U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 July 2004

BALCA Case No.: 2003-INA-173
ETA Case No.: P2001-NY-02476765
In the Matter of:

AMY & PHILIPPE HEILBERG,
Employer,

on behalf of

ROSANNA AGUINALDO TABLADA,
Alien.

Appearance: Y. Judd Azulay, Esquire
Chicago, Illinois
For the 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 matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien employment certification. Permanent alien employment 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."). 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 January 31, 2001, the Employer filed an application for alien employment certification on behalf of the Alien, Rosanna Aguinaldo Tablada, to fill the position of Tutor. (AF 89-90). The job to be performed was described as teaching children English, mathematics, and computers. Instruction was to occur in the Employer's home.

On August 29, 2001, the New York Alien Labor Certification Office provided instructions to the Employer on how to conduct recruitment for the tutor position. (AF 10-11). In accordance with the instructions, the Employer advertised the position in the New York Daily News on September 9, 10, and 11, 2001. (AF 13-15). In response, the Employer received resumes from nine applicants. With the resumes, the State Agency sent the Employer instructions to "contact each applicant within two weeks and take appropriate follow up action." (AF 17-19).

The Employer sent letters by certified mail to Applicants #1-4, advising the applicants that they lacked the minimum two years experience it required for the position. (AF 22, 26, 28, 31-34, 55). The Employer also sent letters by certified mail to Applicants #5-9. In these letters, the Employer indicated to the applicants that they "may possible [sic] meet the minimum requirement [sic] for the position," but that documents pertaining to their work experience had to be verified. (AF 37, 40, 46, 49, 55). The Employer's form letter to these five remaining applicants made the following request:

> We request that you submit copies of work certifications for your position as a Tutor with the New York City Board of Education. The certification should specify the detailed duties and responsibilities, actual dates started (month/year) and finished working (month/year) and whether work was done on a part-time or full-time basis.

(AF 37, 40, 46, 49, 55). The Employer ultimately rejected all five of these applicants.

On September 6, 2002, the CO issued a Notice of Findings ("NOF"), proposing to deny certification on the grounds that the Employer rejected Applicants #5-7 for other

than lawful, job-related reasons. The CO stated that the Employer could rebut this finding by documenting specific lawful job-related reasons for rejection of the three applicants and explaining why it required applicants to bring certifications from the Board of Education to interviews. (AF 63-65). The CO additionally instructed the Employer to include in its rebuttal evidence fully establishing that a *bona fide* tutor position actually existed and that the Employer had employed the Alien in the job as described in its application for alien employment certification. Next, the CO instructed the Employer to submit documentation from the children's school showing the children's school schedules and subjects. Lastly, the CO inquired into the job duties of the Alien from her date of hire in 1998, and requested that the Employer "submit evidence of the Alien's work activities, such as lesson plans, records of teaching activities, progress reports, etc." (AF 63-65).

The Employer filed a rebuttal dated October 2, 2002, addressing the reasons it rejected the U.S. applicants for the tutor position. The CO accepted the portion of the Employer's rebuttal that addressed the rejection of Applicant #7, but determined that the rebuttal still failed to cure deficiencies regarding the rejections of Applicants #5 and #6. The CO noted that the Employer's rebuttal also failed to include any evidence establishing that a *bona fide* tutor position even existed. (AF 67-68). Accordingly, the CO issued a Final Determination ("FD") denying alien employment certification, dated October 22, 2002. (AF 70-72, 91-93).

On May 7, 2003, the Employer filed an appeal brief from the FD of the CO. On August 6, 2003, the Board dismissed this matter because the documentation in the AF indicated that the Employer's request for Board review was untimely. However, in a Motion to Reconsider received on August 12, 2003, the Employer submitted evidence that it had previously submitted a timely appeal from the CO's FD. Accordingly, the August 6, 2003, Order of Dismissal was vacated on August 14, 2003.

DISCUSSION

An employer who seeks to hire an alien for a job opening must demonstrate that it first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.,* 1987-INA-607 (October 27, 1988). Actions by an employer which demonstrate lack of an effort to recruit U.S. workers, or that prevent qualified U.S. workers from pursuing their applications, constitute grounds for denial of alien employment certification. *Id*.

When an employer files an application for alien employment certification, it is signifying that it has a *bona fide* job opportunity that is open to U.S. workers. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*). Inherent in this presumption is the notion that the employer legitimately wishes to fill the position with a U.S. applicant and will expend good faith efforts to do so. *Id*.

An employer who offers a job opportunity to an alien must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). If a U.S. applicant has applied for the position, the CO must consider the applicant able and qualified for the job opportunity if the applicant, by education, training, experience or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. 20 C.F.R. § 656.24(b)(2)(ii).

The Employer imposed additional requirements on Applicants #5 and #6. In its advertisement, the Employer described the tutor position the same way it did on its application for alien employment certification, and listed the two year experience requirement. (AF 13-15). Despite its listed job description and experience requirement, the Employer imposed additional requirements on U.S. applicants who applied for the position, specifically the requirement that they obtain certifications from the Board of Education.

The Employer found Applicants #5 and #6, who had three and four years of tutoring experience respectively, to be unsuitable for the tutor position because neither applicant was familiar with the "ERB" entrance test for which the Employer's older child was preparing at the time. (AF 47, 50, 64, 67-68). The Employer also stated that Applicant #5 had no formal computer training and that Applicant #6 had "no experience with the age group." (AF 54, 64, 68). These requirements for familiarity with the ERB test, formal computer training, and experience with young children were neither listed on the Employer's application for alien employment certification nor in the Employer's advertisement. Therefore, the Employer's rejection of Applicants #5 and #6 on these grounds cannot be considered rejection for lawful, job-related reasons. *See, e.g., Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991) (*en banc*).

Because the Employer failed to satisfy its burden of proof by demonstrating that it rejected the U.S. applicants for lawful, job-related reasons, the CO properly denied certification.

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 twenty 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.