U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 September 2003

BALCA Case Nos.: 2003-INA-32
2003-INA-33
2003-INA-34
2003-INA-35
2003-INA-36

ETA Case Nos.: P2002-PA-03376922
P2002-PA-03375945
P2002-PA-03375944
P2002-PA-03375943
P2002-PA-03375942

In the Matters of:

CITY BLUE INC.,
Employer,

on behalf of

SHIMON MARZIANO, MICHEL CHITRIT, MORDECHAY BEN HAMO, SHLOMI NADAV, MOSHE ATTIAS
Aliens.

Appearance: Joseph M. Rollo
for Employer and Alien
Philadelphia, Pennsylvania

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. City Blue, Inc. ("Employer") has filed an application for labor certification on behalf

of Shimon Marziano, Michel Chitrit, Mordecay Ben Hamo, Shlomi Nadav and Moshe Attias ("Aliens").[1] Employer sought to employ Aliens to fill the positions of Alteration Tailor.[2] (AF 44) Two years of experience in the job offered was required.

This decision is based on the records upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

In August 2002, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the grounds that the job opportunity was not clearly open to U.S. workers. (AF 40-41). The CO advised Employer that there was insufficient information to clearly establish that the positions actually existed. Specifically, it appeared to the CO that the positions may have been created solely for the purpose of qualifying the aliens as skilled workers under current immigration law. It was not customary, the CO noted, that Employer's store should need to employ five alteration tailors. The CO directed Employer to correct the deficiency by establishing that the positions existed by answering the following questions with responses and substantiating documentation. (AF 41).

> (1) Do you sell clothing for children, men or women?
>
> (2) What type of clothing do you sell, i.e., sports, casual, men's suit, women's dresses, etc.?
> (3) What percentage of the clothing you sell are altered? Provide copies of the contracts or work orders of the offsite contractors whose services the employer. In

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[1] 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."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the records upon which the CO denied certification and Employer's request for review, as contained in the respective appeal files and any written arguments. 20 C.F.R. § 656.27(c).

[2] In this decision "AF" refers specifically to the Shimon Marziano Appeal File as representative of the Appeal File of all appeals. A virtually identical application was filed for all Aliens and the issues raised and dealt with by the CO *(i.e.*, NOF, FD, etc.,) in each case are essentially the same.

addition, list the type of alterations performed and provide proof in the form of receipts to show that customers have paid for these alteration services.
(4) How many alteration tailors do you employ, if any?
(5) If no alternation tailors are currently employed, what circumstances led to the current job offer?

(AF 41). Employer submitted its timely rebuttal on August 28, 2002. In rebuttal Employer argues, *inter alia*, that City Blue, Inc. is a retail chain of approximately 28 retail clothing stores in Pennsylvania, New Jersey, Delaware and Ohio. (AF 30-35). In response to the CO's questions, Employer included a list of its stores with their location details. Employer also identified what type of clothing it sells. Employer further stated that most of the clothing sold at City Blue is imported and thus is frequently in need of alteration. Employer added that 45-50% of the merchandise sold requires some type of alteration, which Employer offers to customers for free, and therefore separate receipts for these services are not available. Finally, Employer stated that it is seeking to sponsor additional workers because of recent store expansion.

In a Final Determination, dated September 27, 2002, the CO denied certification on the grounds that Employer's rebuttal was not acceptable. (AF 27-29). The determination to deny certification was based upon the CO's findings that the job opportunity is not clearly open to U.S. workers. Specifically, the CO found that Employer failed to document that it actually does alterations. Since there appeared to be a question as to whether or not the job actually existed, a local representative conducted an on-site visit. (AF 29). The representative personally inquired about having some alterations done and was told that alterations were not provided to customers at all. Additionally, the local office randomly placed phone calls to nine of Employer's establishments to inquire whether alterations were done on merchandise purchased from Employer's stores. In each one of the inquiries the person answering at City Blue, Inc., stated that no alteration tailors were available and that alteration services are not provided to customers.

On November 4, 2002, Employer requested review of CO's denial determination on the grounds that the CO failed to explicitly request documentation of Employer's expansion and thus has

committed reversible error.

DISCUSSION

In *Carlos Uy, III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), the Board held that a CO may properly invoke the bona fide job opportunity analysis authorized by 20 C.F.R. § 656.20(c)(8) if the CO suspects that the application does not represent a *bona fide* job opportunity. When the CO invokes section 656.20(c)(8), however, administrative due process mandates that he or she specify precisely why the application does not appear to state a *bona fide* job opportunity. It is the employer's burden following the issuance of an NOF to perfect a record that is sufficient to establish that a certification be granted. The Board in *Uy* rejected the employer's contention that where a CO does not request a specific type of document, an undocumented assertion must be accepted and certification granted.

In the instant case, the only ground stated by Employer for seeking Board review is that the CO committed reversible error by not explicitly requesting documentation of Employer's planned expansion. Additionally, Employer contends that the CO failed to give appropriate weight to Employer's rebuttal. We note, as to the first ground for appeal, that contrary to Employer's contention, the CO's instructions in the NOF were explicit and Employer's claim that they were vague is unsupported by either reason or the evidence of record. *See* (AF 41).[3] The NOF clearly alerted Employer that there was a question as to whether or not the job actually existed such that the opportunity was clearly open to U.S. workers. The contention that the CO ignored the rebuttal evidence submitted by the Employer is rejected as patently inconsistent with the record, as it offered no evidence whatsoever in support of the rebuttal arguments stated by its lawyer. *Sun Valley Co.*, 1990-INA-393 (Jan. 6, 1992).

[3] Since the CO instructed Employer to describe and document the circumstances that led to the current job offer, such circumstances could reasonably be interpreted by Employer and Employer's counsel to include expansion of Employer's business. Additionally, the NOF provides, in pertinent part, that: "Your responses, documentary evidence, and all other relevant factors, will be evaluated to determine whether the position actually exists. The adequacy of the documentation will be key to the evaluation."

The crux of Employer's argument for its need for alteration tailors is that most of its clothing is imported from Hong Kong, France, England, Italy and Taiwan. (AF 30-35). Many of the pieces produced in these countries, Employer contends, come in a variety of sizes which differ from U.S. sizing charts. *Id.* Additionally, Employer argues that it is seeking additional workers in order to handle increasing workload caused by store expansion. Despite the CO's inquiry, however, Employer presented no evidence demonstrating that it actually does alterations or that it has been under expansion.

In *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), the Board held that "written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve." A bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Here, we find that Employer's statements failed to credibly establish the existence of a *bona fide* job opportunity clearly open to any qualified U.S. worker. Accordingly, labor certification was properly denied.

ORDER

Accordingly, the Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

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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.