U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 July 2004

BALCA Case No.: 2003-INA-153
ETA Case No.: P2000-CA-09503044/JB

In the Matter of:

EAST WEST CLINIC,
Employer,

on behalf of

KUO HWA CHIANG,
Alien.

Appearances: Fred D. Borough, Esquire
Alhambra, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Medical Records Administrator.[1] The CO denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

[1] Permanent 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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On August 24, 1999, the Employer, East West Clinic, filed an application for labor certification to enable the Alien, Kuo Hwa Chiang, to fill the position of "Physician Assistant." Subsequently, on February 11, 2000, the Employer amended the job description to that of "Medical Records Administrator." (AF 45).

On April 24, 2002, the CO issued a Notice of Findings ("NOF"), proposing to deny certification based on a violation of 20 C.F.R. § 656.20(c)(8). (AF 40-42). A second and identical NOF was issued on October 25, 2002. (AF 29).[2] The CO found the fact that the Employer had amended its job description in the ETA 750A, such that the amended job description did not include any of the duties originally described in Item 13 of the ETA 750A, raised a question as to whether a bona fide job opportunity existed. The Employer was advised to include the following in rebuttal: (1) the number of employees on the payroll and their titles; (2) information regarding who was currently doing the duties of the medical records administrator and why this arrangement would no longer work; and (3) an explanation, if the job was newly created, why the position was needed at this time. (AF 30).

The Employer submitted rebuttal on November 20, 2002. (AF 17-28). The Employer stated that it had a total of nine employees and provided a list of names and titles. (AF 20-21). The Employer explained that the current holder of the position at issue was leaving "in the very near future" because of personal problems. (AF 18-19).

A Final Determination ("FD") was issued on December 18, 2002. (AF 15-16). The CO found that the Employer had failed to establish that there was a bona fide job opportunity, as its rebuttal did not establish that there was a current job opening or that a job existed at the time that the application was filed. At best, the Employer had established that it might have a job opening at some unspecified time in the future.

[2] Counsel for the Employer and the Employer submitted Affidavits affirming that they never received the NOF dated April 24, 2002. (AF 32-34). The CO re-issued the NOF, allowing the Employer the opportunity to file rebuttal. (AF 29).

Accordingly, the Employer had failed to establish that it had a current job opening to which a U.S. worker could be referred and the Employer remained in violation of 20 C.F.R. § 656.20(c)(8).

On January 21, 2003, the Employer filed a Request for Review. (AF 2-14). The CO treated this as a Motion for Reconsideration and denied the motion for reconsideration on February 5, 2003. (AF 1). The matter was docketed in this Office on April 10, 2003 and the Employer filed a brief on May 28, 2003.

DISCUSSION

With its Request for Review, the Employer has submitted new documentary evidence. This Board will not consider the material submitted with the request for review, as the regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. §§ 656.27(c), 656.26(b)(4); *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989)(*en banc*). Thus, evidence first submitted with the request for review will not be considered by the Board. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989)(*en banc*).

The Employer contends that it was not advised that it had to give a specific date by which the current employee would be departing and therefore this ambiguity in the NOF resulted in the Employer's failure to adequately address the issue. The Employer argues that this basis for denial was raised for the first time in the FD and therefore, the CO failed to give timely notice of the defect. The NOF cited the regulations at issue and clearly explained what was required to successfully rebut the findings made. (AF 30). The Employer was aware that the issue was whether a bona fide job opportunity existed. Therefore, the proposed reason basis for denial was well set forth in the NOF and the Employer's arguments in this respect are without merit.

In its Brief in Support of Appeal, the Employer argues that the fact that its rebuttal stated that the position at issue was currently filled, but that the employee would be

leaving, satisfied the requirement of 20 C.F.R. § 656.20(c)(4). However, the CO did not find that 20 C.F.R. § 656.20(c)(4) had been violated. With regard to 20 C.F.R. § 656.20(c)(8), the Employer contends that the new duties described in the amendment were not cited in the FD and therefore, it was assumed that the Employer's rebuttal cured the deficiency pursuant to that subsection, showing that the job opportunity was clearly open to qualified U.S. workers.

In the NOF, the CO pointed to the amendment to the job description as the basis for his questioning of whether there was a bona fide job opportunity. The Employer was advised that rebuttal needed to establish that a job opening existed for a Medical Records Administrator. Because the amendment to the job description was not raised again in the FD does not equate to a finding that the Employer has successfully rebutted the NOF and established that a bona fide job opportunity existed. There was no need for the CO to reiterate that the Employer had amended its job description. The issue was whether a bona fide job opportunity existed and the CO determined that it did not.

An employer has the burden of showing that a bona fide job opportunity exists and is open to U.S. workers. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*). Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*). In the instant case, at the time that the Employer filed the application for labor certification, the Employer already employed a Medical Records Administrator and there was no indication as to when or if she would be leaving that position. No evidence was provided that two such employees were needed. The Employer's argument was that once this employee left, it would need to hire a new employee for that position. Given the facts herein, the CO correctly determined that there was no job opening to which a qualified U.S. applicant could be referred at the time of the filing of the application or indeed, at any specific date in the future. Even at the time of the Request for Review, the employee remained in the position. As such, 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.