U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 August 2004

BALCA Case No.: 2003-INA-135
ETA Case No.: P2002-NY-02478556

In the Matter of:

DENISE STATILE,
Employer,

on behalf of

LOURDES VELA GARCIA DE GIL,
Alien.

Appearance: Earl S. David, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Delores Dehaan
New York, New York

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 Lourdes Vela Garcia De Gil ("the Alien") filed by Denise Statile ("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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") of the United States Department of Labor 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 March 30, 2001, the Employer, Denise Statile, filed an application for alien employment certification on behalf of the Alien, Lourdes Vela Garcia De Gil, to fill the position of Domestic Cook. The job duties included preparing, cooking, and serving Peruvian dishes for the family and guests. The minimum requirement for the position was two years of experience in the job offered. The hours of employment were 9:00 a.m. to 5:00 p.m., forty hours per week. (AF 9-10).

A Notice of Findings ("NOF") was issued by the CO on October 7, 2002, proposing to deny labor certification based upon a question of the *bona fide* full-time nature of the job, the Employer's ability to pay the proffered salary, and the restrictive nature of the ethnic food experience requirement. (AF 21-24). The Employer was instructed to provide documentation of a *bona fide* job opportunity and her ability to pay, including responses to eight specific questions. The Employer was also instructed to document business necessity for her restrictive requirement of experience in Peruvian style cooking.

In Rebuttal, the Employer responded that each day, the cook would prepare two meals for two adults and two separate meals for two children, for a total of twenty to twenty-two meals per week, with about three hours of preparation time. The Employer further stated "[b]esides Lourdes' cooking chores, she also takes the children to school, does the laundry for the whole household, cleans and keeps up the house as well as preparing dinner parties, as needed." The Employer also submitted her tax returns as requested. (AF 25-27).

A Final Determination ("FD") denying labor certification was issued by the CO on November 26, 2002, based upon a finding that the Employer had failed to show that a *bona fide* full-time job opening exists, had failed to document sufficient funds to pay the salary offered, and had failed to address the restrictive requirement issue. (AF 28-29).

The Employer filed a Request for Review by letter dated December 23, 2002, and the matter was docketed in this Office on April 8, 2003. (AF 30-34).

DISCUSSION

Requiring that the job opening be *bona fide* ensures that a true job opening exists. In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), the Board held that a Certifying Officer may correctly apply the *bona fide* job opportunity analysis of 20 C.F.R. § 656.20 (c)(8) when it appears that the job was misclassified as a skilled domestic worker rather than some other unskilled domestic service position, or where it appears that the job was created for the purpose of promoting immigration. The burden of demonstrating that the employer is offering a *bona fide* job opportunity is on the employer. *Gerata System America, Inc.,* 1988-INA-344 (Dec. 16, 1988)(*en banc*); 20 C.F.R. § 656.2(b).

In the instant case, the CO concluded that the Employer's application contained insufficient information to determine whether the position of Domestic Cook actually existed in the Employer's household or whether the job was created solely for the purpose of qualifying the Alien as a skilled worker under current immigration law. Hence, the Employer was instructed to provide specific documentation to show the job of Domestic Cook was in fact a *bona fide* job opportunity. As was noted in the NOF, according to the *Dictionary of Occupational Titles* (DOT), almost all household positions are classified as "unskilled" because the occupations require less than two years of training, education and/or experience for proficiency. The occupation of Domestic Cook is an exception because it can require one to two years of Specific Vocational Preparation time, and thus is considered to be a "skilled worker."

As the Board noted in *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999)(*en banc),* "the lack of sufficient duties to keep a worker gainfully employed for a substantial part of a work week may be relevant to the issue of whether the employer is offering a *bona fide* job opportunity. If an employer appears to be mis-characterizing a job or to have created

the job for the purpose of assisting the alien's immigration, the CO may properly question the application under section 656.20(c)(8)." *Schimoler*, *supra at* 5.

Here, the Employer has clearly stated that the prospective employee will be performing numerous duties that fall outside those of a Domestic Cook. Thus, it appears the job was misclassified as a skilled domestic worker rather than under its more appropriate classification as an unskilled domestic worker. The Employer has not rebutted this finding of performing duties outside those of a Domestic Cook and even stated that a Domestic Cook "is not limited to just cooking but she can do other duties as well." Therefore, the CO was correct in determining that there was not a bona fide job opportunity for a Domestic Cook.

As to the Employer's financial ability to guarantee the Alien's salary, we recognize that a tax return may not reveal the whole picture regarding a family's financial circumstances. However, where a CO requests documentation of ability to pay, and the tax return indicates on its face a lack of sufficient funds to pay the proposed salary, an employer should provide a documented explanation or documentation of sources of funds not revealed on the tax return. Here, the Employer's rebuttal merely argued that the CO had not taken into adequate consideration the family's non-cash deductions and that freeing the Employer from cooking responsibilities would enable her to devote more time to earning money. The Employer did not allege the existence of financial resources not shown by the tax return. The Employer's rebuttal is wholly lacking in credibility. This is a family of four members which is proffering that it is willing to devote more than half of its adjusted gross income to paying the salary of a domestic worker. The apparent limited financial resources of the Employer's household strongly suggest that this is not a bona fide application for a domestic cook under the totality of circumstances test.

In addition, we note that in rebuttal, the Employer failed to address the issue of the restrictive requirement of two years of experience cooking Peruvian Style dishes. Twenty C.F.R. § 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted.

On this basis, the Board has repeatedly held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.,* 1988-INA-24 (May 5, 1989) (*en banc*); *Salvation Army,* 1990-INA-434 (Dec. 17, 1991); *Michael's Foods, Inc.,* 1990-INA-411 (Nov. 14, 1991). Under the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Carlos Uy III,* 1997-INA-304 (Mar. 3, 1999)(*en banc*). The Employer failed to address this issue, and thus, we conclude 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 of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.