and B forms. Employer, however, filed the petition for Board review itself and no appellate brief was filed.

² 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

requested review pursuant to 20 C.F.R. §656.26.

DISCUSSION

In a Notice of Findings dated October 11, 2002, the CO raised the issue of unlawful rejection of U.S. workers under 20 C.F.R. § 656.21(b)(6) and 656.24(b)(2)(ii) based on Employer's failure to make any effort to contact an apparently well-qualified U.S. worker other than to make a single, unsuccessful telephone call. (AF 17-20). In rebuttal, Employer provided the following statement:

- 1.-On June 6, 2000 at 3.15 p.m. I tried to contact Mr. Chuck Raspberry by telephone.
- 2.-The telephone company recording answered by saying that the client did not accept calls due to blocked line.
- 3.-I did not try to contact him again because of the answer from the telephone company.
- 4.-I thought he was not interested for the position as Manager.
- 5.-Due to my busy schedule I never tried to contact him again.
- 6.-I called the telephone company and they said that they were unable to provide me with a phone calls record.
- 7.-I do not keep record of the incoming and outgoing phone calls made from my shop.
- 8.-I am willing to retest the market, if you want me to.

(AF 13). The CO issued a Final Determination denying labor certification on November 21, 2002, finding that Employer's rebuttal failed to establish good faith efforts were made to contact the U.S. applicant, noting that the applicant's resume had an address and another telephone number listed for messages. (AF 7-12). On December 1, 2002, Employer requested Board review (AF1) and the

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).

Board issued a Notice of Docketing on March 13, 2003.

In *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*), the Board held:

What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the particular facts of the case under consideration. Where an employer establishes timely, actual contact, *ipso facto*, a reasonable effort is proved. *HRT Clinical Laboratory*, 1997-INA-362 (March 10, 1998). In some circumstances it requires more than a single type of attempted contact. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*). An employer who does no more than make unanswered phone calls or leave a message on an answering machine has not made a reasonable effort to contact the U.S. worker, where the addresses were available for applicants; in such a case the employer should follow up with a letter -- which may be certified mail, return receipt requested. *Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991); *Gambino's Restaurant*, 1990-INA-320 (Sept. 17, 1991).

Here, Employer made a single, unsuccessful attempt to telephone an apparently qualified U.S. applicant. As the CO accurately observed, this applicant provided a mailing address and an alternative telephone number for messages on his resume, (AF 73) and Employer's owner presented no argument or evidence that he attempted to contact the applicant by these alternative means. Although Employer offered in rebuttal to readvertise, the CO was not obligated to permit such a remedy. *See Ronald J. O'Mara*, 96-INA-113 (Dec. 11, 1997)(*en banc*). Accordingly, we find that the CO denied labor certification on the ground that Employer failed to establish good faith in recruitment.³

³ Given this disposition, we do not reach the second issue stated for denial of certification – failure to provide adequate information about posting the job.

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 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 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.