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Issue Date: 05 August 2004

BALCA CASE NO.: 2003-INA-98
ETA Case No.: P2000-CA-09508719

In the Matter of:

CAPELLI ANTIQUES FURNITURE RESTORATION,
Employer,

on behalf of

CHRISTIAN CAPELLI,
Alien.

Appearance: Mary Elizabeth Orr, Esquire
Orange, 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 arose from an application for labor certification on behalf of Christian Capelli (“the Alien”) filed by Capelli Antiques Furniture Restoration (“the 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”) of the United States Department of Labor, San Francisco, California, denied the application, and the 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 the 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 June 29, 2000, the Employer, Capelli Antiques Furniture Restoration, filed an application for labor certification to enable the Alien, Christian Capelli, to fill the position of Furniture Finisher (Antiques). Job duties included restoration and refinishing of furniture, mostly Italian antiques. The only stated requirement for the position was two years of experience in the job offered. (AF 47).

In a Notice of Findings ("NOF") issued on July 19, 2002, the CO proposed to deny certification on the grounds that there is a question whether a current job opening truly exists and/or whether the job opportunity is clearly open to any qualified U.S. workers as required in 20 C.F.R. § 656.20(c)(8). The CO questioned the nature of the job, as the Employer appeared to be "a small business petitioning on behalf of a young family member." The Employer was directed to submit documentation showing an ongoing business and an unfilled job opening. The Employer was instructed to document the relationship between the Alien and the owners, officers, and partners of the Employer, as well as the Alien's ownership interest in the business. The CO also requested documentation of the Employer's ability to pay the Alien's salary. (AF 43-44).

On August 4, 2002, the Employer filed its rebuttal. (AF 5-41). The Employer provided a business license tax certification, state and federal tax returns for 2001, an estimated tax return for 2002, a certificate of qualification, a certification of incorporation, a corporate summary, photographs of a company van and the "refinishing chamber," as well as photographs of various pieces of furniture refinished by the Employer and invoices issued by the Employer. (AF 38-41).

On January 21, 2003, the CO issued a Final Determination ("FD") denying certification. The CO found that the company has three officers, all members of the

Capelli family, and no employees. The Alien is the nephew of the owner. The Employer noted that if a qualified worker is not available, the Employee must hire someone from his family because they have the skills needed. The CO noted that the totality of the circumstances test is used to determine whether the job is truly open to U.S. workers. The CO cited the fact that the company has no other employees, and that it did not appear, based on the tax returns, that the Employer could pay the Alien without the Alien bringing in new business. The CO noted that because labor certification can only be granted where there is a position truly open to U.S. workers, this application had to be denied. (AF 4).

On January 26, 2003, the Employer filed a Request for Review. (AF 1-2). The matter was docketed in this Office on March 13, 2003 and the Employer submitted a brief on April 7, 2003.

DISCUSSION

Although a familial relationship between an alien and an employer does not *per se* require denial of certification, it is one of the factors to be considered in determining whether or not there is a bona fide job opportunity and increases the level of scrutiny to be paid to the application. *See, e.g., Young Seal of America*, 1988-INA-121 (May 17, 1989)(*en banc*); *Paris Bakery Corporation*, 1988-INA-337 (Jan. 4, 1990). In the present case, the Employer is a small, family-owned company, in which the Employer's directors and officers are related to the Alien. (AF 6-7, 30-31). There are no other employees working for the Employer; the company is run by three officers who are all related to the Alien. This suggests that the petitioned position may not be a bona fide job opportunity truly open to U.S. workers. The Employer's statement that his business will grow only with the addition of "skilled old world antique furniture furnishers" further indicates that the job is not open to U.S. workers.

Furthermore, as stated by the CO, the financial information submitted by the Employer fails to establish that it has sufficient ongoing business income to pay the

offered salary to the Alien or a U.S. worker for a full-time position as described. The Employer's 2001 tax returns reveal that, even without paying any wages, its deductions almost equaled its gross profit. Accordingly, the Employer's net taxable income was only \$265. (AF 8-26). Moreover, the depreciation deduction was only \$1,786. (AF 12). Yet, the wage offer for the petitioned position is \$15.00 per hour for 40 hours, plus overtime. (AF 47). Even assuming no overtime, this represents an annual salary of \$31,200. The Employer, with the evidence presented, has not demonstrated that it would be able to pay the Alien's salary based on the income as shown on the tax return. The Employer has not presented further evidence to demonstrate its ability to pay or any argument regarding its ability to pay.

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.