

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)



Issue Date: 16 August 2004

BALCA Case No.: 2003-INA-211
ETA Case No.: P2001-CA-09509975/ML

In the Matter of:

ROSS JEFFREY,
Employer,

on behalf of

MARGARITA MORENO,
Alien.

Appearance: Leonard Stitz, Esquire
Santa Ana, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a United States Department of Labor Certifying Officer ("CO") of his application for alien labor certification. Permanent alien labor certification is governed by § 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 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. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On August 20, 1999, the Employer filed an application for labor certification on behalf of the Alien to fill the position of domestic cook. The duties of the job included cooking a variety of dishes, planning menus, cleaning the kitchen, serving meals, and purchasing food. (AF 22). The application specified a forty hour work week, from 7:00 am to 3:00 pm daily, with overtime as needed.

The CO issued a Notices of Findings (“NOF”) on November 21, 2002, notifying the Employer that the application made it unclear whether the domestic cook position had been and was currently open to any qualified U.S. workers. (AF 15). To establish that a permanent, full-time position existed and was available to a U.S. worker, the CO requested that the Employer provide additional information, including the Employer’s tax returns, the time required for meal preparation, meal time(s), and the rationale for hiring a full-time cook in the household, if a domestic cook had not been previously employed by the Employer. (AF 15-16). The Employer filed a timely rebuttal which stated, *inter alia*, that the cook would be required to prepare, serve and clean up breakfast and dinner for the Employer and his family, and prepare lunches for the Employer’s two children to take to school. (AF 9). Breakfast was to be served at 6:30 a.m., the children’s lunches prepared by 8:30 a.m., and dinner was to be served at 6:00 p.m. The Employer allotted anywhere from forty-five minutes to one hour each for these tasks.

In the Supplementary NOF (“SNOF”), the CO proposed to deny certification, noting that the Employer’s rebuttal failed to resolve the issue of *bona fide* employment raised in the November NOF, and that the Employer had listed 5:45 am to 7:00 pm as the work schedule on its rebuttal in contradiction to the 7:00 am to 3:00 pm work schedule listed in its application. (AF 18). The CO also noted that the hours listed in the rebuttal totaled only 5 3/4 hours of work per day, not the eight hours listed in the Employer’s application.

The CO also found two additional issues raised by the rebuttal: (1) an unduly restrictive job requirement because a 7 1/2 hour gap between the morning and evening duties necessitated the split shift work schedule; and (2) an impermissible combination of the duties of a domestic

cook and child monitor. (AF 18). In his timely rebuttal dated February 23, 2003, the Employer responded by stating that the cook would work eight hours per day, from 7:00 a.m. to 4:00 p.m. (AF 8). The Employer also removed the child care requirement from the job description. No mention was made of whether the cook would still be required to prepare, serve and clean up dinner.

The CO issued the Final Determination (“FD”) on April 10, 2003. In his review of the Employer’s rebuttal, he noted that the Employer had failed to correct the deficiencies listed in the SNOF. (AF 7). Specifically, the Employer failed to establish that a *bona fide* job offer for full-time, permanent employment existed when it provided contradictory work schedules for the position. The CO also concluded that the position required a split-shift work schedule, an impermissible restrictive requirement, as the worker’s duties included cooking both breakfast and dinner. For those two reasons, the CO denied certification.

The Employer subsequently filed a timely Request for Administrative Review dated May 6, 2003 and the matter was docketed by the Board on June 10, 2003. (AF 1). A Statement of Position was timely submitted by the Employer on July 8, 2003 in support of his appeal.

DISCUSSION

The CO determined that the Employer’s rebuttals had failed to resolve the restrictive requirement issue. The FD stated that the 7:00 am to 4:00 pm work schedule described by the Employer contradicted the job duty of serving meals in the evening. (AF 4). The CO concluded that the position required working a split shift, an impermissible restrictive job requirement. 20 C.F.R. § 656.21(b)(2).

The regulations place the burden on the employer to show that the job opportunity’s requirements either (a) are those normally required for the job in the United States, (b) are those defined for the job in *Dictionary of Occupational Titles* (DOT), or (c) arise from a business necessity. 20 C.F.R. § 656.21(b)(2). The Employer presented no evidence that a domestic cook position normally requires a split-shift schedule, that the DOT includes the split-shift schedule as

a requirement for a Domestic Cook, or that the split-shift schedule arose from a business necessity. In the Employer's statement of position, the Employer argues that the CO erred in concluding that the job duties cannot be performed absent a split-shift schedule. The Employer maintains that the position requires no split shift because there is no need for the cook to stay after 4:00 p.m. at the residence. Instead, the cook is required to prepare dinner for the Employer's family from 1:00 p.m. to 3:00 p.m., clean up from 3:00 p.m. to 4:00 p.m. and may leave the prepared dinner for the family to reheat and serve at their leisure.

We need not consider the work schedule submitted by the Employer for the first time in the statement of position, as it is not part of the record upon which the CO's denial of certification was based. *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989) (*en banc*). However, we note that this third version of the job position's work schedule still contradicts the job duty of serving all meals, including dinner at 6:00 p.m. The Employer consistently listed "serving meals" as a job duty in the application for certification, the rebuttal to the NOF, and newspaper advertisements describing the position. (AF 9, 22, 25, 35). In lieu of independent documentation that the assertion was credible or true, the CO was not required to accept the Employer's written rebuttal to the SNOF asserting that no split shift was required; he was obligated only to consider it and give it the weight it rationally deserved. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Confronted with multiple, contradictory versions of the position's work hours, but only one version of the job duties, the CO properly concluded that the Employer failed to show that the duties of the domestic cook position did not require a split-shift schedule.

We agree with the CO that the Employer violated 20 C.F.R. § 656.21(b)(2) by failing to establish that no unduly restrictive job requirement existed. Accordingly, the denial of certification must be affirmed, and it is not necessary to reach the issue of whether a *bona fide* job offer existed.

ORDER

The CO'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 OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.