U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue Date: 25 February 2004

BALCA Case No.: 2003-INA-27
ETA Case No.: P2001-FL-04381994

In the Matter of:

EVA V. RUS-BIASON,
Employer,

on behalf of

LEONOR M. PASTOR,
Alien.

Certifying Officer: Floyd Goodman
Atlanta, Georgia

Appearances: William J. Sanchez, Esquire
Miami, Florida
For Employer and the Alien

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 Eva V. Rus-Biason ("Employer") on behalf of Leonor M. Pastor ("the Alien") for the position of Child Tutor. (AF 56-57).[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").

[1] 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 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On April 29, 2001, Employer filed an application for alien labor certification on behalf of the Alien for the position of Child Tutor. Job duties included caring for the child in and out of the home. Minimum requirements for the position were listed as two years, six months experience in the job offered, and knowledge of Spanish was preferred. Hours of employment were listed as 8:00 a.m. to 5:00 p.m. and the rate of pay was listed at $12,000 per year and later amended to $14,144 per year. (AF 48-49, 56-57).

On December 26, 2002, the CO issued a Notice of Findings ("NOF") proposing to deny labor certification on several bases. (AF 44-47). In accordance with 20 C.F.R. § 656.20(c)(8), the CO challenged whether a bona fide job full-time job opportunity existed, noting that the majority of hours scheduled for the tutor were during the hours that children are normally in school. Employer was instructed to provide documentation of a bona fide job opportunity, including schedules for the child, the parents and the tutor. (AF 45-47).

In Rebuttal, Employer responded that the thirteen year old child was in school from 8:00 a.m. to 3:00 p.m. The tutor's schedule including tasks such as shopping, cooking and preparing lesson plans or other activities for the child, with two hours per day spent with the child. (AF 16-31).

On May 1, 2002, the CO issued a Final Determination ("FD") denying labor certification based upon a finding that Employer had failed to show that a bona fide full-time job opportunity existed. (AF 14-15).

Employer filed a Request for Review by letter dated June 4, 2002 and the matter was docketed in this Office on December 4, 2002. (AF 1-13). Employer filed a Statement of Position on January 31, 2003.

DISCUSSION

Requiring that an employer demonstrate that the job opening is bona fide ensures that a true job opening exists. In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), the Board held that a CO may correctly apply the bona fide job opportunity analysis of 20 C.F.R. § 656.20(c)(8) when it appears that the job was misclassified as a skilled domestic worker rather than some other unskilled domestic service position, or where it appears that the job was created for the purpose of promoting immigration. It is the employer's burden to establish that the job opportunity is bona fide. *Gerata System America, Inc.,* 1988-INA-344 (Dec. 16, 1988) (*en banc*); 20 C.F.R. § 656.2(b).

In the instant case, the CO observed that the Alien had been employed by Employer as a tutor since January 1998 and therefore it was not clear if a bona fide job opening existed. (AF 47). The CO questioned whether the children were home schooled, given that the majority of hours scheduled for the tutor were during the time that children are normally in school, and requested documentary evidence of the schedules of the parents, the children and the tutor.

As the Board noted in *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc),* "the lack of sufficient duties to keep a worker gainfully employed for a substantial part of a work week may be relevant to the issue of whether the employer is offering a *bona fide* job opportunity. If an employer appears to be mischaracterizing a job or to have created the job for the purpose of assisting the alien's immigration, the CO may properly question the application under section 656.20(c)(8)." *Schimoler*, *supra at* 5.

Furthermore, the Board previously held that a job opportunity for a child tutor was not bona fide when the employer could not substantiate that the job was full-time. *Ruth Hai*, 1993-INA-111 (June 9, 1994). The tutor was to spend three hours preparing to tutor and five hours tutoring the child after the child had returned home from school. The employer made only self-serving statements regarding the bona fide nature of the position and changed the job description multiple times. The Board determined that the

schedule was unrealistic and the employer had not presented any evidence other than her own assertions that the job was full-time. Id.

Employer represented that she has one child who attends school during the majority of hours the tutor is employed. Employer provided a schedule of the tutor's workweek which appears to include an excessive and unrealistic schedule of preparation for very little contact or interaction with the child she is purportedly employed to tutor. The tutor spends six hours preparing for two hours of interaction with the child. (AF 17). The job is described as entailing the "care, overseeing, teaching and taking disciplinary measures" of a child with whom she spends only ten hours of her forty-hour workweek. Thus, we concur with the CO's conclusion that it is "unreasonable to accept that 30 hours of a work week are needed to prepare to tutor a child for 10 hours a week" and on this basis, 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 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.