



Issue Date: 02 March 2004

BALCA Case No.: 2002-INA-267
ETA Case No.: P2001-NY-02467208

In the Matter of:

ANGELINA MONGIOVE,
Employer,

on behalf of

GLYNIS LORRAINE NAPOLEAN,
Alien

Appearance: Peter E. Torres, Esquire
New York, New York
For Employer and the Alien

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges



DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Glynis Lorraine Napolean (“the Alien”) filed by Angelina Mongiove (“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 January 5, 1998, Employer filed an application for labor certification to enable the Alien to fill the position of “Live-in Domestic,” which was classified by the Job Service as “Houseworker, Gen’l, Live-In.” The job duties for the position included cooking, cleaning and child care for three children. The only stated job requirement for the position was three months experience in the job offered. (AF 17).

In a Notice of Findings (“NOF”) issued on April 4, 2002, the CO proposed to deny certification on the grounds that Employer’s documentation of the Alien’s past paid experience was deficient, pursuant to 20 C.F.R. § 656.21(a)(3).¹ (AF 31-33).

Employer initially submitted rebuttal evidence on May 2, 2002. (AF 34-44). In addition, the AF reveals that Employer sought to supplement the rebuttal under cover letter, dated May 8, 2002. (AF 55-69). The CO found the rebuttal unpersuasive regarding the above-cited deficiency and issued a Final Determination (“FD”), dated June 4, 2002, denying certification. (AF 45-46). On or about July 3, 2002, Employer filed a Request for Review. (AF 72-73). The matter was docketed in this Office on August 26, 2002; Employer filed an appeal brief on September 27, 2002.

DISCUSSION

The CO’s denial of labor certification is grounded on Employer’s inability to establish at least one year of past paid experience and thereby remove the application for a household domestic service worker from Schedule B. *See* 20 C.F.R. § 656.11(b)(26). In the absence of such action, an employer seeking a labor certification for a Schedule B

¹ The other deficiency cited in the NOF questioned the business necessity of the live-in requirement. (AF 32). However, in the Final Determination, the CO stated that Employer had successfully documented the business necessity for the requirement under 20 C.F.R. § 656.21(b)(2)(i). (AF 45).

occupation may petition for a waiver pursuant to 20 C.F.R. § 656.23. *See* 20 C.F.R. § 656.11(a)(26).

In the NOF, the CO stated, in pertinent part:

For live-in domestic occupations Section 656.21(a)(3) requires documentation of the alien's past paid experience in the form of statements from past or present **(not sponsoring)** employers setting forth the dates employment started and ended, place where the alien worked, a detailed statement of the duties performed on the job, and the wages paid for such duties.

(AF 32). The purpose of requiring this documentation is to establish that the alien understands “the demands unique to household domestic service work” and is likely to continue in this occupation.” Id.

The initial rebuttal consisted of a letter from Employer's counsel, dated May 2, 2002, and a provision from the Technical Assistance Guide [TAG] which relates to “Documentation of Paid Experience.” (AF 34, 43-44). Employer argued that the regulations do not prohibit the sponsoring employer from demonstrating the one year paid experience. Employer's counsel argued that he “could not find” 20 C.F.R. § 656.21(a)(3), the regulation referred to by the CO and requiring documentation of the alien's previous experience from a non-sponsoring employer. (AF 43).

On May 8, 2002, Employer's counsel provided supplemental rebuttal: a cover letter and a “Statement by Employer in Support of One [Year] Experience Requirement.” (AF 68-69). The AF indicates that the supplemental rebuttal was sent by certified mail on May 8, 2002 and was received by the CO on May 13, 2002. (AF 55). Accordingly, the supplemental rebuttal was mailed in a timely manner, one day prior to the deadline stated in the NOF. (AF 33).

In the FD, dated June 4, 2002, the CO found the rebuttal inadequate regarding this issue, stating that a sponsoring employer cannot provide past paid experience to satisfy the one year experience requirement for the Alien. (AF 45-46). The CO noted that

Employer argued this was not correct, according to § 656.21(1)(b) of the Technical Assistance Guide. Although Employer claimed to have submitted a statement in support of the one year experience requirement, the CO found that the statement was not provided. On appeal, Employer requests that the case be remanded to the CO for consideration of the May 8, 2002 submission. (AF 72-73).

We find that the CO's failure to address Employer's supplemental rebuttal statement constituted harmless error. In making this determination, we find Employer's attempt to document that the Alien had one year paid experience is, on its face, clearly inadequate.

Employer had previously submitted documentation, dated October 7, 2000, which stated that the Alien had been working for her as a domestic worker since May 1996. The Alien worked five days per week, over forty-four hours per week at a salary of \$200 per week. Furthermore, Employer listed the Alien's job duties. (AF 2). However, this Board has repeatedly held that the alien cannot establish the one year requirement through employment in the same job with the petitioning employer. The rationale for this holding is to require the alien to possess the required experience at the time of hire, so the alien does not acquire this experience at the unfair expense of other qualified workers. *See Roger and Denny Phelps*, 1988-INA-214 (May 31, 1989) (*en banc*); *Mark and Andrea Smith*, 1990-INA-178 (Jan. 19, 1993); *Greg A. Lindquist*, 1991-INA-345 (Dec. 16, 1992) (*en banc review denied*) (Mar. 3, 1993); *Marvin and Ilene Gleicher*, 1993-INA-3 (Oct. 29, 1993) (*en banc*).

In the ETA 750B, the Alien represented that prior to being hired by Employer, she had been employed as a full-time, Live-in Domestic, working over forty-four hours per week, for three previous employers: Cathy Volpe, from August 1995 to May 1996, Steven Glessing, from March 1994 to November 1994, and Lucy Neuwirth, from March 1991 to March 1994. (AF 3).

As stated in the NOF, the CO instructed Employer to provide "documentation of

the alien's past paid experience in the form of statements from past or present (**not sponsoring**) employers setting forth the dates employment started and ended, place where the alien worked, a detailed statement of the duties performed on the job, and the wages paid for such duties." (AF 32). In Employer's initial rebuttal submission, Employer did not provide the requested statements from the Alien's past employers. Instead, Employer argued that the sponsoring employer should also be allowed to present such evidence. (AF 34, 43).

In her supplemental rebuttal statement, Employer stated that the Alien had told her that she had worked for three previous employers. The details of the employment were noted on the ETA 750B. (AF 3). Employer stated that she went to visit the Alien's former employer, Lucy Neuwirth, at her home, located at 50 Prince Street in Staten Island, New York on May 5, 2002. Employer claimed that a neighbor told her Ms. Neuwirth no longer lived there and had no forwarding address to contact her. (AF 67-68).

Employer's supplemental rebuttal statement apparently sought to use the TAG exception (unknown relocation of an employer) as the basis for providing an alternative source of documentation (Employer's own statement), in lieu of statements by the Alien's other employers.

Upon review of Employer's supplemental rebuttal statement, however, we find that it is entitled to no weight. First, we find Employer's reliance upon an unnamed neighbor's alleged statement regarding Mrs. Neuwirth's whereabouts to be unpersuasive. Furthermore, we note that even if Mrs. Neuwirth had been unavailable, Employer could have documented the Alien's one year past experience, as directed by the CO in the NOF, by submitting statements from Cathy Volpe and Steven Glessing (Alien's alleged combined experience with these employers was greater than one year). (AF 3). Moreover, assuming that Employer had established that all of the Alien's prior employers had died or had moved to distant locations and left no forwarding addresses, Employer's statement still does not establish that she personally knew of the Alien's prior work

experience or periods of employment. To the contrary, Employer's statement regarding the Alien's past work history is based solely upon the representations made to her by the Alien. (AF 67-68).

In summary, petitioning Employer only has personal knowledge of the Alien's work experience while in her employ. As stated above, such experience cannot establish the one year requirement. *Roger and Denny Phelps, supra; Mark and Andrea Smith, supra; Greg A. Lindquist, supra; Marvin and Ilene Gleicher, supra.* Employer's statement regarding the Alien's prior past paid experience is based on the Alien's self-serving statements to Employer, when hired. It is not based upon Employer's personal knowledge. Therefore, Employer's rebuttal, including her supplemental statement, does not constitute adequate documentation under 20 C.F.R. § 656.21(a)(3).

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