U.S. Department of Labor

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

Issue date: 08Aug2001

In the Matters of:

M.N. AUTO ELECTRIC CORP.,
Employer,

BALCA Case No. 2000-INA-165
ETA Case No. P1998-NY-02111700

on behalf of

DIEGO PAUTA,
Alien;

and

PIRCO DRY CLEANING INC.,
Employer,

BALCA Case No. 2000-INA-175
ETA Case No. P1999-NY-02401417

on behalf of

BLANCA ARPI-LIMA,
Alien.

Appearances: For Employer M.N. Auto Electric Corp.:
Ernie C. Villanueva, Agent
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For Employer Pirco Dry Cleaning Inc.:
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For the Certifying Officer, Dolores Dehaan, New York, NY:
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For *Amicus Curiae*, American Immigration Lawyers Association:
Ronald Y. Wada, Esquire
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Before: Burke, Chapman, Holmes, Huddleston, Jarvis, Vittone and Wood
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

These matters arise from Employers' request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification.[1] The Board has taken these matters under consideration *en banc* to address the use of certified mail in recruitment of U.S. workers under the labor certification regulations. We hold that the CO cannot require an employer to use certified mail, return receipt requested, to prove actual contact with U.S. applicants.

STATEMENT OF THE CASES

M.N. Auto Electric Corp., 2000-INA-165

On May 24, 1996, Employer -- an automobile starters repair business -- filed an application for alien employment certification in order to fill the position of automotive generator and starter repairer. (M.N. AF 10, 22) Recruitment was conducted, and a report filed by Employer on October 27, 1997. (M.N. AF 38) In the report, Employer stated its reasons for rejecting five applicants.[2]

In a Notice of Findings dated September 30, 1999, the CO found that three U.S. workers "were rejected for reasons that can not be substantiated at this time." The CO wrote:

> It is the employer's contention that he/she attempted to contact each of the applicants by telephone or by mail. The employer must provide proof of such contact. The employer's evidence must include documentation which shows an effort was made to contact U.S. workers by telephone and by mail.

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[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 records upon which the CO denied certification and Employers' request for review, as contained in the respective appeal files ("M.N. AF"; and "Pirco AF"), and any written arguments. 20 C.F.R. 656.27(c). The Appeal Files in these cases were renumbered because the numbering affixed by the CO was illegible.

[2] We attach as an appendix to this decision information about Certificates of Mailing and Certified Mail obtained from official United States Postal Service publications. We take official notice of this information as it assists in understanding Postal Service practice, and is directly relevant background information.

> If the employer attempted to reach applicants by telephone and was unsuccessful then evidence must be furnished which shows an effort was made to contact U.S. workers by certified mail, return receipt requested.
>
> Employer may rebut by submitting evidence which consists of certified mail receipts accompanied by signed certified return cards and itemized telephone bills which show applicant's telephone number and the length of time the phone call lasted. The telephone company will issue itemized telephone bills for local areas if requested.

(M.N. AF 50-51)

Employer filed a rebuttal on October 18, 1999. (M.N. AF 52-54) Employer's president stated that he had decided that the most reliable way to contact the applicants was by certified mail, return receipt requested rather than to call them by telephone. In regard to the first applicant, Employer's president observed that he had paid for certified mail, return receipt requested, and that the applicant in fact called to set up an appointment; however, that applicant later called to cancel. In regard to a second applicant, Employer's president stated that he followed the same procedure, that the applicant obviously received the letter because he called, but that the applicant declined to pursue the interview when he discovered that no benefits were being offered. In regard to the third applicant, Employer stated that he again followed the same procedure, but did not receive a reply. Employer stated that he did not telephone because he was certain that the applicant received the recruitment letter. Finally, Employer stated that he did not receive the return receipt cards for any of the letters.

The CO issued a Final Determination on November 29, 1999. She found that:

> Our NOF objected to employer's rejection of three (3) fully qualified U.S. workers for reasons that could not be substantiated. Employer was instructed to submit evidence, i.e., certified mail receipts accompanied by signed certified return cards and itemized telephone bills.
>
> Employer's rebuttal claims that he sent the three (3) applicants certified letters and requested return receipts, but never received them. Employer also states that he did not telephone these applicants because he sent them certified letters requesting return receipts.
>
> Employer failed to submit any of the evidence requested in order to prove that these three (3) U.S. workers were actually contacted about this job offer. Employer's original reasons for rejection remain unsubstantiated and therefore this case for Alien Employment Certification is denied.

(M.N. AF 58-59)[3] On January 3, 2000, Employer filed a request for Board review, which was initially treated by the CO as a motion for reconsideration (although the request document does not appear to contain such a motion). The CO denied reconsideration on January 21, 2000, and the case was referred to this Board. In its request for Board review, Employer discussed a letter from a Consumer Affairs Analyst of the United States Postal Service, New York District, and attached a copy of that letter. (*see* M.N. AF 63) This letter appears not to have been previously submitted to the CO, and the CO when treating the request for Board review as a motion for reconsideration, declined to reconsider her Final Determination. Accordingly, the letter cannot be considered by the Board. *See University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988); §§ 656.26(b)(4), 656.27(c).

Pirco Dry Cleaning Inc., 2000-INA-175

On April 21, 1997, Employer -- a dry cleaning business -- filed an application for alien employment certification in order to fill the position of dry cleaning supervisor. (Pirco AF 8) Upon referral of U.S. applicants, the State of New York employment service office sent letters to Employer detailing recruitment requirements. The letter suggested that employers keep detailed records and "[w]hen contacting applicants by mail, use certified mail with a return receipt. Make copies of all letter to applicants and certified mail return receipt." The letter directed that the recruitment report include, *inter alia*, "copies of certified mail receipts and letters sent to applicants." (Pirco AF 20, 21)

Employer submitted a recruitment report dated December 23, 1998, in which it explained the rejection of three U.S. applicants. Two of the applicants were rejected for not responding to letters sent certified mail, return receipt requested. Employer stated that a third applicant, also contacted by certified mail, return receipt requested, did come in for an interview, but withdrew his name from consideration because he was seeking a job in a larger company. (Pirco AF 36)

The CO issued a Notice of Findings on August 19, 1999. (Pirco AF 42-43) The CO wrote:

> It is the employer's contention that he/she attempted to contact each of the applicants by telephone or by mail. The employer must provide proof of such contact. The employer's evidence must include documentation which shows an effort was made to contact U.S. workers by telephone and by mail.
>
> If the employer attempted to reach applicants by telephone and was unsuccessful then evidence must be furnished which shows an effort was made to contact U.S. workers by certified mail, return receipt requested. It is noted that the employer sent applicants certified letters requesting applicants call him to set up interviews. Employers requested and paid for Return Receipts, but failed to submit same to this office with recruitment report. Without signed receipts, there is no evidence that applicants ever received employer's letter.

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[3] The CO's selection of the three applicants named in the NOF and Final Determination is confounding. Two of the applicants were actually contacted by Employer, while another applicant who was not contacted was not mentioned in the NOF or Final Determination.

> Employer may rebut by submitting evidence which consists of certified mail receipts accompanied by signed certified return cards and itemized telephone bills which show applicant's telephone number and the length of time the phone call lasted. The telephone company will issue itemized telephone bills for local areas if requested.
>
> In the alternate, employer may document why he was unable to contact applicants by telephone and by mail.

(Pirco AF 42) In rebuttal, Employer restated its grounds for rejecting the applicants and provided copies of the certified mail receipts; Employer's rebuttal, however, did not include copies of return receipts or returned mail. (Pirco AF 44-52)

The CO issued a Final Determination denying labor certification on October 12, 1999. (Pirco AF 53-54) The CO wrote:

> Employer's rebuttal reiterates his original reasons for rejecting these three (3) U.S. workers and employer failed to submit the signed certified mail receipts. Employer failed to show that each of these three (3) U.S. workers were actually contacted.
>
> Due to employer's failure to submit reasonably requested evidence, to prove that each of the three (3) U.S. workers were contacted, this case for Alien Employment Certification is denied.

(Pirco AF 53)

Employer filed a request for Board review on November 16, 1999. (Pirco AF 55-73) Attachments to the request for review included photocopies of return receipts signed by two of the U.S. applicants (Pirco AF 61 (Bakht); Pirco AF 55 (Meyer)).[4] These copies of return receipts, however, were not contained in the record at the time the CO rendered her Final Determination. Accordingly, they cannot be considered by the Board. *See University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988); §§ 656.26(b)(4), 656.27(c).

Employer filed a brief with the Board on April 24, 2000, and an *en banc* brief on March 6, 2001.

Procedural History

On December 5, 2000, the Board provided notice that it would review the above-captioned cases *en banc*, and stated the following specific issues of concern:

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[4]In her *en banc* brief, the CO argues the signature on the David Meyer receipt is illegible, and that the Arjumano Bakht receipt is signed by a "L Bakht" rather than an "A Bakht". CO Brief at 4-5. Because we are not considering these documents in determination of the appeal in this case, we do not address these issues.

(1) Is the standard of proof actual contact of U.S. applicants, documentation of reasonable efforts to contact U.S. applicants, or some other standard?

(2) Where the Employer contacts applicants by mail, whether the Department of Labor can impose a certified mail, return receipt requested, requirement as the means of proving such contact?

(3) If certified mail, return receipt required, is not appropriate for use in alien certification recruitment, what types of proof are available to adequately document recruitment efforts?

The parties were afforded an opportunity to submit briefs, and the Board invited the American Immigration Law Association ("AILA") and the American Immigration Law Foundation ("AILF") to submit *amicus curiae* briefs. Following an extension of time, the CO, AILA, and Employers, all submitted briefs. AILA has also requested leave to file a supplemental brief, which responds to several issues raised in the CO's brief. No party has objected to the filing of AILA's supplemental brief; accordingly, we have received the supplemental brief and considered it in rendering this Decision and Order. On the whole, the quality of the briefs in this matter was quite good, and the Board thanks AILA and the parties for their participation in the *en banc* consideration of these cases.

A third case, *Bruno Frustaci Contracting*, 2000-INA-51, was also included in the notice of *en banc* review; however, the CO subsequently determined that labor certification would be granted. CO Brief at 1-2, 7. The Board remanded the case for issuance of a labor certification on May 24, 2001.

DISCUSSION

Standard of Proof; Actual Contact or Reasonable Efforts to Contact

In the cases *sub judice* the CO required Employers to submit certified mail return receipts to prove actual contact of U.S. applicants. In her brief, however, the CO conceded that actual contact of applicants is not required; rather, the standard of proof for an employer to establish good faith recruitment is reasonable efforts to contact U.S. workers. (CO's brief at 9, 13 n.11) We concur – prior *en banc* decisions of this Board have consistently held that 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*); *Creative Cabinet & Store Fixture, Co.*, 1989-INA-181 (Jan. 24, 1990) (*en banc*).[5]

[5] *See also Dove Homes, Inc*., 1987-INA-680 (May 25, 1988) (*en banc*) ("[r]easonable attempts must be made during the recruitment period to contact an apparently qualified applicant directly, in order to discuss the job opportunity with the applicant...."); *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*) (an employer may decline to interview applicant whose resume shows there is no reasonable possibility that an applicant

(continued...)

As AILA observed in its supplemental brief, the CO's concession on this issue (and, in effect, admission of error in the *Frustaci* case) resolves the major issue posed by the Board in notice of *en banc* review. We hold that in order to establish good faith recruitment, an employer does not need to establish actual contact of applicants, but only reasonable efforts to contact applicants.

Whether the CO Can Require Use of Certified Mail, Return Receipt Requested When Contacting U.S. Applicants

The second question for review is whether reasonable efforts to contact applicants necessarily includes the use of certified mail, return receipt requested, when contacting applicants by mail. We hold that use of certified mail, return receipt requested, is not mandatory, although it is a useful device for documenting recruitment efforts.

Background

The statute and regulations are silent on the question of whether an employer must use certified mail, return receipt requested, when sending recruitment letters to U.S. applicants. In an *en banc* decision, *Bel Air Country Club*, 1998-INA-223 (Dec. 23, 1988) (*en banc*), the Board held that Employer declarations could establish good faith effort to recruit U.S. workers, even though Employer's certified mail receipt did not have a postmark stamped on it by the Postal Service. In that case, however, Employer presented the declaration of employer's general manager attesting that he had mailed the letter by certified mail, return receipt requested, and that the applicant had subsequently called to state that he would not be able to attend the interview. In addition, Employer presented the declaration of an executive attesting that he had returned the applicant's telephone call and was told by the applicant that he was no longer interested in the job. Thus, *Bel-Air* establishes that certified mail, return receipt requested is not the only means by which an employer can establish good faith efforts to contact U.S. workers.

Panel decisions of the Board contain a wide range of statements on the use of certified mail, return receipt requested in recruitment, but the general theme is that the burden is upon the employer to document its good faith recruitment efforts, *e.g., Aquatec Water Systems*, 2000-INA-150 (Sept. 21, 2000); *American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999), and that an employer may prove that it contacted U.S. applicants by producing copies of certified mail, return receipt requested. *E.g., American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999)*; Mattco Equities, Inc*., 1997-INA-400 (June 30, 1998).[6] Indeed, where U.S. applicants deny that the employer contacted them,

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[5](...continued)
meets the job requirements); *see also Edelweiss, Inc.*, 2000-INA-231 (Sept. 21, 2000) (panel decision; actual contact to show good faith is an excessive requirement; demonstration of reasonable efforts is what is required).

[6] Many BALCA panels have ruled that a certified letter is the minimally acceptable effort on the part of an employer when it cannot reach applicants by telephone. *See, e.g., Saturn Plumbing*, 1992-INA-194 (Feb. 3, 1994); *Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991); *Dr.*
(continued...)

return receipts may provide an employer with the best evidence available that a letter contact actually was made. *E.g. HRT Clinical Laboratory*, 1997-INA-362 (March 10, 1998).[7] Conversely, where an employer produces a receipt for mailing certified mail, but the U.S. applicant denies contact and the employer fails to produce a return receipt, a negative inference can be drawn that Employer did not contact these workers. *E.g., Claudia Catania Cady*, 1996-INA-200 (Feb. 1, 1999); *Corato Contracting Corp.*, 1998-INA-114 (Oct. 13, 1998).

Most BALCA panels have taken the position that reasonable efforts to contact qualified U.S. applicants may require more than a single type of attempted contact. *Diana Mock*, 1988-INA-255 (Apr. 9, 1990); *C'est Pzazzz Industries*, 1990-INA-260 (Dec. 5, 1991); *Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991); *Gambino's Restaurant*, 1990-INA-320 (Sept. 17, 1991); *Sierra Canyon School*, 1990-INA-410 (Jan. 16, 1992); *Zephyr Grill Restaurant*, 1996-INA-00269 (May 7, 1998); *S. Balian Designs*, 1989-INA-299 (Sept. 20, 1991); *Johnny Air Cargo*, 1997-INA-123 (Mar. 4, 1998). Some panel decisions of this Board have held that an employer who sends a letter to an applicant requesting that the applicant contact the employer in regard to the job may end its recruitment efforts if the applicant does not respond to the letter. *Tile Tech, LLC*, 1997-INA-335 (June 10, 1998); *Light Fire Iron Works*, 1990-INA-2 (Nov. 20, 1990); *Wash-N-Vac Carwash*, 1998-INA-59 (Jan. 27, 1999).[8]

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[6](...continued)
Frank Storts, Chiropractor, 1997 INA 330 (May 22, 1998) (employer could have used restricted delivery where the receipt was signed by someone other than the applicant). Other panels have taken the position that although proof of actual contact or use of certified mail is not required, certified mail is nevertheless the preferred method of contact when mail is used to contact U.S. applicants because it provides "concrete and verifiable proof that the letters were mailed." *S.T.S. Contractor, Inc.*, 2000-INA-89 (June 6, 2000) (responding to Employer's statement that it used postcards because in its experience, people delay in picking up certified mail); *see also American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999). In *Ambras Trading Co.*, 1997-INA-406 (July 27, 1998), the panel observed that certified mail receipts may be advantageous as proof, although the Board does not require contact be made by certified mail. The panel found that Employer established good faith where it made contemporaneous copies of the letters and copies of the meter marked envelopes sent to the applicants, U.S. applicants statements about the lack of contact were five weeks after the recruitment, and Employer's account of the recruitment process had been consistent and detailed.

[7] Similarly, where in rebuttal Employer produced a PS Form 3811 Domestic Return Receipt (Receipt after mailing) showing that there was actual delivery, Employer disproved the CO's theory that employer used the wrong address. *Wash-N-Vac Carwash*, 1998-INA-59 (Jan. 27, 1999).

[8] *See also Four Season Garment Cutting*, 1996-INA-0443 (Sept. 14, 1999) (where resume indicated a minimum salary requirement, Employer sent certified letter, return receipt requested, asking if applicant interested in lower salary, and no response, Employer justified in not following up further).

In her brief on *en banc* review, the CO's position is that if mail is used as the sole means to try to contact applicants, then certified mail, return receipt requested is required. Further, the CO's brief takes the position that "[i]f for some reason the employer sent a letter by certified mail, return receipt requested but cannot produce a signed return receipt, evidence of attempts to contact the applicant by other means, such as by telephone, can provide proof of recruitment efforts."

Analysis

A review of the extensive case law involving contact of U.S. applicants reveals indisputably that use of certified mail, return receipt requested, can greatly assist employers in documenting their efforts at contacting U.S. applicants. Moreover, such documentation greatly assists COs and this Board in reviewing an employer's recruitment to determine if it was made in good faith. In her *en banc* brief, however, the CO seems to concede that, except where a letter is the only method used by an employer to attempt to contact U.S. workers, means of proof other than certified mail, return receipt requested, may be sufficient to establish good faith recruitment.

In American jurisprudence, the general rule is that a properly addressed piece of mail placed in the care of the Postal Service is rebuttably presumed to have been delivered. *Rosenthal v. Walker*, 4 S.Ct. 382, 111 U.S. 185 (U.S. 1884); *Baldwin v. Fidelity Phenix Fire Ins Co of New York*, 260 F.2d 951, 953 (6th Cir. 1958); 2 McCormick on Evidence § 343 (4th ed. 1992); 29 Am Jur 2d, Evidence §§ 193-198 (1967); 1 Jones on Evidence § 3:41 (6th ed.1972). Some authority, however, would deny the presumption where there is no actual proof that the letter was mailed or that a business' customary practice was followed in mailing of letters. Jones on Evidence, *supra* § 3:41. Moreover, testimony by the addressee of the letter that it was never received is treated by many courts as placing the receipt of the letter as an issue of fact for resolution by the fact finder. 29 Am Jur 2d, Evidence § 198.

In labor certification cases, COs and this Board have required more than a mere assertion that a letter was mailed to establish good faith efforts to recruit.[9] Unfortunately for the many honest employers applying for alien labor certification, review of the case law reveals that a significant number of employers engage in gamesmanship when contacting U.S. applicants by letter. *See, e.g.*, *El Paso Marketing, Inc*., 1997-INA-219 (May 13, 1999), *aff'd on recon on this ground* (April 7, 2000) (misrepresentation of date of mailing of certified letters). Thus, at best, an employer's declaration of timely mailing of a recruitment letter in relation to an alien labor certification application would invoke a weak presumption of receipt by the applicant, especially given the ease by which a certificate of mailing or a certified mail receipt may be obtained from the postal service and the great motivation for misrepresentations in labor certifications.

We hold that a CO may not require an employer to use certified mail, return receipt requested, when contacting U.S. applicants. Rather, an employer must be given an opportunity to prove that its overall recruitment efforts were in good faith, even if it cannot produce certified mail

[9] In *Bel Air Country Club, supra*, the Board accepted Employer's declaration of mailing, but that declaration was partly bolstered by a certified mail receipt (albeit missing a postmark) and declarations establishing that the U.S. applicant had in fact called in, and that his phone call was returned.

return receipts to document its contacts with U.S. applicants. Moreover, a CO may not summarily discard an employer's assertions about what efforts were made to contact applicants. Employers should be cognizant, however, that 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.

Moreover, it is appropriate for the CO to have local job services, when providing recruitment instructions to employers, to strongly suggest use of certified mail, return receipt requested, and to remind employers that it is their burden to establish good faith efforts at recruitment. A savvy employer would take such a recommendation as well-advised. Without such documentation, an employer may have a difficult time responding to questions about date of mailing or an assertion by a U.S. applicant that he or she was never contacted. Instructions to the employer may also include a statement describing the employer's obligation to try alternative means of contact if one type of contact does not work, which is hereinafter discussed.

What Methods of Proof Are Acceptable in Establishing Reasonable Efforts to Contact U.S. Applicants

Since we have ruled that a CO cannot require an employer to use certified mail, return receipt requested, the final question noticed for *en banc* review about what alternate methods of proof are available needs to be addressed. Thus, it may be useful to review the Board's rulings on what constitutes adequate documentation of good faith efforts to contact and recruit U.S. workers. The bottom line is that although a CO may not require use of certified mail, an employer who fails to do so runs the risk of not being able to prove its good faith efforts at contact and recruitment of U.S. workers.

First, an employer must document that it is making the contacts in a timely fashion. When an employer files an application for labor certification, it is signifying that it has a *bona fide* job opportunity which is open to U.S. workers. Inherent in this presumption is the notion that the employer legitimately wishes to fill the position with a U.S. applicant and will expend good faith efforts to do so. When presented with seemingly qualified U.S. applicants, therefore, an employer who has a *bona fide* opening it desires to fill would, in exercise of good faith, contact these workers as soon as possible. By introducing an unwarranted delay, doubt is cast upon whether the position is clearly open to U.S. workers. *Creative Cabinet & Store Fixture, Co.*, 1989-INA-181 (Jan. 24, 1990) (*en banc*). When using mail to contact applicants, an employer who relies only on a declaration that the letter was timely mailed may find itself on shaky ground. An employer would be wise to, at a minimum, obtain a Certificate of Mailing receipt from the Postal Service; a certified mail receipt provides the same documentation, but adds backup record keeping by the Postal Service. *See* Appendix to this decision.

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).

The difference between a regular letter or one sent by certified mail or a regular letter where a Certificate of Mailing is obtained is one of proof. The receipt for certified mail or a Certificate of Mailing is credible evidence from a disinterested third party, the Postal Service, that the letter was mailed on the date indicated. However, where there is no return receipt the employer has no way of knowing whether the letter was received. Whether the mailing of the letter in and of itself constitutes a reasonable effort to contact a qualified U.S. applicant depends on the facts of the case. It has been held that "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 applicants. *Diana Mock*, [19]88-INA-255 (April 9, 1990)." *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); *see also Johnny Air Cargo*, 1997-INA-123 (Mar. 4, 1998); *Therapy Connection*, 1993-INA-129 (June 30, 1994). However, since actual contact is not required, evidence of timely mailing [10] to numerous applicants of a letter which does not tend to discourage or contain onerous requirements, [11] does not contain blank paper[12] and allows sufficient time for U.S. applicants to attend an interview[13] may constitute a reasonable effort where there is a significant response to the letter. *H.C. Lamarche, Ent. Inc.*, 1987-INA-607 (Oct. 27, 1988); *Gem Sound Corp.*, 1989-INA-290 (Oct. 29, 1990); *cf.*, *Bada Apparel*, 1987-INA-712 (April 13, 1988). Some panel decisions of this Board indicate that an employer who sends a letter to an applicant requesting that the applicant contact the employer in regard to the job may end its recruitment efforts if the applicant does not respond to the letter. *Tile Tech, LLC*, 1997-INA-335 (June10, 1998); *Light Fire Iron Works*, 1990-INA-2 (Nov. 20, 1990); *Wash-N-Vac Carwash*, 1998-INA-59 (Jan. 27, 1999); *Simon's Precision Machine*, 1988-INA-105 (July 31, 1989). We limit those decisions to situations in which it is crystal clear that the applicants' non-response evinces a lack of further interest in the job. *See, e.g., Four Season Garment Cutting*, 1996-INA-443, footnote 8, *supra.*

To document initial or follow-up telephone conversations, an employer must, at a minimum, keep reasonably detailed notes on the conversation (*e.g.*, when the call was made, how long it lasted,

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[10] *Professional Maintenance Enterprises*, 2000-INA-4 (Jan. 19, 2000); *Aquatec Water Systems*, 2000-INA-150 (Sept. 21, 2000).

[11] *John C. Meditz*, 1994-INA-572 (Sept. 4, 1996); *Dulles Airport Days Inn*, 1999-INA-193 (Sept. 7, 1999); *Goldberg Commodities, Inc.*, 1994-INA-314 (Aug. 31, 1995); *Kolesh Jewelers, Inc.*, 1995-INA-141 (July 2, 1999); *Rysan, Inc.*, 1994-INA-606 (Sept. 12, 1995); *Armando's Italian Restaurant*, 1992-INA-51 (Mar. 23, 1993).

[12] *Photo Medium 16P, Ltd.*, 1992-INA-316 (Nov. 8, 1993).

[13] *Jeepney Grill*, 1994-INA-401 (July 3, 1995); *Creative Building Concepts*, 1991-INA-71 (April 30, 1992); *Tempco Engineering, Inc.*, 1988-INA-101 (June 20, 1988), *Hervco Contractors*, 1993-INA-261 (June 3, 1994).

whether there was a successful contact with the applicant, the substance of the conversation). Pre-prepared checklists may be helpful in documenting what was discussed with the applicants). Where available, phone records showing the time and duration of the phone contacts should be submitted by Employer.[14] If an employer is not successful on the first telephone call, several additional attempts should be made. It may be necessary to vary the time of day that the calls are made in order to establish that a good faith effort was made to contact the applicant.

If a U.S. applicant denies contact by the employer, and the employer used certified mail, return receipt requested, a CO may reasonably request that the employer produce the return receipt for that applicant. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). If certified mail, return receipt requested was not used, an employer may provide a written assertion or attestation of its attempts to contact U.S. applicants, supported by any available substantiating evidence such as contemporaneous evidence of the mailing and documentation of other recruitment efforts, such as telephone contacts. *See, e.g., Lotus Corp.*, 1991-INA-203 (July 28, 1992); *Ambras Trading Co.*, 1997-INA- 406 (July 27, 1998). A CO must weigh such evidence and give it the weight it rationally deserves; unsupported assertions may not be entitled to much weight in view of conflicting evidence, such as a U.S. applicant's statement that he or she was not contacted.

CONCLUSION

We concur with AILA's supplemental brief that the grounds for denying the two applications still at issue stated in the CO's *en banc* brief are not the grounds stated in the Final Determinations in these cases, which were clearly premised on lack of proof of actual contact. An employer must be given an opportunity to prove that its overall recruitment efforts were in good faith, even if it cannot produce certified mail return receipts to document its contacts with U.S. applicants.

Therefore, we remand these cases for further consideration by the CO in accordance with the principles set forth in this decision.

ORDER

The Certifying Officer's denial of labor certification in these cases is vacated and they are remanded for further consideration in accordance with this decision.

For the Board:

DONALD B. JARVIS
Administrative Law Judge

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[14] The record in the cases before the Board suggest that the CO believes that records of local phone calls are available upon request from the telephone company. This may or may not be true, *compare Edelweiss*, 2000-INA-231 (Sept. 21, 2000) (Employer produced a flier from the phone company establishing that local calls could not be itemized). An employer should, however, at the least be prepared to document that it asked the phone company for such records in a timely fashion.

APPENDIX

Administrative Notice:

The Board takes official notice of the following from official United States Postal Service publications (*see* 29 C.F.R. § 18.201):

United States Postal Service, Consumer's Guide to Postal Services and Products (Publication 201, July 1996):

> **Certificate Of Mailing**
> A certificate of mailing is a receipt showing evidence of mailing. It can be purchased only at the time of mailing. The certificate does not provide insurance coverage for loss or damage, nor does it provide proof of delivery. No record is kept at the mailing office, and a receipt is not obtained when mail is delivered to the addressee.
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> **Certified Mail**
> Certified mail provides proof of mailing and delivery of mail. The sender receives a mailing receipt at the time of mailing, and a record of delivery is maintained by the Postal Service. A return receipt to provide the sender with proof of delivery can also be purchased for an additional fee. Certified mail service is available only for First-Class Mail or Priority Mail. ...

In regard to certified mail, the United States Postal Service, Handbook PO-130, TL3, Postal Products and Services (Sept. 2000), provides the following information: the Postmark stated on the receipt when the item is mailed is the sender's proof of mailing; the Postal Service does not maintain a record of Certificates of Mailing, so it is the sender's responsibility to keep the receipt; a Certificate of Mailing can only be purchased at the time of mailing. *Id*. at 1-8. In regard to certified mail, Handbook PO-130 provides the following information: the Postmark stamped on the receipt when the item is mailed is proof of mailing; for an additional $1.25 the sender can purchase a request for a Return Receipt; the Postal Service retains a record of the transaction for 2 years; after the article is mailed the sender can purchase a copy of the delivery record for $7. *Id.* at 1-2. Handbook PO-130, also provides the following information:

> The person who receives your Certified Mail must sign a delivery receipt, which provides proof of the delivery date and address.
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> If the recipient is not there when we try to deliver the article, this is what we do:
>
> 1. The delivery employee leaves a notice explaining that we will hold the Certified Mail at the post office and the recipient is asked to either pick it up or request a new delivery date.
>
> 2. In 5 days, the delivery employee leaves a second notice.
>
> 3. The Postal Service holds the Certified Mail for 15 days from the first attempt at delivery.

4. After 15 days, we return the Certified Mail to the sender.

Id. at 1-2. *See also id*. at 1-5 (return receipt information).