U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 August 2008

BALCA Case No.: 2008-INA-00065
ETA Case No.: P-04275-11805

In the Matter of:

TECHNIVATE, INC.,
Employer,

on behalf of

ADALBERTO MARTINEZ,
Alien.

Appearance: Anthony A. Maturano, III
Maturano & Associates
Kennett Square, Pennsylvania
For the Employer and the Alien

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center[1]

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 this application 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] 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. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

The Employer – a residential home construction company – filed an application for labor certification on behalf of the Alien on April 27, 2001 to fill the position of heavy equipment operator. (AF 25)[3]. The application was signed by Donald Taylor, Vice-President.

In its application, the Employer described the duties of the position as:

> [O]perates several types of power equipment such as track loader, bulldozer, backhoe, excavator, crane shovel, tractors, scraper or motor graders to excavate, move and grade earth, erect structural and reinforcing steel, pour concrete or other hard surface paving material, sub and fine grade yards, and excavate for pipe instillation. Turn valves to control air and water output of compressors and pumps, adjust hand wheels and depress pedals to drive machines and control such as blades, buckets, scrapers and swing booms.

The Employer required no experience in the job offered. (AF 25).

On January 23, 2006, the CO issued a Notice of Findings (NOF) proposing to deny certification on the ground that two U.S. applicants were unlawfully rejected in violation of Section 656.21(b)(6). The CO noted that five U.S. applicants were referred

[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.

[3] In this decision, AF is an abbreviation for Appeal File.

by the Philadelphia Regional Job Center. The CO also noted that the Employer's recruitment report indicated that a phone message which was not returned was left for one applicant and an email sent to a second applicant which was returned since the email address was inoperable.[4] The CO stated that no alternative attempts, such as written correspondence were made. The CO further stated that an employer who does no more than place unanswered telephone calls without making additional attempts to contact the applicant has failed to make a minimally acceptable effort. The CO concluded that although an employer's established system of recruitment may suffice for routine recruitment, it is inadequate for purposes of obtaining a labor certification. (AF 22-23).

The Employer submitted rebuttal on February 21, 2006. (AF 16). In its rebuttal, the Employer argued that it followed its own internal normal hiring procedures and policies regarding contact of prospective employees. The Employer contended that if an applicant does not return a telephone call for a position paying a wage of $21.89 per hour with no requirements, then it can be reasonably inferred the applicant is no longer interested in the position. The Employer also argued that an employer should not and is not required by Section 545.21(b)(5) to send certified mail notices or other written communication to an applicant that it has tried in good faith to contact for interview. (AF 16-17).

The CO issued a Final Determination on June 22, 2007. In the Final Determination the CO found that the Employer's rebuttal confirmed that no further attempt to contact the qualified U.S. applicants was made after the initial attempt failed. The CO stated that a minimally acceptable effort requires follow-up with written correspondence when an initial attempt at contact by telephone or email is unsuccessful. The CO reiterated its earlier statement that although an employer's established system of recruitment may suffice for routine recruitment, it is inadequate for purposes of obtaining a labor certification. (AF 10-12).

[4] We note that the Employer's recruitment report states that the Employer also called this applicant's home and left a message with a woman. (AF 20).

By letter dated July 25, 2007, the Employer requested BALCA review. The Employer reiterated that an employer is not required by Section 656.21(b)(6) to send certified mail notices or other written communication to an applicant that it has tried in good faith to contract for interview. (AF 1 - 9).

BALCA docketed the appeal on November 13, 2007, and issued a Notice of Docketing on November 15, 2007. Neither the CO nor the Employer filed appellate briefs

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). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and 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 an employer which indicate a lack of a 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 *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (en banc), the Board reviewed the case law on what constitutes adequate documentation of good faith efforts to contact and recruit U.S. workers. As pertinent to the instant appeal, the Board wrote:

> 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).

M.N. Auto Electric Corp., USDOL/OALJ Reporter at 10-11.

In the instant case, the Employer argued that its efforts to telephone or email two of the applicants in order to schedule an interview constituted good faith recruitment because such a procedure is the way recruitment normally occurs in its business. We agree with the CO, however, that what may be considered adequate recruitment by an employer for routine hiring is not necessarily adequate to establish good faith efforts to recruit U.S. workers for the purposes of supporting a labor certification application. Clearly, sending a recruitment letter to the two applicants who could not be reached by telephone would not be an undue burden. In the instant case, there is no evidence that the Employer attempted any alternative means of contact, by certified mail or regular mail, despite the unsuccessful telephone calls and email. The Employer's meager steps toward trying to reach applicants show a minimal effort that by itself does not equate to a good faith recruitment effort. The Employer's effort must show that it seriously wanted to consider the U. S. applicant for the job, not to merely go through the motions of a recruiting effort without serious intent. *Dove Homes, Inc.*, 1987-INA-680 (May 25, 1988) (*en banc*); *Suniland Music Shoppes*, 1988-INA-93 (Mar. 20, 1989) (*en banc*).

The Employer took a minimalist approach to recruitment. In so doing, it failed to document that it made good faith efforts to recruit all of the U.S. applicants. Thus, the CO properly denied certification.

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, 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.