



Issue Date: 07 September 2004

BALCA Case No.: 2003-INA-208
ETA Case No.: P2002-MA-01324734

In the Matter of:

CLEANEX HOUSE CLEANING SERVICE, INC. ,
Employer,

on behalf of

CRISTINA CUNHA,
Alien.

Appearances: Robert Gaynor, Esquire
Boston, Massachusetts
For the Employer and the Alien

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

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 his 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 ("C.F.R."). 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 April 27, 2001, Cleanex House Cleaning ("the Employer") filed an application for labor certification on behalf of Christina Cunha ("the Alien") to fill the position of "Supervisor of Janitorial Service." The duties required an employee to "supervise and coordinate activities of workers engaging in cleaning and maintaining premises of residential or other establishments." (AF 45). A forty hour work week, with hours from 8 a.m. to 12 p.m. and 6 p.m. to 10 p.m. was called for. The only job requirement was two years of experience in residential and commercial clearing or equivalent.

The State Agency sent the Employer the resumes of five U.S. applicants. On April 24, 2002, the Employer submitted a recruitment report. (AF 24-25). According to the report, one applicant was contacted by telephone and during that conversation, declined the position, stating that he was not interested. One applicant was found not to be a viable candidate for the position because he was not familiar with the geographic area where the company was located and owned his own cleaning business at the time, presenting a conflict of interest. Another applicant was not a viable candidate for the position because he was unable to work the hours stated in the advertisement. Two applicants failed to respond to the Employer's attempts to contact them by both telephone and certified mail.

On February 4, 2003, the CO issued a Notice of Findings ("NOF"), proposing to deny certification pursuant to 20 C.F.R. § 656.20(c)(8). (AF 20-21). The CO found that no bona fide employer/employee relationship existed because the Employer and the Alien possessed the same last name. (AF 21). The Employer was asked to provide the names and addresses of the corporate officers, their relationship to the alien, their financial interest, duties, responsibilities and to submit the company's Articles of Incorporation.

The Employer was also instructed to submit any documentation that should be provided to rebut the NOF.

The Employer's rebuttal letter dated March 28, 2003 stated that the Alien was the Employer's sister. (AF 7-8). However, the Employer argued that the Alien is not in a position to control or influence hiring decisions, has no financial interest or management role in the company, and is not on the board of directors or an officer of the company. The Employer's supporting rebuttal documentation was also filed at this time. (AF 9-17). The Employer's Articles of Organization designate the Alien's brother as the President, Treasurer, Clerk, and sole Director. (AF 14). The Alien's brother is also identified as the contact person regarding the position. (AF 27).

A Final Determination ("FD") was issued on April 15, 2003, denying the application. (AF 4). The CO found the position was not *bona fide* in that it was not clearly open to qualified U.S. workers. (AF 5). Specifically, the CO found that since there is a familial relationship between the Employer and the Alien, there does not appear to be a bona fide job opening to which qualified U.S. workers could be referred, as it appears that the position was only open to the Alien.

On May 8, 2003, the Employer filed a Request for Review and the matter was docketed in this Office on June 2, 2003. (AF 1-3).

DISCUSSION

Twenty C.F.R. § 656.209(c)(8) requires that "the job opportunity has been and is clearly open to any qualified U.S. worker." In addition, the employer has the burden of providing clear evidence that a valid employment relationship exists, that a bona fide job opportunity is available to domestic workers, and that the employer has, in good faith, sought to fill the position with a U.S. worker. *Paris Bakery Corp.*, 1988-INA-337 (Jan. 4, 1990) (*en banc*); *Young Seal of America*, 1988-INA-121 (May 17, 1989) (*en banc*), *citing Amger Corp.*, 1987-INA-545 (Oct. 15, 1987).

The board in *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*), sets forth a totality of the circumstances test, which may include, but is not limited to questions as to whether the alien can control or influence hiring decisions regarding the job for which certification is sought, whether the alien is related to the corporate directors or officer, whether the alien has an ownership interest in the company, is involved in the management of the company, or is one of a small number of employees. Thus, one of the factors considered under the totality of the circumstances test to determine whether a job is clearly open to U.S. workers is whether the alien for whom certification is sought is related to the employer's directors, officers or employees. *Id.*

In *Young Seal of America*, 1989-INA-121 (May 17, 1989), the Board held that no bona fide job opportunity existed where the alien's wife was director, chief financial officer and corporate secretary of the employer corporation. However, in *Paris Bakery, supra*, the Board stated that a close family relationship between the person having the authority to hire and the alien does not, standing alone, establish that the job is not bona fide or available to U.S. workers.

The Board further stated in *Paris Bakery* that while a family relationship increases the level of scrutiny to be paid to the application, it is only one factor to be considered. If the employer genuinely needs an employee with the alien's qualifications, the job has not been tailored to the alien, and good faith recruitment has not produced qualified applicants, a family relationship does not *per se* require denial of certification. *Id.*

While we note that evidence of a family relationship between an alien and the person having the hiring authority does not require denial of labor certification by itself, the factual pattern presented in the case at bar differs from *Paris Bakery*. In *Paris Bakery*, the Employer sought to fill the position of French Baker. The responsibilities included operation of baking equipment, maintenance of production standards and schedules, some supervision of bakery employees, and required four years of experience. More importantly, it was necessary for the French Baker to be familiar with French baked

products and French industrial baking methods. There were no U.S. applicants with four years experience in the job requirement of French baking. The alien (the brother of the owner), however, had over four years experience as a French baker. Therefore the board held there were no U.S. workers who could have been prejudiced by the familial relationship. *Id*

In contrast to this case, there were at least five qualified U.S. applicants with two or more years of experience in the position of Supervisor of Janitorial Service. In addition, the Alien's brother is designated as the President, Treasurer, Clerk, and sole Director. The Alien's brother is also identified as the contact person regarding the position.

In light of the familial relationship, responses by qualified U.S. applicants, and the amount of control exercised by the Alien's brother, it appears evident that the Alien is unlikely to be displaced by a U.S. worker and the Employer has not established that a bona fide job opening was in fact available to U.S. workers. Therefore, we agree with the CO's finding that the Employer has not met its burden to prove that the position represents a legitimate job opportunity for U.S. workers and we uphold the denial of 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 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.