U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: May 20, 2003

BALCA Case No.: 2002-INA-126
ETA Case No.: P2001-NY-02474153

In the Matter of:

SUSAN HIRSCHHORN,
Employer,

on behalf of

SUSAN HERRERA RAMIREZ,
Alien.

Appearance: Steven Elias, Esquire
New York, NY

Certifying Officer: Dolores Dehaan
New York, NY

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 Susan Herrera Ramirez ("Alien") filed by Susan Hirschhorn ("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, New York, New York, denied the application, and the 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 the 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

On August 21, 2000, the Employer, Susan Hirschhorn, filed an application for labor certification to enable the Alien, Susan Herrera Ramirez, to fill the position of "Live-Out Domestic," which was classified by the Job Service as "Houseworker, Gen'l 'Live-out'" (AF 17). The job duties for the position, as stated on the application, are as follows:

> General Household chores, including cleaning, doing the laundry, ironing, changing and making the beds, cooking, serving meals, and running errands.

(AF 17, Item 13). The position does not require any training or experience. In fact, the Employer expressly noted: "No experience required" on the ETA 750A form (AF 17, Item 14).

In a Notice of Findings ("NOF") issued on October 31, 2001, the CO proposed to deny

certification on the grounds that the Employer had rejected numerous U.S. workers for other than lawful, job-related reasons, in violation of the regulatory provisions set forth in 20 C.F.R. §656.21(b)(6); and thereby failed to demonstrate that the job opportunity is clearly open to any qualified U.S. worker, as provided in 20 C.F.R. §656.20(c)(8). (AF 100-102). The Employer submitted its rebuttal on or about December 3, 2001 (AF 103-113). The CO found the rebuttal unpersuasive and issued a Final Determination, dated January 5, 2002, denying certification on the above grounds (AF 114-115). Under cover letter, dated February 5, 2002, the Employer filed a Request for Review (AF 116-123). Following the issuance of a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief," dated March 28, 2002, Employer's counsel submitted another "Request for Review," which summarized the issues and Employer's position regarding thereto, together with related documents.

DISCUSSION

Under 20 C.F.R. §656.21(b)(6), an employer must document that U.S. applicants were rejected solely for lawful job-related reasons. Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and 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 good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an 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 report of recruitment results includes Employer counsel's cover letter, dated August 31, 2001 (AF 92-93), Employer's letter, dated August 23, 2001, which summarizes her "interviews" of

various U.S. applicants and the purported bases for not hiring any of the 40 applicants listed (AF 89-91), as well as copies of various resumes.

In the NOF, dated October 31, 2001, the CO cited 31 rejected applicants, and listed them in various categories, as reported by the Employer: 9 applicants who are not legal; 5 applicants who found another job; 11 applicants who did not have enough housekeeping and/or cooking skills or were no longer interested in the job; and, 6 applicants who were disqualified because they had poor English (AF 99-102).

Although the NOF cited all the foregoing applicants as qualified, and requested various types of documentation from the Employer, for the purpose of rendering a decision herein, our focus is on those applicants who purportedly were rejected because they lacked household or cooking skills. In pertinent part, the CO directed the Employer to document further her lawful job-related reasons for rejecting applicants based on interview and/or the resume alone (AF 99-100).

In Employer counsel's rebuttal letter, dated December 3, 2000 (AF 111-113), Mr. Elias stated, in pertinent part:

> In regard to the next eleven applicants, it must be noted that the employer referred to the applicants' ability to perform the duties in question and not the applicants' experience. Just because the job offer does not require experience does not mean that every applicant is able to perform the functions described in the job offer. No where does the certifying officer insert a requirement that the employer train applicants without experience.

(AF 112).

The rebuttal also includes the Employer's affidavit, dated November 19, 2001, which states:

On August 23, 2001 I submitted a list of applicants responding to the ad placed for our job with the date interviewed and the reason declined. To support these efforts were in good faith:

1. I wish to confirm that the interviews were conducted on the telephone for appropriate lengths of time ranging up to fifteen minutes. Calls were made from our home and my husband's office. The telephone plans involved do not break out local numbers.

2. Those people who did not respond were mailed a letter by certified mail, return receipt requested. Subsequently, I spoke to nearly all of them except for Elsy Correa whose letter was returned to me marked undeliverable.

3. I worked many hours to assure that the applicant interview process was fair and complete and that the report submitted on August 23, 2001 accurately reflected the results.

(AF 104).

In the Final Determination, dated January 5, 2002, the CO accepted the Employer's reasons for rejecting the nine applicants who were not authorized to work, but found the Employer's rebuttal unpersuasive regarding the remaining 22 U.S. applicants, based on lack of adequate documentation justifying the rejection of such applicants, and Employer's failure to establish that the U.S. workers were not able, willing, qualified or available for this job (AF 114-115). We agree.

Having carefully reviewed the Appeal File, we find that the Employer's reported bases for rejecting several of the U.S. applicants lacks credibility. For example, the Employer stated that she interviewed Kim Salazar on August 8, 2001, and allegedly rejected him/her because he/she "does not have adequate cooking skills." (AF 91). Yet for this general houseworker position which requires

no experience whatsoever, Kim Salazar not only had experience performing the various household tasks listed as duties for the job offered, but also had experience doing "light cooking" (AF 77). The Employer's purported basis for rejecting U.S. applicant Vynette Tyson is even less credible. In a cover letter dated July 8, 2001, Ms. Tyson specifies her interest in the position as a general houseworker (AF 71). Moreover, Ms. Tyson's resume lists her work experience from June 1998 to June 2001, as entailing the following responsibilities: General cleaning, laundry and ironing, making beds, grocery shopping, meal preparation, and assisting with care of two children ages 18 month and 4 ½ years (AF 70). Accordingly, Ms. Tyson has three years of experience performing essentially the same housekeeping duties as listed by the Employer for a position which requires no training or experience. Yet, after supposedly interviewing Ms. Tyson on August 8, 2001, the Employer purportedly rejected this clearly qualified U.S. applicant for the following reason: "Experienced accountant, cannot handle housekeeping duties as required." (AF 90).

As found by the CO and illustrated above, we conclude that the Employer failed to document that it rejected qualified U.S. applicants solely for lawful job-related reasons, as provided in 20 C.F.R. §656.21(b)(6); and/or to establish that the job opportunity is clearly open to any qualified U.S. worker, as required in 20 C.F.R. §656.20(c)(8). Accordingly, we find that labor certification was properly denied.

ORDER

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

Entered at the direction of the panel:

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.