

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: 27 August 2008

BALCA Case No.: 2008-INA-00100
ETA Case No.: D-05201-37566

In the Matter of:

WISCONSIN CAREER ACADEMY,
Employer,

on behalf of

YASAR BORA,
Alien.

Appearance: L. Robert Thaxton, Esquire
Bloomfield & Kempf, LLP
Columbus, Ohio
For the Employer

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center¹

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

JOHN M. VITTORE
Chief Administrative Law Judge

DECISION AND ORDER

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.

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 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 state charter school -- filed an application for labor certification on behalf of the Alien on September 7, 2004 to fill the position of Secondary Mathematics Teacher. (AF 266).³ In its application, the Employer described the duties of the position as "Teach Mathematics to 6 – 12 grade students; prepared daily and annual teaching plans; evaluate students academically; attend staff meetings and parent-teacher conferences and sponsor extracurricular activities." The Employer required a B.A. or B.S. in the field of mathematics and one year of experience. In addition, the Employer required a state teacher license. (AF 266). In a letter submitted with the application, the Employer also requested that the application be handled under the special provisions for Reduction in Recruitment (RIR) processing. (AF 262-265).

On August 8, 2007, the CO issued a Notice of Findings (NOF) proposing to deny certification. The CO concluded that the Employer did not make a bona fide, good faith effort to recruit U.S. workers for the job offered because the Employer made no attempt to contact any of the job applicants but, rather, rejected all applicants without adequately investigating their qualifications. The CO noted, in particular, that one applicant had

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.

seven years of teaching experience in math and science as well as a Master's Degree in Education Computing and a Bachelor of Science degree in Computer Science with a minor in Mathematics. The CO stated that the Employer could rebut this finding by submitting documentation to show that U.S. workers applying for the job opportunity were rejected solely for lawful, job-related reasons. The CO also listed documentation that must be included with the rebuttal such as the number of U.S. workers responding to the Employer's recruitment, the manner of contact, the number of workers who were interviewed, and information regarding the interview.

The CO also noted that at the time of the application, the Employer was "delinquent" according to the Wisconsin Secretary of State's public website, and that the Employer was not restored to "good standing" until January 27, 2005. The CO concluded, therefore, that at the time of application, the Employer had not yet legally restored his qualification to legally conduct business in the State of Wisconsin. (AF 244-249).

The Employer submitted rebuttal on September 11, 2007. (AF 212-213). The Employer's rebuttal documentation included copies of the Charter School Proposal and Charter School contract which established the requirement for the Employer to hire teachers with current and appropriate licenses or permits. (AF 158-211). The Employer also submitted copies of web pages from the Wisconsin Department of Public Instruction regarding three-year substitute teaching permits for short-term substitutes.

In addition, the Employer submitted an affidavit from Kemal Kaman, Director of the Wisconsin Career Academy, stating that there had only been two applicants for the Math Teacher position, and neither were qualified since they did not possess valid teaching licenses. (hereinafter "Applicant 1" and "Applicant 2").⁴ Mr. Kaman stated further that Applicant 2 possessed only a short-term substitute teaching license valid for 20 days. Mr. Kaman concluded by stating: "I was not the person in charge of the hiring

⁴ The original recruitment report indicates that there were actually five applicants. (AF 286-287).

of teachers at the school. The individual who was in charge is no longer employed with Wisconsin Career Academy.” (AF 214).

The Employer also submitted copies of letters and emails sent to the two applicants in August, 2007 to determine if the applicants were still interested in the job opportunity, (AF 215-226) a copy of the Alien’s teacher of the year award for 2007, (AF 227) and copies of information from the Wisconsin Department of Financial Institutions web site indicating that “delinquent” status is not an assessment of the entity’s financial condition, stability or business practice, but is rather an indication of the entity’s status in regards to filing annual reports. (AF 228-243).

The CO issued a Final Determination on September 27, 2007. (AF 145-154). The CO found that the Employer’s rebuttal did not provide the information requested in the NOF. Specifically, the CO noted that the affidavit from Kemal Kaman stated that there were only two applicants for the Mathematics teacher position but neither were qualified since neither had a valid teaching license. The CO concluded that neither applicant had actually been contacted by the Employer back when the recruitment took place in 2004. The CO found that Mr. Kaman’s affidavit was not credible because it testified to information about which he did not have first-hand knowledge, and that the only way to determine for certain that the applicants did not possess the required license would have been to contact them. In addition, the CO found that the Employer’s attempt on rebuttal to contact the two U.S. applicants in 2007, three years after the resumes were submitted, was not sufficient. Therefore, the CO concluded that the Employer did not recruit in good faith and that the Employer unlawfully rejected U.S. workers for the job offered since Employer failed to contact the U.S. applicants in a timely fashion to fully investigate their qualifications and ensure that the Employer had lawful, job related reasons for rejecting the U.S. applicants.

The CO also found that the Employer’s submission of the web pages from the Wisconsin Department of Financial Institutions was insufficient to establish that the Employer had the legal authority to transact business in the state of Wisconsin. The CO

stated that while the information defined the code “delinquent,” there was no information that discussed the legal implications of that status as it pertained to the Employers’ “Certificate of Authority” or the Employer’s ability to legally transact business in the State of Wisconsin. The CO concluded that the Employer had not addressed the deficiencies in the NOF and, therefore, the CO denied the application for labor certification.

On October 30, 2007, the Employer requested BALCA review. The Employer submitted a brief and additional documents with the request for review. (AF 1-144). The Employer argued that Applicant 2, the only U.S. applicant noted in the NOF, was lawfully rejected since he did not have a valid and appropriate license to teach. The Employer argued that this Board should take administrative notice that Applicant 2 did not have a valid and appropriate license to teach. In support, the Employer attached a page from the Wisconsin Department of Public Instruction website printed on October 23, 2007 listing the licenses for Applicant 2. The Employer argued that an employer’s responsibility to investigate further if the resume is unclear as to a requirement for the job does not need to be an actual interview of the applicant. In this case, the Employer argued that the web site for the State of Wisconsin provided a mechanism to investigate whether persons have teaching licenses. Finally, the Employer argued that since the CO concluded that the Employer unlawfully rejected U.S. applicants, the CO should have referred the case for supervised recruitment since the case had been accepted for Reduction in Recruitment (RIR) citing *Express Photo, Inc.*, 2005-INA-00128 (May 16, 2007) (*en banc*).

BALCA docketed the appeal on December 13, 2007, and issued a Notice of Docketing on January 10, 2008. The Employer filed a Statement of Position on January 18, 2008, enclosing the brief and accompanying documents which were submitted with the request for review. The CO did not file an appellate brief.

DISCUSSION

The Employer's Operating Status

The CO concluded that the Employer was not legally able to conduct business in the State of Wisconsin at the time of application (September 7, 2004) since the Employer was in “delinquent” status and not restored to good standing until January 27, 2005.

On rebuttal, the Employer argued that this status was not an indication of its ability to conduct legal business but rather reflected only that it was late in filing required annual reports. The CO found in the Final Determination that the web pages from the Wisconsin Department of Financial Institutions submitted on rebuttal did not actually discuss the legal implications of any status/conditions codes as it pertained to the Employer's ability to legally continue to transact business in the State as a consequence of its delinquency or being designated as in “bad standing.”

What is missing from this record, however, is an explanation from the CO as to why a company's temporary delinquent status in filing annual state reports is fatal to a labor certification application. If the CO had proof that the delinquency had led to a dissolution of the petitioning company, then grounds for denial of certification may have been presented. It appears to us, however, that the CO was merely speculating on the meaning of the Wisconsin Secretary of State's public website when the issue was raised in the NOF, and that the finding in the Final Determination that the Employer's rebuttal was inadequate because the Wisconsin web pages provided did not adequately explain the meaning of the codes did not make the original ground for denial any less speculative. While we concur with the CO that the documentation presented on rebuttal did not establish with certainty that the Employer's operating status was legal in 2004,⁵ we are

⁵ In its appellate brief, the Employer's attorney presented a compelling demonstration that the Employer's delinquent filing status in 2004 did not cause it to be unable to conduct business in the State of Wisconsin, but only put it at risk of being administratively dissolved if it continued in delinquent status for an extended period. Moreover, the brief and supporting documentation demonstrated that the delinquent status could be cured by filing a current report and paying the back annual report fees. This argument and the supporting documentation were not presented to the CO, however, at the rebuttal stage of the processing of the application. Thus, it cannot be considered by the Board on appeal. See 20 C.F.R. §§ 656.27(c), 656.26(b)(4).

not convinced that the CO made a reasonable inference that the Employer's delinquency equated to lack of legal operating status in Wisconsin. In other words, we decline to fault the Employer for failing to rebut an unwarranted assumption raised in the NOF.

Moreover, even if the Employer was temporarily unable to operate legally in Wisconsin, its delinquency appears to have been resolved by the time the CO was reviewing the application. Without an explanation of why a temporary loss of legal status to operate as a business at the time of the application would cause the application not to be certifiable, we decline to affirm the CO's denial of certification on this ground.⁶

Rejection of U.S. Applicants and Good Faith Recruitment

Twenty C.F.R. § 656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *Veterans Administration Medical Center*, 1988-INA-70 (Dec. 21, 1988) (en banc). A U.S. worker will be considered able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed.

Where a resume does not expressly state qualifications for all of an employer's job requirements, but lists such a broad range of experience that there is a reasonable possibility the applicant may meet the job requirements, it is incumbent on the Employer to further investigate the U.S. applicant's qualifications, either through an interview or by other means. *See Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (en banc).

⁶ We do not decide in this Decision and Order that a CO could not deny certification on the ground that the Employer was not a legally viable enterprise at the time the application was filed. We only find that the Appeal File support that conclusion.

In the instant case, the Employer rejected Applicant 2 based upon the Employer's determination that he was not qualified for the job because he did not have the appropriate teaching certificate. We have reviewed Applicant 2's resume and agree with the CO that he appeared to be well qualified for the job offered. While the resume did not indicate whether he had a teaching certificate, an employer truly seeking a qualified U.S. applicant would have contacted Applicant 2 to inquire further about his qualifications. The CO correctly applied the well established principle that the applicant's resume raised a reasonable possibility that he met all the employer's requirements and, therefore, the employer should have further investigated the applicant's credentials. *Gorchev & Gorchev, supra*. There is no evidence in the Appeal File that the Employer actually attempted to contact Applicant 2 at the time of the recruitment in 2004.

On rebuttal, the Employer submitted an affidavit by Mr. Kaman asserting that applicant Applicant 2 was unqualified. That affidavit, however, was not supported by any objective evidence. Bare assertions by an employer are not sufficient to carry the burden of demonstrating good faith recruitment. *See, e.g., Brilliant Ideas, Inc., 2000-INA-46* (May 22, 2000). Moreover, we agree with the CO's conclusion that Mr. Kaman's affidavit lacks credibility as it attests to information about which he did not have first-hand knowledge and does not identify where he obtained this information.

In the request for review, the Employer argued that an interview of the U.S. applicant was not necessary since information on the Wisconsin State web site indicated that U.S. applicant Karim did not have the appropriate teaching license. Initially, we note that this Board cannot consider the additional documentation which was first submitted with the request for review, as our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. §§ 656.27(c), 656.26(b)(4). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant, 1990-INA-480* (Jan. 7, 1992).

Assuming arguendo that we could consider this new evidence, there is no indication in the Appeal File that the Employer reviewed this information on Wisconsin's web page in 2004 at the time of recruitment. Thus, the evidence only documents that the Employer might have been able to verify the licensing status of applicants, not that it actually did so in 2004.

Thus, we find that the CO properly concluded that Applicant 2's credentials had not been fully investigated in good faith by the Employer at the time of the recruitment.

RIR Posture of the Case

The instant case was before the CO in the posture of a request for reduction in recruitment. The Board held in *Express Photo, Inc.*, 2005-INA-00128 (May 16, 2007) (en banc), that where an application was before the CO in the posture of a RIR request based on pre-application recruitment, and that recruitment is found to have been defective, the CO may deny the RIR in whole or in part, but may not simply deny the application on the merits. See generally *Compaq Computer Corp.*, 2002-INA- 249-253, 261 (Sept. 3, 2003) (When the CO denies an RIR, such denial normally should result in the referral of the application for regular processing).⁷ Therefore, while we find that the CO properly found that the Employer's pre-application recruitment was insufficiently thorough so as to grant an RIR, we further find this matter should be remanded to the CO for regular processing and supervised recruitment.

⁷ Although it is probable that the pre-application recruitment in this case was performed in anticipation of filing a labor certification application, the Board in *Express Photo* declined to take into consideration a lack of innocence in pre-application recruitment as an impractical and degenerative analysis. *Express Photo*, slip op. at n.19.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby **VACATED** and this matter **REMANDED** for further proceeding consistent with the above.

For the panel:

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JOHN M. VITTON
Chief Administrative Law Judge

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.