#### **U.S. Department of Labor**



Board of Alien Labor Certification Appeals 800 K Street, NW, Suite 400-N Washington, DC 20001-8002

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Issue Date: 22 January 2004BALCA Case No. 2002-INA-275

ETA Case No. P2000-CA-09487845/MR

*In the Matter of:* 

#### HOLLEN IVONNE SMITH,

Employer,

on behalf of

## MANUELA ENRIQUEZ,

Alien.

Appearance: Maria Magueda

Huntington Park, California

For Employer

Certifying Officer: Martin Rios

San Francisco, California

Before: Burke, Chapman and Vittone

Administrative Law Judges

## **DECISION AND ORDER**

**PER CURIAM.** This case arises from an application for labor certification on behalf of Manuela Enriquez ("the Alien") filed by Hollen Ivonne Smith ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and 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 3, 1998, Employer filed an application for labor certification on behalf of the Alien for the position of Cook. (AF 67-68).

On November 23, 2001, the CO issued a Notice of Findings ("NOF") indicating the intent to deny the application on the ground that Employer's application did not provide sufficient information to determine if the position was a bona fide job opportunity in accordance with 20 C.F.R. § 656.20(c)(8). (AF 60-65). The CO submitted a questionnaire to Employer in order to assess if the job was a bona fide employment opportunity. The CO also delineated a series of deficiencies found in the employment contract. The CO required Employer to correct each of the provisions of the contract that were found to be deficient. Additionally, the CO found that Employer did not sufficiently document the Alien's one year paid experience in a live-in position. To remedy that deficiency, the CO required Employer to provide statements from Alien's past employers indicating specific details about the Alien's work experience. (AF 61–65).

In her Rebuttal dated January 24, 2002, Employer answered all questions presented by the CO. (AF 27-55). Among the answers, Employer asserted that the position required the preparation of three meals a day, five days a week, for a total of fifteen meals a week. The preparation time for each meal took around one and a half hours. Employer indicated that she did not entertain on a regular basis. However, because both spouses worked outside the home, they required a domestic cook for themselves and their six year old son. Both spouses worked from 7:30 a.m. to 4:00 p.m. and their son attended school from 8:00 a.m. to 2:00 p.m. Employer stated that the worker took care of their son until the parents got home from work. Employer also asserted that the position did not exist before hiring the Alien, as they did not previously have a need for a domestic cook. Employer amended the employment contract as requested by the CO. Employer also submitted statements from the Alien's previous

employer documenting the Alien's previous paid experience in a live-in position. (AF 27-55).

On March 4, 2002, the CO issued a Second Notice of Findings ("SNOF"). (AF 24-26). In the SNOF, the CO indicated that Employer's Rebuttal did not persuasively demonstrate that the position offered was a bona fide full-time, forty hours a week job for a domestic cook, in accordance with 20 C.F.R. § 656.20(c)(8). The CO noted that Employer stated that the Alien performed other tasks not related to cooking, such as caring for the six year old child and cleaning, duties associated with a general houseworker. To remedy the deficiency, Employer was required to document that the position was a bona fide full-time job for a domestic cook. Additionally, the CO found that the employment contract had to be amended further to state the exact duties that the Alien had to perform, which could not include tasks other than that of a cook. (AF 26).

On March 26, 2002, Employer submitted her rebuttal to the SNOF. (AF 4-23). Employer provided detailed descriptions of the daily routine of the Alien as a domestic cook. In general, the cook would spend around half an hour preparing breakfast, an additional half an hour preparing lunch and two to three hours preparing dinner. An amended contract was also submitted by Employer. Employer asserted that she had demonstrated that there was a need for a domestic cook in her household and that the position was a bona fide offer of employment. (AF 7-13).

On May 28, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 2-5). The CO found that the documentation submitted by Employer failed to establish that a bona fide position existed. The CO added that according to Employer's detailed description of the Alien's daily tasks, the Alien did not spend eight hours a day preparing, cooking and serving meals during the workweek. Therefore, Employer's Rebuttal was not persuasive that the job offer was a full-time, forty hour a week position. Accordingly, the CO denied the labor certification application.

Although the AF does not contain Employer's request for reconsideration, on July 1, 2002, the CO denied Employer's Request for Reconsideration on the grounds that Employer did not raise issues that could not have been raised in the rebuttal. (AF 1). As per Employer's request, the file was forwarded to the Board for review and the matter was docketed in this Office on August 30, 2002. Employer filed a Statement of Position on October 4, 2002.

## **DISCUSSION**

The CO made a factual finding that Employer had not established that the job opportunity was for full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Under 20 C.F.R. § 656.3, "employment" means permanent full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full-time. *Mr. and Mrs. Stanley Tee*, 1994-INA-10 (June 27, 1995). Where an employer fails to demonstrate the volume of work necessary to support a full-time employee, it fails to establish full-time employment. *Tousi Rugs*, 1992-INA-374 (Sept. 29, 1993). As the employer bears the burden of proving that a position is permanent and full-time, certification may be denied if the employer's own evidence is not sufficient. While the CO's findings may not be based on speculation, undocumented statements of an employer which are inconsistent or illogical are not compelling evidence of entitlement to certification. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

The Board in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) used a totality of the circumstances test to determine if a position (specifically a domestic cook position for which the CO had questioned the bona fide nature of the position) supported full-time employment. The Board considered such factors as the percentage of an employer's income that would be devoted to paying the alien's salary, the total numbers of hours the alien would work per week, taking into consideration the industry standard,

whether the alien would be engaged in duties for a substantial portion of the working day, the credibility of the position, and whether Employer had motive to misdescribe the position. The totality of the circumstances test used a number of factors to determine whether a bona fide job opportunity existed. Such scrutiny is especially warranted where an employer has not previously employed a household cook, no other household workers are to be employed, and the record does not clearly indicate how the other household chores will be performed. *Marguerite Gorman*, 1995-INA-672 (Aug. 25, 1997).

In this case, the CO noted numerous deficiencies in Employer's application. Employer originally described the position with duties of both a domestic cook and general houseworker. (AF 61-62, 67). The CO also noted that the daily routine of the worker, in her capacity as a cook, only accounted for approximately five hours of cooking duties per day. The CO believed that this indicated that there was not enough work to support the full-time employment of a domestic cook. (AF 3). In addition, Employer stated that there are three people residing in the household (two adults and one child) and the family does not entertain other than a birthday party for their child. Employer provided a detailed description of the domestic cook's duties, including a weekly menu outlining the meal preparation. (AF 7-13).

As directed by *Carlos Uy III*, this case should be analyzed using a totality of the circumstances test because the bona fide nature of the job opportunity is being questioned. As noted by the CO and confirmed by Employer in his detailed work description, the Alien does not spend a full forty hour week performing cooking duties. Meal preparation time varies between three and five hours per day. This would not significantly increase due to Employer's entertainment schedule, as Employer has admitted that they do not entertain. Based solely on these duties, the worker would only be required to work between fifteen and twenty-five hours per week. The Board in *Leonard Green*, 1994-INA-213 (June 5, 1995) held that thirty hours per week is not full-time employment. This alone does not indicate the lack of a bona fide job opportunity, but it is indicative of the lack of credibility of the full-time nature of the position. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

Employer originally indicated that the Alien would perform caregiving duties for the child during the course of the day. Employer also required the Alien to perform housekeeping duties and other chores. (AF 28). This requirement, coupled with the fact that the worker's cooking duties only occupy a portion of the daily shift, suggests that there is not a bona fide job opportunity for a domestic cook. Rather, it establishes a combination of duties, *i.e.*, those of a domestic cook and a general houseworker.

Further, the totality of the circumstances demonstrates Employer's misdescription or mischaracterization of the position. Employer has already attempted to include housekeeping and child care duties under the guise of a domestic cook. Employer's elaborate description of the meals prepared by the worker does not hide the fact that the duties are not significant enough to account for full-time employment. As such, it appears that the job duties as described do not establish that there is a bona fide job opportunity. Employer has failed to provide adequate evidence to establish that the job opportunity is for full-time employment.

Consequently, for the above stated reasons we affirm the CO's denial and the following order will enter:

# **ORDER**

The CO's denial of labor certification in this matter 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 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.