**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 02 September 2008**

**BALCA Case No.: 2008-INA-00028**
ETA Case No.: P-05152-50755

*In the Matter of:*

**GLOBAL TRAVEL INTL CORP.,**
**d/b/a**
**INNOVA TRAVEL,**
*Employer,*

*on behalf of*

**HSIU-LING WU,**
*Alien.*

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

Appearance: Yin Lee Chang
Manager
*Pro se for the Employer*[2]

East Brunswick, New Jersey
*For the Employer and the Alien*

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

# DECISION AND ORDER

[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.

[2] Weicheng Wang, Esquire appeared for the Employer and the Alien before the Certifying Officer; however, the appeal was taken pro se.

**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 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.").[3]

## STATEMENT OF THE CASE

On July 6, 2004, the Employer, Global Travel Intl Corp., d/b/a Innova Travel, filed an application for labor certification to enable the Alien, Hsiu-Ling Wu, to fill the position of Accountant. (AF 158). The position required forty hours per week and no overtime hours. A Bachelor's degree in accounting or business administration was required, as were three years of experience in the job offered or three years in the related occupation of administrative manager or sales manager. As an alternative to the education requirement, two years of college plus six years of work experience in business administration was also acceptable. (AF 158).

In the spring of 2007 the Employer submitted its recruitment results indicating that it had placed a job order with the state workforce agency, advertised in the newspaper and posted the job internally. (AF 46). Nineteen resumes were received. The Employer listed the contact had with each applicant. Four candidates did not have the required degree and/or experience; two candidates were listed twice, one of whom was no longer interested and the other was not interested in full-time work. Several other candidates were either unwilling to take the job or did not respond to contacts by the Employer; one had a salary requirement which was too high; another candidate did not want to work full-time; and two candidates were found to be overqualified.

[3] 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.

On August 3, 2007, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the basis of the rejection of U.S. workers for other than lawful, job-related reasons.[4] (AF 38). The CO found that the Employer had placed telephone calls to U.S. applicants and that some of these were unsuccessful; yet the Employer had failed to make other attempts to contact the applicants. The CO requested documentation of attempts to contact the referred applicants in a timely manner, and suggested that such documentation could include evidence such as certified mail receipts, itemized telephone bills or other documentation of timely contact which would establish good faith recruitment. The CO also found that U.S. workers had been rejected for other than lawful, job-related reasons. In this respect, two U.S. applicants were rejected for being overqualified, while a third was rejected for not having the required experience, although her resume listed duties which were similar to those listed on the Employer's ETA 750A and were similar to the related occupation of administrative manager. The CO stated that the Employer needed to establish that the U.S. workers were not able, willing, qualified or available for this job opportunity. Failure to provide lawful, job-related reasons for their rejection was a violation of Federal regulations.

The Employer submitted rebuttal on August 29, 2007, arguing that it did contact the U.S. applicants, and asserting that it was in the process of obtaining its telephone bills. (AF 27). With regard to the U.S. applicants who had been rejected, the Employer argued that their rejection was consistent with normal business practices of the industry and its own normal practice.

A Final Determination was issued on September 29, 2007. (AF 23). The CO noted that the Employer's recruitment effort was reduced to an undocumented series of telephone calls. The CO did not accept the Employer's argument regarding good faith recruitment, noting that placing unanswered telephone calls without making additional attempts to contact U.S. applicants did not constitute good faith recruitment. The CO also found that the Employer failed to provide lawful job-related reasons for rejecting the three U.S. applicants listed in the NOF, because their rejection for what the Employer

[4] Another finding, which was successfully rebutted, will not be detailed.

claimed were reasons consistent with normal industry practices was not consistent with labor certification procedures. The CO further advised the Employer that it could seek review by the Board of Alien Labor Certification Appeals or request reconsideration of the denial by the CO. (AF 5).

The Employer submitted a letter addressed to the CO on October 4, 2007, requesting review of the denial and requesting that the letter also be accepted as a request for reconsideration of the denial. (AF 1). This matter was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Board issued a Notice of Docketing on October 31, 2007. Neither the Employer nor the CO filed appellate briefs.

## DISCUSSION

In the letter dated October 4, 2007, Employer specifically sought reconsideration of the denial by the CO. The request was timely filed, having been received prior to the time in which the Final Determination became final. There is no record that the CO did, in fact, reconsider the decision. Where an employer timely files a motion of reconsideration, the CO must formally rule on the motion. *Charles Serouya & Son, Inc.*, 1988-INA-261 (Mar. 14, 1989) (*en banc*). The CO is required to "state clearly whether he has denied an employer's request for reconsideration, *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*), or has granted the request and, upon reconsideration, affirmed his denial of certification." *Richard Clarke Associates*, 1990-INA-80 (May 13, 1992) (*en banc*).

In the interest of administrative efficiency, however, we decline to remand this case for a ruling by the CO on the motion for reconsideration, because – in full – the grounds stated in the motion for reconsideration and BALCA review were:

> The denial decision is incorrect for the following reasons:
>
> 1. The employer did contact the candidates.

2. The rejection of those US workers was consistent with normal business practice of the industry and our own normal practice.

(AF 1-2). Those are exactly the same grounds stated in the rebuttal. (AF 34-35).[5] A motion for reconsideration is inherently inadequate where it merely rehashes arguments already considered and rejected. A remand in this case would only cause a needless delay.

Both of the grounds cited by the CO for denying certification are supported by BALCA caselaw. First, 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.*, 2000-INA-165 (Aug. 8, 2001) (en banc), USDOL/OALJ Reporter at 10-11. In the instant case, although the Employer asserted that all applicants were contacted, it produced no documentation to prove that assertion.

Second, the Employer rejected at least two applicants as overqualified. The Board has repeatedly ruled that an employer who is recruiting pursuant to a labor certification application may not reject an applicant solely because that applicant is overqualified. *World Bazaar*, 1988-INA-54 (June 14, 1989) (en banc); *Tri-State Corp. Windows and Doors*, 1990-INA-186 (Dec. 12, 1991); *Deerwood Club*, 1990-INA-227 (Sept. 3, 1991); *John C. Stevenson Architect, Inc.*, 1988-INA-522 (Aug. 14, 1991); *King & Garvis Consulting Eng., Inc.*, 1990-INA-217 (July 1, 1991); *Palacio Metal Works*, 1990-INA-396 (Mar. 27, 1991); *Gala Engineering*, 1989-INA-224 (June 12, 1990); *Lakewood Manor Apartments*, 1988-INA-572 (Oct. 18, 1989).

Based on the foregoing, we find that the CO properly denied labor certification.

[5] The Employer indicated that its rebuttal letter was a request for BALCA review. However, as the CO noted in the Final Determination, the Employer could not request BALCA review until the CO had made a Final Determination. (AF 5).

## 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 of Alien Labor Certification Appeals. 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.