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OUTBACK STEAKHOUSE, Employer, on behalf of MARTIN JUAREZ, Alien

Nos. 2005-INA-00096, P2002-CA-09537432/JS

DEPARTMENT OF LABOR,
BOARD OF ALIEN LABOR CERTIFICATION APPEALS

2007 BALCA LEXIS 26

January 19, 2007

COUNSEL:

Certifying Officer: Martin Rios, San Francisco, California

Paul Steinberg, Managing Partner n1, Pro Se for the Employer

n1 Peter H. Morgan, Jr., was shown as the Employer's and the Alien's agent while the application was before the CO. The Appeal, however, was filed pro se by Mr. Steinberg.

JUDGES:

BEFORE: Burke and Chapman, Administrative Law Judges; John M. Vittone, Chief Administrative Law Judge

OPINIONBY: VITTONE

OPINION:

DECISION AND ORDER

This case arises from the Employer's request for review of a U.S. Department of Labor Certifying Officer's ("CO") denial of alien labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations. n2

n2 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.

STATEMENT OF THE CASE

In 2001, the Employer filed an application for permanent labor certification to enable the Alien to fill its position for a Cook. (AF 36-78). The CO issued a Notice of Findings on August 10, 2004, proposing to deny labor certification because the Employer had failed to establish that it made vigorous attempts to recruit multiple qualified U.S. workers.

(AF 32-34). The CO determined that two applicants had not been sufficiently contacted and recruited because the Employer did not have certified mail return receipts proving that the applicants received the recruitment letters. The CO determined that the third applicant received the contact letter, but that the letter did not refer to the advertised labor certification job, so the applicant may not have known that the Employer's letter pertained to the advertised position. The CO requested that the Employer submit rebuttal documents demonstrating that the U.S. applicants were recruited in good faith and rejected solely for lawful, job-related reasons.

In its rebuttal filed September 2, 2004, the Employer elaborated on the actions it took to contact the applicants. (AF 15-31). The Employer indicated that it was unsure whether applicant 1 received the contact letter, but that it had twice attempted to contact him by telephone and was unsuccessful because there was no answer and the applicant had no answering machine. The Employer claimed it made a good-faith effort to contact him. Regarding applicant 2, the Employer indicated that he was contacted by certified mail and that it twice attempted to contact him by telephone but was unsuccessful because there was no answer. As for applicant 3, the Employer argued that its letter to him stated it was in receipt of his resume regarding the position of Cook and that the applicant would have fully understood that he had applied for the job that had been advertised. Additionally, the Employer stated that this applicant did not respond to the letter and that it attempted to twice contact him by phone. The Employer argued that these attempts constituted good faith recruitment efforts.

The CO thereafter issued a Final Determination on September 13, 2004, finding that the Employer's rebuttal failed to demonstrate a good-faith effort on the part of the Employer to recruit qualified U.S. workers. (AF 13-14). The CO found that the Employer did not know whether its certified letters were received during the recruitment period by applicants 1 and 2 and, without such knowledge, only made two attempts to telephone each applicant before giving up. Regarding applicant 3, the CO determined that the Employer had failed to properly describe the advertised position in its recruitment letter and also fell short of good faith recruitment efforts in only making two attempts to contact the applicant by telephone. n3

> n3 The CO made reference to the sufficiency of the description of the position, stating "Whether or not the employer used the word, 'advertised,' in his letter was not the point. We also disagree that the employer's two attempts to telephone [applicant 3] were sufficient." (AF 14). The Board interprets this language to mean that the CO was denying certification in regards to applicant 3 on two grounds -- good faith effort to contact the applicant and the sufficiency of the language in the letter.

In its appeal request (AF 1-12), the Employer stated that applicants 1 and 2 were sent recruitment letters by certified mail, return receipt requested, but that the Postal Service did not return the receipt. The Employer claimed it was reasonable to believe that they received its contact letters and chose not to contact the Employer as requested. Additionally, the Employer noted that it attempted to contact applicant 1 by telephone on November 1, 2002, at 9:00 a.m., and again on November 8, 2002, at 11:30 a.m.; and attempted to contact applicant 2 on November 1, 2002, at 9:30 a.m., and again on November 8, 2002, at 12:00 p.m. For each applicant, the Employer stated that it allowed the phone to ring a sufficient number of times for answering machines to intercept the call but that no one answered the phone. The Employer argued that its three attempts to contact each of these applicants constituted a good-faith effort to recruit them. Regarding applicant 3, the Employer noted that he received its contact letter by certified mail on October 24, 2002, and that it attempted to contact him on two occasions by telephone but no one answered the phone. The Employer claimed that its attempts to contact applicant 3 also constituted a good-faith effort to recruit him. The Employer claimed it did not reject these three U.S. applicants for any unlawful reason and that its rebuttal information demonstrated that a good-faith effort was made during the recruitment period.

DISCUSSION

The issue before the Board is whether the CO appropriately denied certification on the basis of insufficient

recruitment of the three U.S. applicants. 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 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). The burden of proof in applications for labor certification is on the employer. 20 C.F.R. § 656.2(b). 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.

We find that the Employer made a good-faith effort to recruit U.S. applicants for the Cook position. Assuming we interpreted the language of the Final Determination properly, n4 the CO first denied certification because the recruitment letter mailed to applicant 3 failed to refer to the advertised labor certification position and merely described the position as "Cook." We find that the reference to the "Cook" position in the letter with the Employer's name on it would have clearly indicated to applicant 3 that the letter was sent in reference to the advertised employment opportunity. The absence of a reference to the advertisement did not prevent applicant 3 from further pursuing the job opportunity.

n4 *See* n.3, *supra.*

Additionally, the CO denied certification on the grounds that the Employer's three attempts to contact each applicant were insufficient. We disagree. An employer does not need to establish actual contact with applicants in order to establish good faith recruitment efforts. *M.N. Auto Electric Corp.,* 2000-INA-00165 (Aug 8, 2001)(holding that reasonable efforts are sufficient). It is clear that this Employer made reasonable efforts to contact all three applicants. The Employer provided copies of the certified mail receipts, demonstrating that it mailed recruitment letters through certified mail, return receipt requested, to the addresses provided on the applicants' resumes. Each of the certified mail receipts was postmarked and each letter requested that the applicant contact the Employer if interested in setting up an interview.

The Employer then went a step further and followed the letters with two phone calls to each applicant at a number provided on his resume. The Employer recorded the dates, times, and circumstances of each call attempt, which further demonstrates reasonable efforts to contact the U.S. applicants. *M.N. Auto Electric Corp.,* 2000-INA-00165 (Aug 8, 2001). Additionally, attempting to contact each applicant through two different means of communication demonstrates good faith effort. *Diana Mock,* 1988-INA-255 (Apr 9, 1990)(noting that where there are a small number of applicants, reasonable effort to recruit may require more than a single method of contacting applicants); *Bruce A. Fjeld,* 1988-INA-333 (May 26, 1989)(holding that merely calling a telephone number and not writing a letter can constitute a failure to make reasonable efforts to contact an applicant).

Although the Employer's efforts were not vigorous, they were reasonable and constitute good faith efforts under the Act. Accordingly, based on the above, we find that the Employer made a good-faith effort to recruit qualified U.S. workers and that applicants were rejected solely for lawful job-related reasons.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby **REVERSED** and the CO is **ORDERED** to **GRANT** certification.

For the Panel:

JOHN M. VITTONE

Chief Administrative Law Judge