



Issue Date: 27 August 2008

BALCA Case No.: 2008-INA-00105

ETA Case No.: P-05020-34990

In the Matter of:

LYNCH METALS, INC.,
Employer,

on behalf of

ADESH DINESH,
Alien.

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center¹

Appearances: Marjorie J. Siegel, Esquire
New York, New York
For the Employer and the Alien

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor

¹ The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about these applications should be directed to the Chicago Processing Center.

certification. 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.”).²

STATEMENT OF THE CASE

The Employer – a metals distributor – filed its application for labor certification to enable the Alien to fill the position of Operations Foreman on April 28, 2001. (AF 132). The CO denied the application on three grounds. The first ground was that the Employer did not recruit in good faith because it had only tried to contact applicants by telephone, and had not attempted the alternative of writing to those applicants. The CO found that the Employer’s rebuttal response, which was to simply offer to re-advertise, was not a remedy for lack of good faith in recruitment. The CO also denied the application based on the Employer’s rejection of U.S. applicants for lacking experience not specified as a job requirement in the ETA Form 750A, and its failure to establish that the Alien had such experience prior to being hired by the Employer. (AF 23-26).

The Employer requested BALCA review by letter dated December 3, 2007. (AF 1-21).

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Further, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer

² This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and did not stop short of fully investigating an applicant's qualifications. Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer indicating a lack of a good faith recruitment effort, or actions preventing qualified U.S. workers from further pursuing the particular job opportunity, are thus a basis for denying certification. In such circumstances, the employer has failed to prove 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.

In *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (en banc), the Board considered what constitutes a reasonable effort to contact a qualified U.S. applicant. It determined that some circumstances require more than a single type of attempted contact, and that 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.

On appeal, the Employer does not argue that it made adequate efforts to contact apparently qualified U.S. applicants, but rather argues that the Notice of Findings had given it the option to rebut by amending its job requirements and re-advertising. The Employer argues that it chose re-advertisement as its rebuttal option for Finding One, and in this regard pointed to option "D" on page 5 of the NOF. (AF 1).³

³ The Employer's attorney explained that the Employer chose re-advertisement as its rebuttal because the attorney had only recently been retained – long after the recruitment had taken place, and because there was a change in management at the petitioner's workplace making it difficult to find all records necessary to rebut the NOF.

But option “D” related to the Alien’s qualifications issue, not to the issue of whether the Employer engaged in good faith efforts to contact U.S. applicants. A CO is not required to permit an employer to re-advertise where the citation is grounded in a lack of good faith recruitment. *See Ronald J. O’Mara*, 1996-INA-113 (Dec. 11, 1997) (en banc).

Because the CO was not obligated to permit the Employer to re-advertise to cure a lack of good faith recruitment efforts, we affirm the denial of certification.

ORDER

The Final Determination of the Certifying Officer denying 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, NW Suite 400

Washington, DC 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.