U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: June 12, 2003

BALCA Case No.: 2002-INA-97
ETA Case No.: P2000-NY-0446491

In the Matter of:

FRED AND CAROLE B. GUEST,
Employer,

on behalf of

MARIA E. PARDO,
Alien.

Appearances: Annamaria Lombino, Esquire

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 private household for the position of Domestic Cook. (AF 7-8).[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 December 19, 1997, Employer, Fred and Carole Guest, filed an application for alien employment certification on behalf of the Alien, Maria Pardo, to fill the position of

[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".

a Live-in Domestic Cook. A minimum of two years experience in the job offered was required. (AF 7-8).

Employer received three applicant referrals in response to their recruitment efforts, all of whom were rejected as either unqualified or uninterested in the position. (AF 41-42).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on October 24, 2001, proposing to deny labor certification on several bases. Citing Section 656.20(c)(8), the CO questioned the existence of a bona fide job opportunity open to U.S. workers and concluded the application contained insufficient information to determine whether the position of Domestic Cook actually exists in their household or whether the job was created solely for the purpose of qualifying the Alien as a skilled worker.[3] Documentation "at a minimum" was to include responses to thirteen enumerated questions including documentation as requested and where appropriate. In addition, the CO challenged Employer's "live-in" requirement as restrictive and their rejection of two of the U.S. worker applicants as for other than lawful, job-related reasons. (AF 48-52).

Employer's rebuttal, dated November 12, 2001, in its entirety states:

> Please be advised that I, the employer am willing to readvertise this case as a LIVE-OUT cook.

(AF 52-53).

[3] The CO noted that under immigration law, the number of immigrant visas available to "unskilled workers" (those occupations requiring less than two years experience) is very limited, whereas, there is no current waiting period for most immigrant visas in the "skilled worker" category (at least two years experience). Because the occupation of Domestic Cook can require one to two years for proficiency, it is considered to be a "skilled worker" under the immigration law. Employer was instructed to explain why the position of Domestic Cook in their household should be considered a bonafide job opportunity rather than a job opportunity that was created solely for the purpose of qualifying the alien as a skilled worker under current immigration law.

A Final Determination denying labor certification was issued by the CO on December 22, 2001, based upon a finding that Employer's rebuttal failed to address both the findings with respect to the bona fide job opportunity issue and the lawful rejection of U.S. workers issue. Employer's offer to readvertise without the live-in requirement was found sufficient to rebut the restrictive requirement issue. (AF 55-56).

Employer filed a Request for Review by letter dated January 9, 2001, and the matter was referred to and docketed in this Office on March 6, 2002. (AF 84-85).

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).[4] 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 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). Moreover, as was noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued."

[4] 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.

In the instant case, Employer failed to adequately address the issues raised by the CO in the NOF, and accordingly, labor certification was properly denied. Section 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. Employer was specifically advised of this requirement to rebut in the cover letter of the NOF. (AF 52). The Board has repeatedly held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989)(*en banc*); *J.J. Concrete Cutting*, 1994-INA-229 (Apr. 13, 1995); *Hagopian & Sons, Inc.*, 1994-INA-178 (May 4, 1995); *Gemmel and Associates*, 1993-INA-482 (June 3, 1994); *E. Davis, Inc.*, 1992-INA-277 (Aug. 4, 1993). Here, the CO raised three specific and separate issues, citing to three specific and different regulations she had determined the Employer to be in violation of, and provided specific instructions on how to address and rebut each of those findings. Employer failed to address, in any way whatsoever, two of the three issues raised in the NOF. On this basis, we conclude 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.