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)

Date Issued: June 12, 2003

BALCA Case No.: 2002-INA-92
ETA Case No.: P1999-CA-09443038/JS

In the Matter of:

CORAZON GIRON,
Employer,

on behalf of

CHRISTINE JAO,
Alien.

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a household owner for the position of Domestic Cook. (AF 30-31).[2] The following 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. ("AF").

STATEMENT OF THE CASE

On June 20, 1997, Employer, Corazon Giron, filed an application for alien employment certification on behalf of the Alien, Christine Jao, to fill the position of Domestic Cook. Minimum requirements for the position were listed as two years experience in the job offered. The job to be performed was described as follows:

[1] 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 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

> Plans menus and cooks meals, in private home, according to recipes & Philippine style of cooking, or tastes of employer: peels, washes, trims & prepares vegetables & ingredients, meats and fish for cooking. Cooks vegetables and bakes breads and pastries. May boils, broils, fries and roasts meats [sic]. Must know procedure of cooking Philippine recipes such as adobong manok-baboy, kitson kawali, paksiw na litson, milagang karne, sinigang baboy, pakbet, kaldereta, paksiw or pinangat-isda, laing, pochero, chopchoy, pancit gisado bihon, cnaton, sotanghon, palabok, luglug, tokwat baboy, bachoy, aroscaldo, apritada, kilawin, kare-kare, kakanin-malagkit, bibingka, lumpiang shanghai, kutsinta, mahablanca, ginataang-bilobilo, sapin-sapin at ibapa. May serve meals to guests during party occasions. Clean kitchen & cooking utensils.

(AF 30).

Employer received one applicant referral in response to its recruitment efforts, who Employer reported was rejected for failure to appear for the scheduled interview. (AF 38).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on May 30, 2001, proposing to deny labor certification on several bases, including as pertinent herein, that a U.S. worker did not appear to have been rejected for lawful, job-related reasons. (AF 24-29). The applicant, Michael D. May, had been sent a letter dated December 9, 1998, advising him to appear for an interview on December 18, 1998 at 11:30 a.m., and to bring numerous items of documentation, including "two (2) pieces of identification, reference letter from your previous or present employer as domestic cook and proof of legal authorization to work in the United States" such as an "original U.S. birth certificate, Valid U.S. passport, Alien Resident Card/Greencard or Permanent resident adjustment –EAD." (AF 41). The CO found the requirement of the production of documentation at the interview to be an undisclosed requirement. Noting that a U.S.

worker might not have some of these items available on hand, the CO concluded Employer's contact letter appeared discouraging to prospective applicants, and thus challenged Employer's good faith recruitment effort.

In Rebuttal, Employer asserted that if the U.S. worker had no such documents, he should have called the Employer and verified whether it was all right to come for the interview and then provide the required documents at a later time. (AF 12).

A Final Determination denying labor certification was issued by the CO on August 18, 2001, based upon a finding that Employer had failed to adequately document lawful rejection of an apparently qualified U.S. worker. The CO concluded that since Employer's letter contained discouraging requirements, Employer did not demonstrate a good faith attempt to recruit and thus had failed to show that the applicant was truly unavailable. (AF 8-9).

Employer filed a Request for Review by letter dated September 17, 2001, and the matter was referred to this Office and docketed on February 21, 2002. (AF 1-7).

DISCUSSION

Congress enacted Section 212(a)(14) of the Immigration and Nationality Act of 1952 (as amended by Section 212(a)(5) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." *Cheung v. District Director, INS*, 641 F2d. 666, 669 (9th Cir., 1981); *Wang v. INS*, 602 F.2d 211, 213 (9th Cir. 1979).[3] To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Consequently, the burden of proof in the

[3] The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. *See* S. Rep No. 748, 89th Cong., lst Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 3333-3334.

labor certification process is on the Employer. *Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997); *Marsha Edelman,* 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b).

Federal regulations at 20 C.F.R. § 656.21(b)(6) state that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may only be rejected for lawful job related reasons. This regulation applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. An employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*).

Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.,* 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of 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 such circumstances, the employer has not proven 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.

The Board has repeatedly held that where an applicant's resume raises a reasonable possibility that he/she is qualified for the job, an employer bears the burden of further investigating the applicant's credentials. *See, i.e., Ceylion Shipping, Inc.,* 1992-INA-322 (Aug. 30, 1993); *Executive Protective Serv., Inc.,* 1992-INA-392 (July 30, 1993); *Messina Music, Inc.,* 1992-INA-357 (July 20, 1993); *M.S.O. Dev. Corp.,* 1992-INA-326 (July 30, 1993). The employer's responsibility to investigate can be accomplished by interview or other means. Under certain circumstances, such other means may include sending the applicant a written request for clarifying information. However, whatever means are utilized by the employer, they many not place unnecessary burdens on the recruitment process, be dilatory in nature, or otherwise have the effect of

discouraging U.S. applicants from pursuing the job opportunity. *Ryan, Inc.*, 1994-INA-606 (Sept. 12, 1995)(holding that employer failed to recruit workers in good faith where it sent follow-up letters to applicants requiring the applicants to submit excessive information).

In the instant case, we conclude that Employer failed to recruit workers in good faith. In its letter of contact, Employer demanded that the prospective applicant provide numerous items of documentation at the time of interview as itemized by Employer, several of which may not have been readily available or easily obtainable. Many U.S. workers may not have an original birth certificate or valid U.S. passport on hand. In addition, Employer requested two pieces of identification, which some workers may not have readily available, and a letter of reference. Employer's contact letter appears more an effort to deter rather than recruit prospective applicants. While the Board has on occasion upheld the rejection of U.S. workers for failure to provide verification of work history or references, *(see, i.e. Ernie Vejar Landscape Maintenance,* 1994-INA-189 (July 19, 1995); *Al-Ghazi Sch.,* 1988-INA-347 (Mar. 31, 1989)), Employer's request in the instant case to provide such extensive documentation prior to interview appears onerous and dilatory in nature, particularly in light of the fact that there was only one applicant under consideration. Employer suggests that the applicant should have contacted the Employer and verified whether if was okay to come for the interview and provide the required documents at a later date. However, if Employer's letter was discouraging, the applicant should not have been required to persist in spite of the discouraging requirement. Employer made no effort to follow up on the contact letter. As previously noted, Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*).

On this basis, we conclude Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity, and accordingly, determine that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

_____

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 of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.