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

BALCA Case No.: 2003-INA-202
ETA Case No.: P1999-CA-09472858

In the Matter of:

MAXINE R. NEWMAN, PH.D.,
Employer,

on behalf of

SARA ZALMANOWITZ,
Alien.

Appearances: Rafael Rose, Esquire
Los Angeles, 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 her application for alien labor certification. 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 ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20. The following decision is based 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 June 30, 1997, Maxine Newman, Ph.D. ("the Employer") filed an application for labor certification on behalf of Sara Zalmanowitz ("the Alien") to fill the position of "Psychological Evaluator/Assistant." (AF 103). The duties included meeting with clients, reviewing case history, evaluating conditions, and administering psychological tests, all performed under the supervision of a licensed psychologist. The position required working with patients with depression, anxiety, post-traumatic stress disorder, and panic disorder. The job required a Master's degree in Psychology, two years of experience in the job offered, familiarity with the listed neuropsychological and psychological tests, and the ability to speak fluent Hebrew and Yiddish.

The CO issued a Notice of Findings ("NOF") on August 15, 2001, proposing to deny certification pursuant to 20 C.F.R. § 656.20(c)(8). (AF 99-101). The Employer filed his rebuttal on September 7, 2001. On September 28, 2001, the CO issued a Final Determination ("FD") denying certification because the Employer failed to submit the requested documentation, namely the articles of incorporation, and failed to provide any proof that the Alien is not a partner or has no ownership relationship in the business. (AF 63). The Employer then sought administrative review. (AF 59). On April 15, 2002, the BALCA panel remanded the case to the CO for review under *Modular Container Systems Inc.,* 1989-INA-228 (July 16, 1991) (*en banc*), using the "totality of the circumstances" test to consider whether the Employer's application presents a *bona fide* job opportunity. (AF 50-51).

Following the order of remand, the CO issued a NOF on July 18, 2002, proposing to deny certification pursuant to 20 C.F.R. §§ 652.3 and §656.20(c)(7) and (8). (AF 43-45). In the NOF, the CO questioned whether a bona fide job opportunity existed based on new information submitted by the Employer suggesting the relationship between the Employer and the Alien might be more of an association of independent professionals than a true employer-employee relationship. (AF 45). Additionally, the CO questioned the Employer's ability to pay the prevailing wage of $30 per hour. The CO instructed the

Employer on the supplemental information she should provide in support of a rebuttal to the NOF.

The Employer filed rebuttal on August 20, 2002. (AF 17-19). The Employer argued that a bona fide job opening exists as the Employer will employ the Alien or any other qualified U.S. worker at the terms set forth in the job offer. (AF 17). The Employer submitted a copy a 2001 Profit and Loss Report and a Balance Sheet. (AF 18-19). The Employer also asserted that she has paid the Alien as an independent contractor for the convenience of withholding taxes, which is justified by the fact that much of the work is done off premises. (AF 16). The Employer stated that regardless of the employer/employee relationship the job opening exists and would be offered to any interested, qualified U.S. worker.

On February 20, 2003, the CO issued another FD denying certification. (AF 14). The CO denied certification because the Employer had not demonstrated that a bona fide job opportunity existed. (AF 14). The CO stated:

> "No rationale has been provided to show how the job has changed in any way to demonstrate how there is now an employee position where the same exact job had been considered self employment up until now. From the information provided it does not appear that the employer can pay the offered wage of $30 per hour to an employee. The employer provided a copy of a balance sheet from January through December 2001, showing the employer's Net Income of $54,648.40. However, the offered wage on the ETA 750A is $30 per hour, which equates to about $62,400 per year. This indicates that the employer would pay an employee at a higher rate of income than brought in by the employer. The employer's income information does not substantiate the ability to hire a full time employee at the offered salary."

(AF 15). Therefore the CO maintained that there does not appear to be a true job opening.

The Employer again requested administrative review, arguing that there is a clear job opening available to U.S. workers. (AF 1). The Employer states that the job market has been tested and no qualified U.S. workers have been found. (AF 2). Furthermore, the Employer states the full time employment of the Alien will double the accounts

receivable to further easily enable the Employer to pay the offered salary, or in the least, will diminish the Employer's hours as a working psychologist resulting in a smaller draw. The Employer filed a Brief in Support of Appeal on July 1, 2003.

DISCUSSION

Twenty C.F.R. § 656.20(c)(8) requires that the employer offer a *bona fide* job opportunity. *Carlos Uy, III,* 1999-INA-304 (Mar. 3, 1999) (*en banc*); *Modular Container Systems, Inc.*, 1989-INA-228, *supra.* Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test.

This case was remanded so that the CO could issue a new NOF and FD based on a review of the Employer's application under the standards articulated in *Modular Container Systems, Inc.* The CO stated in the FD that certification was denied because no bona fide job opportunity exists that is open to U.S. workers. (AF 15). The CO reasoned the employee position offered appeared to be the same exact job that had been considered self-employment up until now, and the Employer's income information did not substantiate the ability to hire a full-time employee at the offered salary. (AF 45). The Employer was afforded the opportunity to document the ability to pay the wage offered, as she submitted a 2001 Profit and Loss report and balance sheet. (AF 18-19).

In applying the totality of the circumstances test, factors that may be examined to determine whether the job is clearly open to a U.S. worker may include, but are not limited to, whether the alien has an ownership interest in the company, is involved in the management of the company, is one of a small number of employees, or is in a position to control or influence the hiring decision. *Modular Container Systems, supra.* The totality of the circumstances test also includes a consideration of the employer's level of compliance and good faith in the processing of the claim. *Id.*, *citing Malone & Associates*, 1990-INA-360 (July 16, 1991) (*en banc*). In the instant case, such an analysis includes the sufficiency of funds available to pay the wages or salary of a full time employee.

It is highly questionable on the record before us that the Employer has sufficient income to guarantee the proposed salary. The Employer's net income in 2001 was $54,648.40. However, the Employer is offering to pay an employee $30 per hour, or about $62,400 per year. The Employer argued that an additional employee would increase accounts receivable and decrease her work load, resulting in her receiving a smaller draw. While these statements may be true, there is no evidence to support a finding that the Employer is able to provide the salary offered. Furthermore, as the CO observed, the Employer would be paying an employee at a higher rate of income than that brought in by the Employer. These facts make it highly unlikely that the position exists in the manner stated in the application.

Accordingly, labor certification was properly denied. The remaining issues need not be addressed and the following order will issue.

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.