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: 16 March 2004

BALCA Case No.: 2003-INA-12
ETA Case No.: P2002-NY-02482519

In the Matter of:

KRISTIN ROBIE,
Employer,

on behalf of

SOPHIA PHILOMENA DOMINIQUE,
Alien.

Appearance: Mark N. Fish, 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 arises from an application for labor certification on behalf of Sophia Philomena Dominique ("the Alien") filed by Kristin Robie ("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 March 21, 2001, Employer filed an application for labor certification on behalf of the Alien for the position of "Live-in Housekeeper," which the Job Service classified as "Houseworker, Gen'l, Live-In." The job duties for the position were general housekeeping, vacuuming, laundry, dusting, ironing, cooking and helping to care for a child. The only stated job requirement for the position was three months experience in the job offered. (AF 33).

In a Notice of Findings ("NOF") issued on May 28, 2002, the CO proposed to deny Employer's request for Reduction in Recruitment and the application for labor certification on the grounds that Employer failed to establish that the live-in houseworker would be provided a private room and board at no cost to the worker, as provided in 20 C.F.R. § 656.21(a)(3)(I). (AF 18-19). Employer's counsel submitted rebuttal on July 2, 2002, wherein it was argued that Employer intended to partition the living room portion of Employer's apartment to create private quarters for the Alien. (AF 20-22).

The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated August 14, 2002, denying certification. (AF 25-26). On September 18, 2002, Employer filed a request for review and the matter was docketed in this Office on October 16, 2002. (AF 36-37).

DISCUSSION

Employer bears the burden of complying with the regulatory requirements for live-in workers. *Sandra Ross*, 1989-INA-42 (Oct. 30, 1989). Mere assertions without supporting documentation are generally insufficient to carry Employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Rajwinder Kaur Mann*, 1995-INA-

328 (Feb. 6, 1997).

The CO, in the NOF, raised the issue of the private room for a live-in worker required by 20 C.F.R. § 656.21(a)(3)(I). (AF 18-19). The CO stated that Employer's residence consisted of three rooms (two bedrooms and a living/dining room) for three family members (two adults and one child). The CO questioned whether a private room could be guaranteed for the worker, as the residence did not contain three bedrooms. (AF 19). In rebuttal, Employer stated that the living room was large enough to partition part of the room to create a private bedroom for either the Alien or the child. (AF 22). In the FD, the CO responded that at this time, Employer could not offer the Alien a private room and that therefore, certification was denied. (AF 25). Employer, in its Request for Review, reiterated that construction of such a partition would create a permanent, private room. Employer also stated that until the partition was constructed, the Alien could use the child's room and the child would share a room with the parents. (AF 36-37).

The mere assertion by Employer that the living room/dining room is large enough to partition does not constitute adequate documentation that there is currently a private room available for a live-in household worker.[1] The fact that Employer is capable of constructing a partition to create a private room does not establish that the private room is available for the Alien. Employer's assertions are not corroborated by any documentary evidence supporting Employer's intention to construct such a partition. Employer has only stated that the living room is large enough to accommodate a separate room and that this room would be sufficiently large "by Manhattan standards." (AF 36). Employer's offer to temporarily house the Alien in the child's room is not sufficient, as it does not guarantee a private room for the Alien. As such, Employer's statement fails to satisfy his

[1] Although not the basis for our decision herein, we note that the record raises serious questions regarding the business necessity of the "live-in" requirement inherent in the job title of the position offered. *See* 20 C.F.R. § 656.21(b)(2)(iii). The ETA 750B, dated March 15, 2001, signed by the Alien, stated that she began working for Employer in November 2000 as a "Live-in Housekeeper." (AF 6). However, the same document, as well as the ETA 750A form, listed different addresses for the Alien and Employer. (AF 7,10). Furthermore, on appeal, dated September 18, 2002, Employer's counsel represented that "the alien does not currently live-in at this position but it is the intention of both the alien and the sponsor that the offer of employment is for a live-in position." (AF 37). This suggests that, approximately eighteen months after the application for labor certification was filed, the duties specified on the ETA 750A form were apparently still being performed, even though the Alien was not living at Employer's premises.

burden of proof to comply with the live-in requirements of 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 five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.