Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

**Issue Date: 27 September 2004**

**BALCA Case No.: 2003-INA-283**
ETA Case No.: P2002-CT-01324771

*In the Matter of:*

**GABRIELE & IVANA DIFEDERICO,**
*Employer,*

o*n behalf of*

**ANTONIO CISNEROS,**
*Alien.*

Appearance: Judith Sporn, Esquire
Westport, Connecticut
For the Employer and the Alien

Certifying Officer: Raimundo Lopez
Boston, Massachusetts

Before: Burke, Chapman, and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

## DECISION AND ORDER

This case 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 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 30, 2001, Gabriele and Ivana Difederico ("the Employer") filed an application for labor certification on behalf of Antonio Cisneros ("the Alien") to fill the position of Private Household Cook. The job duties for the position required preparing, cooking and serving Mexican foods and sauces. A forty hour work week, with hours from 11 a.m. to 7 p.m., was required and the only job requirement was two years of experience. (AF 1). The Employer filed a request for Reduction in Recruitment.

The CO issued a Notice of Findings ("NOF") on October 15, 2002, proposing to deny certification. (AF 12). In the NOF, the CO questioned whether the position was truly open to U.S. workers pursuant to 20 C.F.R. § 656.20(c)(8). (AF 13). The CO determined that the application contained insufficient information to determine whether a domestic cook position actually existed or whether the job was created solely for the purpose of qualifying the Alien as a skilled worker under current immigration law. The CO noted that the *Dictionary of Occupational Titles* ("DOT") classifies almost all household positions as unskilled because the occupations require less than two years of education, training and/or experience, while the occupation of domestic cook is an exception and can require as many as two years of training, and thus is considered skilled work under immigration law.

In order to determine whether the position was in fact a bona fide job opportunity requiring two years of experience, the CO requested that the Employer submit answers to a series of twelve questions.[1] (AF 13). Additionally, the CO specifically instructed the Employer to support the answers with reasoning and evidence, and to include a tax return for the year immediately preceding the calendar year from the date this application was filed through the current year. (AF 13-14).

[1] The CO requested information regarding the number of meals prepared each day and week, any special dietary circumstances of the household, childcare responsibilities, circumstances leading to the current job offer, the Alien's training and experience as a cook, an entertainment schedule, and the percentage of the Employer's disposable income devoted to paying the Alien's salary. (AF 13-14).

The Employer's rebuttal was received on November 22, 2002. (AF 15). The rebuttal was a one page letter addressing less than half of the questions propounded by the CO. The Employer stated that the Alien was to work approximately thirty-eight hours a week, from 9 a.m. to 1 p.m. and 2 p.m. to 5 p.m. The Employer indicated that there was no entertainment schedule and no special household dietary requirements. Furthermore, the Employer stated that the Alien was recommended by friends and had prior experience working as a cook in both restaurants and residences. The Employer asserted that its income would support the offer of employment; however, the Employer failed to submit a tax return or any other supporting documentation as instructed by the CO.

The CO reviewed the Employer's rebuttal and issued a Final Determination ("FD") on April 24, 2003. The CO denied labor certification on the grounds that the Employer's rebuttal documentation contained insufficient information to substantiate that the position of domestic cook in the Employer's household was a bona fide job opportunity and not a position that was created solely for the purpose of qualifying the Alien as a skilled worker. (AF 17). The CO noted that the Employer failed to address many of the questions outlined in the NOF and failed to provide supporting documents as instructed.

The Employer filed a Motion for Reconsideration on May 28, 2003, contending that its agent filed the November 22, 2002 rebuttal without consulting the Employer. (AF 19). The Employer also argued that the agent permanently left the country and that at all times the Employer had the documentation and rebuttal questions answered, and was unaware that the rebuttal was submitted without his review. Attached to the Motion was a Notice of Appearance by the Employer's new attorney, answers to the CO's twelve questions, the Employer's tax return, and receipts documenting the Employer's grocery expenditures. (AF 22-113).[2]

On June 24, 2003, the CO denied the Motion to Reconsider, stating that such motions are entertained only with respect to issues which could not have been addressed in the rebuttal. (AF

[2] The Employer's answers to the CO's questions included the following information: as many as twenty family members are frequently entertained at home during the week and every weekend, the cook's duties are limited to cooking, food shopping and organizing the kitchen, the Employer decided to hire a cook for the first time because the increasing number of family members eating at the household has stretched the mother's capacity to cook and properly care for her children, and the mother prefers to care for her children. (AF 23).

20). The CO found that the present motion did not raise such matters, and therefore denied the motion.

The Employer requested review by this Board on July 2, 2003 and submitted a position statement on September 24, 2003.

## DISCUSSION

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document must be produced. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 1988-INA-40 (July 5, 1988). The denial of certification is not appropriate if the CO requests documentation which is difficult to obtain and the employer submits other evidence sufficient to rebut the CO's challenge. *Engineering Measurement Co.,* 1990-INA-171 (Mar. 29, 1991).

In the instant case, the CO denied labor certification on the grounds that the Employer's rebuttal documentation contained insufficient information to substantiate that the position of domestic cook in the Employer's household was a bona fide job opportunity and not a position that was created solely for the purpose of qualifying the Alien as a skilled worker. (AF 17). While the NOF specifically advised the Employer to submit answers to a series of twelve questions and to support those answers with reasoning or evidence, the Employer merely submitted a one page rebuttal consisting of unsupported conclusory statements. The CO requested this evidence, as it had a direct bearing on determining whether the domestic cook position was a bona fide job opportunity. The Employer's agent's failure to sufficiently address all of the questions outlined in the NOF and failure to provide supporting documentation led the CO to conclude that there was insufficient evidence to substantiate the position of domestic cook as a bona fide job opportunity.

However, the CO abused his discretion in denying the Employer's Motion for Reconsideration. A CO has the authority to entertain a motion for reconsideration which is filed before the FD becomes final. *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*). A motion for reconsideration may properly be denied where "it is based on new evidence that should have been presented (as) a part of the employer's rebuttal to the NOF." *E. Davis, Inc.* 1992-INA-277 (Aug. 4, 1993); *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993); *Royal Antique Rugs, Inc*., 1990-INA-579 (Oct. 30, 1991). Where the motion is grounded in allegations of oversight, omission or inadvertence by the CO, which if credible, would cast doubt upon the correctness of the final determination, and the employer had no previous opportunity to argue its position or present evidence in support of its position, the CO should reconsider his or her decision. *Tancredi*, *supra.*

In the instant case, the CO denied the Employer's Motion for Reconsideration because the CO found that it was based on new evidence that should have been presented as part of the Employer's rebuttal to the NOF. The Employer argues that the evidence submitted with the Motion should have been considered and blames its agent for failing to submit the requested documentation with the rebuttal, as he acted without consulting the Employer. This argument could not have been presented at the time of the rebuttal, as it involves the Employer's agent's mishandling of the rebuttal. The Employer, in the Motion for Reconsideration, argued that the agent submitted the rebuttal without contacting the Employer. The Employer stated that upon receipt of the NOF, he attempted to contact the agent, who did not return the Employer's phone calls. After receipt of the FD, the Employer attempted to visit the agent, but was informed that the agent no longer worked at the law firm. (AF 19). The Employer then filed the Motion for Reconsideration, along with supporting documentation. The Employer's motion included answers to the twelve questions in the NOF, as well as a tax return and receipts documenting the Employer's expenditures at a local grocery store. (AF 23-113).

While we decline to rule on whether the documentation submitted successfully rebuts the findings in the NOF, we note that the CO should have at least granted reconsideration and considered this evidence. This case is remanded to the CO to examine the Employer's documentation submitted with the Motion for Reconsideration.

Further, in the event that the CO determines that the Employer's rebuttal fails to rebut the NOF, the CO should remand the matter to the state agency for recruitment, in accordance with the procedure for a request for Reduction in Recruitment. Twenty C.F.R. § 656.21(i) provides that a CO "may" reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it has adequately tested the labor market with no success at least at the prevailing wage and working conditions. The purpose of the RIR regulations is to expedite applications in occupations where there is little or no availability of U.S. workers. Twenty C.F.R. § 656.21(i)(5) provides that "unless the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer shall return the application to the local (or State) office so that the employer might recruit workers to the extent required in the Certifying Officer's decision." The CO, in this case, issued an FD denying certification. This is in error, as upon ruling on and denying an RIR request, the CO should return the case to the local office for processing. *See Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003).

## ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and the matter is **REMANDED** to the CO for proceedings consistent with this opinion.

For the Panel:

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**JOHN M. VITTONE**
Chief Administrative Law Judge

**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. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.