U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 July 2003

BALCA Case No.: **2002-INA-133**
ETA Case No.: P1998-CA-09065290/JS

In the Matter of:

RICHARD MILLER,

Employer,

on behalf of

ZOILA CHAVEZ,

Alien.

Appearance: Felipe Insalata, Immigration Consultant
c/o Multicentro Internacional
Santa Ana, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Zoila Chavez ("Alien") filed by Richard Miller ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and Employer requested review pursuant to 20 C.F.R. §656.26.

Under section 212(a)(5), an alien seeking to enter the United States for the purpose of

performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and Attorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

Employer, Richard Miller, filed an application for labor certification to enable the Alien, Zoila Chavez, to fill the position of "Domestic Cook," which was classified by the Job Service as "Cook" under Occupational Code 305-281-010 of the Dictionary of Occupational Titles ("D.O.T.") (AF 56).[1] The job duties for the position, as stated on the application, are as follows:

[1] Although the application was initially filed with the local office on July 25, 1996, Employer amended the hourly wage on September 25, 1997, and also deleted the "Other Special Requirements." Subsequently, the Regional Office received the application on February 24, 1998 (AF 56). Furthermore, the Notice of Findings lists the "Date of acceptance for processing" as April 17, 1998 (AF 51). Similarly, the "Appellant's Brief/Statement of Position" states that the application was filed on April 17, 1998.

> Cook, season, and prepare meals in a private home per employer's instructions or recipes. Bake breads and pastries, broil, fry and roast meats. Plan menus and order foods. Required to clean the kitchen.

(AF 56). The stated job requirement for the position is two years of experience in the job offered (AF 56).

In a Notice of Findings ("NOF") issued on March 1, 2001, the CO proposed to deny certification on following grounds: 1) Employer filed an incomplete ETA 750, Part B form, in violation of §656.21(a)(1). 2) Employer failed to provide adequate information to establish that there is a bona fide job opportunity for a Domestic Cook position in Employer's household which is clearly open to U.S. workers, in violation of §656.20(c)(8). (AF 51-54). Employer submitted its rebuttal thereto on or about March 30, 2001 (AF 9-50). The CO found the rebuttal unpersuasive and issued a Final Determination, dated December 3, 2001, denying certification on the above grounds (AF 6-8). On or about January 7, 2002, Employer filed a Request for Review of the denial of labor certification (AF 1). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. On March 28, 2002, the Board issued an initial "Notice of Docketing and Order Requiring Statement of Position or Legal Brief," which was re-served, pursuant to our Order, dated April 10, 2002. Employer filed a timely response thereto.

DISCUSSION

Under 20 C.F.R. §656.21(a)(1), an employer must provide a statement of the qualifications of the alien, signed by the alien. In the NOF, the CO cited the foregoing section and stated that the ETA 750, Part B form was incomplete. Accordingly, the CO directed Employer to take the following corrective action:

> Submit an amendment, in duplicate, both copies signed by the alien showing all of the

> alien's employment for the three years prior to submitting the application. This shall include:
>
> Names and addresses of employer; name of job; date started; date left; kind of business; description of duties performed. Include any self employment with full description including address of work location.

(AF 52).

Employer's rebuttal regarding the foregoing issue consists of part of a letter, dated March 30, 2001, signed by Employer and Alien (AF 9-10,13) and three exhibits (AF 14-23). The relevant portion of the signed letter, dated March 30, 2001, states, in pertinent part, that the ETA 750, Part B "was properly completed and signed by the alien when the petition was filed on June 25, 1996." In addition, the letter lists information regarding the Alien's employment as a Domestic Cook for Sally Johnson from September 1987 to August 1993; and, for Employer from September 1993 to June 1996; and, as a self-employed Cook from June 1996 to the present (AF 9-10). The supporting Exhibits include the following: Exhibit I - Copy of ETA 750, Part B (AF 14-17); Exhibit II - Letters by two employers of the Alien regarding her work as a domestic cook on unspecified dates (AF 18-20); and, Exhibit III - A letter by a past employer of the Alien in El Salvador regarding the Alien's alleged work experience as a domestic cook from October 6, 1973 through January 15, 1986 (AF 21-23).

In the Final Determination (AF 6-8), the CO rejected Employer's rebuttal regarding this issue, stating, in pertinent part:

> In rebuttal to the first finding, that ETA 750 B was incomplete, the employer has submitted a copy of the same information that had been entered on Form ETA 750, Form B, and the employer has also enclosed two letters. One letter is from Blanca Miranda...and the other is from Elva Guzman....Both writers indicate that the alien

> worked for them as a cook, and both recommend her services. However, this is not what was requested in the Notice of Findings. There is still no indication of the dates of employment for these employers or whether the alien worked for these employers during the period that was in question before the filing of the labor certification application. It remains that the employer has not shown a full description of the alien's prior three years of employment, including date started and date left and work location for the period of self-employment stated to have begun in June, 1996.

(AF 7).

Upon review, we note that the ETA 750, Part B form, dated June 25, 1996, included a "Rider." Both the primary ETA 750, Part B form and the Rider thereto were signed by the Alien (AF 86-88). The above-referred documents set forth, in detail, the Alien's work history during the period from September 1987 until June 1996. However, the information provided regarding the current work experience is somewhat vague. As stated therein, the job title and duties are virtually identical with those listed for her prior jobs. Furthermore, the Alien alleges that she still works a 40-hour week, even though she is "currently self-employed. Working on a piece by piece basis." (AF 87). In addition, the Alien's entry regarding her current job does not specify the work location.[2]

As outlined above, in the NOF, Employer was specifically instructed to submit, in duplicate, an amended ETA 750, Part B form, which sets forth a more complete work history, including the Alien's self employment with full description and address of work location. Instead, Employer chose to file a copy of the previously submitted ETA 750, Part B forms (AF 15-17; *Compare* AF 86-88). Accordingly, we concur with the CO's determination that Employer's rebuttal regarding this issue was inadequate.

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[2] We also note that the Alien's alleged work as a domestic cook in El Salvador from October 6, 1973 through January 15, 1986 is not listed on the ETA 750, Part B form (*Compare* AF 21-23, AF 86-88). However, the CO only requested information regarding the Alien's more recent work history. Therefore, this omission is not the basis for our decision herein.

In addition, we find Employer's submissions, in conjunction with the other deficiency cited in the NOF, to be very disturbing. As stated in the Final Determination, Employer's rebuttal includes copies of the Alien's tax returns from 1996 and 1997 (AF 12, 38-49), which appear to contradict the ETA 750, Part B form (AF 86-88). Specifically, the ETA 750, Part B form states that the Alien worked as a full-time (40-hour week) Domestic Cook for Employer throughout the period from March 1995 until June 1996 (AF 87). Accordingly, the Alien allegedly worked for Employer for the first five or six months of 1996. Yet the Alien did not report any wages on her 1996 Federal tax returns (AF 42). Moreover, the ETA 750, Part B form states that the Alien has been self-employed,as a "Domestic Cook" since June 1996 (AF 87). Although the Alien did report some business income for 1996 (*i.e.*, net $760), she listed her "principal business or profession" as "House Cleaning," *not as a Domestic Cook* (AF 46). While not the primary basis for our decision herein, the foregoing inconsistencies underlie the rationale of the regulations in requiring a statement of the qualifications to be signed by the alien, as well as the CO's request, in this particular case, for a more complete and detailed statement by the Alien herein.

Since Employer failed to comply with the reasonable request of the CO to provide a more complete, amended ETA 750, Form B, labor certification was properly denied.[3]

[3] In view of the foregoing, we need not address the other deficiency cited by the CO.

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 PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 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 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, N.W., Suite 400
Washington, D.C. 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 typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.