U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 February 2004

BALCA Case No.: 2002-INA-222
ETA Case No.: P2000-NJ-02448369

In the Matter of:

ERICK & ELIZABETH GERSHON,
Employer,

on behalf of

TERESA L. GASSER,
Alien.

Appearances: John A. Nicelli, Esquire
New York, New York
For Employer and the Alien

Certifying Officer: Delores Dehaan
New York, New York

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 Teresa L. Gasser ("the Alien") filed by Erick & Elizabeth Gershon ("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 the regulations promulgated thereunder, 20 C.F.R. Part 656. 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 December 3, 1997, Employer, Erick & Elizabeth Gershon, filed an application for labor certification on behalf of the Alien, Teresa L. Gasser, for the position of "Houseworker-Live Out/Landscape Gardener," which the Job Service classified as "Landscape Gardener." (AF 31). The job duties for the position, as initially stated on the application, were as follows:

> Prepare, cook, serve meals, wash dishes, linens & cloths (sic). Clean furnishings, floor & windows. Clean grounds, maintain lawns, trees & shrubs in healthy condition. Check shrubs, plants & trees for disease & treat accordingly. Apply dry & liquid nutrients. Wax & polish floors. Mow & trim lawns. Locate & plant shrubs, trees & flowers selected by owner to obtain desired esthetic contour.

(AF 11).[1] The only stated job requirement for the position, as specified on the application, was two years experience in the job offered. (AF 11).

In a Notice of Findings ("NOF") issued on January 15, 2002, the CO proposed to deny certification on the grounds that the job opportunity involved a combination of duties, in violation of 20 C.F.R. § 656.21(b)(2) and Employer failed to establish that the job opportunity was clearly open to U.S. workers, in violation of 20 C.F.R. § 656.20(c)(8). (AF 21-23).

Employer submitted its rebuttal on or about February 6, 2002. (AF 25-29). The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated March 21, 2002, denying certification on the above grounds. (AF 35-36). Employer requested review and the matter was docketed in this Office on June 14, 2002. (AF 43).

[1]Employer subsequently amended the job duties by deleting "Prepare, cook, serve meals." (AF 31; *Compare* AF 11).

DISCUSSION

Under 20 C.F.R. § 656.21(b)(2)(ii), if the job opportunity involves a combination of duties it is presumed to be unduly restrictive. The presumption may be overcome if the employer documents that it has normally employed persons for that combination of duties; and/or workers customarily perform the combination of duties in the area of intended employment; and/or the combination of duties is based on a business necessity. 20 C.F.R. § 656.21(b)(2)(ii).

Accordingly, in the NOF, the CO found that Employer's application combined the duties of Landscape Gardener and Houseworker, General. These occupations were separate and distinct and the duties of both were not normally combined. The CO stated that Employer could rebut the finding by submitting evidence that Employer has normally employed persons for this combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and/or the combination of duties arises from a business necessity. Employer could also delete the combination of duties. (AF 21-22).

Employer's rebuttal consisted of Employer's letter, dated February 6, 2002 (AF 28-29); a copy of Employer's previously submitted letter, dated June 27, 2000 (AF 26-27); and, part of an article from The New York Times, dated June 20, 2000, on the effects of global warming. (AF 25).

Employer stated in Rebuttal that their home is 4,000 to 5,000 square feet in size and is situated on three and a half acres of property. The property consists of extensive gardens, a large tennis court, sitting areas, and a pond. It requires daily maintenance due to changes in season and decorations, as well as to prevent attacks from wildlife. Due to a temperate climate, outdoor maintenance is performed year-round. In addition, Employer's home requires constant maintenance; however, because Employer and his wife have full-time jobs and two teenage children, they do not have the time to maintain

the property and the house themselves. Employer found that it was too expensive to have outside contractors maintain the home and for security purposes, Employer did not want different outside workers coming to the home. As such, Employer stated that there was a need for one individual to care and maintain Employer's home and property. Employer determined that based on these reasons, this was a business necessity, not merely a matter of convenience. (AF 26-29).

In the FD, the CO found Employer's rebuttal regarding the combination of duties issue to be inadequate. (AF 35-36). The CO stated that Employer merely reiterated that the combination of duties was essential but failed to establish that Employer has normally employed persons for this combination job opportunity and/or that workers customarily perform the combination of duties in the area of intended employment. The CO determined that Employer failed to demonstrate business necessity for the combination of duties and did not establish why it was impractical to hire both a Landscape Gardener and a Houseworker, General. The CO believed that there was sufficient work to support both positions, but as one position, the job opportunity appeared to be tailored to the Alien's qualifications. (AF 35). We agree.

As we held in *Robert L. Lippert Theatres*, 1988-INA-433 (May 30, 1990)(*en banc*):

> An employer must document that it is necessary to have one worker to perform the combination of duties, in the context of the employer's business, including a showing of such a level of impracticability as to make the employment of two workers infeasible. Implicit in this holding is a showing by the employer that reasonable alternatives such as part-time workers, new equipment and company reorganization are infeasible. A showing that the duties are essential to perform each other also helps to show business necessity, although such a showing is not necessary.

In the present case, Employer did not provide the specific documentation requested in the NOF. Instead, Employer simply expressed concern that hiring more than one person to perform the combination of duties would be too expensive, inconvenient, and/or a security risk. (AF 26-29). As set forth in the FD and in accordance with our

holding in *Robert L. Lippert Theatres, supra,* Employer failed to adequately document why other alternatives would not be feasible, such as hiring two employees to handle the positions (*i.e.,* houseworker and landscape gardener, respectively). Furthermore, Employer failed to explain why their security concerns could not be addressed through other means, such as an electronic security system. Finally, we note that the unusual combination of job duties also suggests that the requirements have been tailored to the Alien's qualifications and abilities. (AF 12). This also tends to undercut Employer's argument of business necessity. *See, e.g., Chinese Community Center, Inc.*, 1990-INA-99 (June 4, 1991) (holding that an assertion that a combination of duties would produce financial savings for the employer is not sufficient to justify business necessity).

In summary, Employer failed to submit evidence that they have normally employed persons for the combination of duties and/or that workers customarily perform the combination of duties in the area of intended employment. Furthermore, Employer's assertions of convenience and practicality are insufficient to establish that the combination of duties arises from a business necessity. As stated above, Employer failed to provide adequate documentation to support their contentions and/or to document why other alternatives would not be feasible, as reasonably requested in the NOF. In view of the foregoing, 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 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 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.