U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 September 2004

BALCA Case No.: 2003-INA-236
ETA Case No.: P2002-MA-01325677

In the Matter of:

HANTEL, INC.,
Employer,

on behalf of

RAKESHKUMAR PATEL,
Alien.

Certifying Officer: Raimundo Lopez
Boston, Massachusetts

Appearances: Kevin R. Leeper, Esquire
Framingham, Massachusetts
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a Convenience Store for the position of Store Manager. (AF 57-58).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF"). 20 C.F.R. § 656.27(c).

[1] 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 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

On April 27, 2001, the Employer, Hantel, Inc., filed an application for alien employment certification on behalf of the Alien, Rakeshkumar Patel, to fill the position of Store Manager. Minimum requirements for the position were listed as two years of experience in the job offered or in the related occupation of Supervisor, General. (AF 57-58).

The Employer received six applicant referrals in response to its recruitment efforts, all of whom the Employer reported were rejected as unqualified, unavailable and/or uninterested in the job. (AF 25-26, 36).

A Notice of Findings ("NOF") was issued by the CO on February 24, 2003, questioning the existence of a bona fide full-time job opportunity to which qualified U.S. workers could be referred. (AF 34-35). Noting that the sponsor and beneficiary share the same last name, the CO questioned whether a *bona fide* employer/employee relationship existed. The Employer was instructed to submit documentation showing the names and addresses of the corporate officers, their relationship to the Alien, their financial interest, duties and responsibilities, and the Articles of Incorporation, as well as any data or information which would support a finding that a *bona fide* employer/employee relationship and a legitimate job opening exists. The Employer was also instructed to submit a detailed report of the results of recruitment.

In Rebuttal, the Employer submitted copies of Certificates of Naturalization and passports for both the sponsor and the Alien. (AF 24-33). In addition, the Employer submitted a letter stating:

> I hereby certify that I have no family or other relationship to the sponsored employee "Patel". I am of Indian origin as is the sponsored employee. The surname, Patel, is probably the most common name in my country. We do not share any relationship or similarity except for sharing the same last name. Further, I hereby certify that a bona fide employee/employer relationship does exist. This position is open to qualified American workers as well as beneficiary.

(AF 28).

A Final Determination ("FD") denying labor certification was issued by the CO on April 15, 2003, based upon a finding that the Employer had failed to submit the documentation requested or respond to all the issues raised in the NOF. (AF 22-23).

The Employer filed a Request for Review by letter dated May 16, 2003, including copies of the Articles of Incorporation and the names and addresses of the corporate officers. (AF 2-10). The Request was considered as a Request for Reconsideration and denied by the CO on July 9, 2003. (AF 1). The matter was docketed in this Office on July 15, 2003. The Employer filed a Statement of Position on August 11, 2003.

DISCUSSION

In seeking labor certification, the employer must offer a job opportunity that is truly open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). In the instant case, the CO questioned the existence of a *bona fide* employer/employee relationship and a *bona fide* job opportunity given the fact that the sponsor and the Alien share the same last name. On this basis, the Employer was requested to provide specific documentation to rebut the findings.

The burden of proof in the labor certification process is on the employer. *Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997); *Marsha Edelman,* 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b). As was noted by the Board in *Carlos Uy III,* 1997-INA-304 (Mar. 3, 1999)(*en banc*), "[u]nder 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."

The Board in *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*), held that if the CO requests a document which has a direct bearing on the resolution of an issue and is

obtainable by reasonable efforts, the employer must produce it. An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. Although a written assertion constitutes documentation that must be considered under *Gencorp*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

In the instant case, the CO raised an issue and was very specific in his request for documentation to rebut the findings. The requested documentation, documents showing the names and addresses of the corporate officers, their relationship to the Alien, their financial interest, duties and responsibilities, and the Articles of Incorporation, should have been easily obtainable and have a direct bearing on the resolution of this issue. The Employer failed to produce any of the requested documentation.

While it is noted that the Employer submitted some of the requested information in its Request for Review, as well as a discussion of other additional documentation, rebuttal evidence first submitted with the Request for Review, after issuance of the Final Determination, is not part of the record and cannot be considered on appeal pursuant to 20 C.F.R. § 656.27 (c). The regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. § 656.26(b)(4); *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989) (*en banc*). The Board's review of the denial of labor certification is based solely on the record upon which the denial was based, the request for review, and legal briefs. The Board does not consider additional evidence submitted in conjunction with a request for review. *The University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988); *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*).

Given the Employer's failure to produce the documentation requested, and the Employer's failure to submit alternative adequate evidence in rebuttal, 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.