U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 September 2004

BALCA Case No.: 2003-INA-225
ETA Case No.: P2002-CA-09521406/LA

In the Matter of:

OPEN EVANGELICAL CHURCH,
Employer,

on behalf of

SUN YONG WUI,
Alien.

Appearances: Glenn N. Kawahara, Esquire
Los Angeles, 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 arises from an application for labor certification filed by the Open Evangelical Church ("the Employer") on behalf of Sun Yong Wui ("the Alien") 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") 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 May 20, 2002, the Employer filed an application for labor certification on behalf of the Alien for the position of Choir Director. (AF 131-134). The duties of the position were listed as follows:

> CHOIR DIRECTOR. Select traditional and modern Korean and western church music for all church services, meetings, and other functions. Organize choir and direct it at rehearsals, services and other performances. B.A. in Music, 2 yr exp. $1,800/mo. 40 hrs/wk.

(AF 130).

On November 26, 2002, the CO issued a Notice of Findings ("NOF") indicating an intent to deny the application on the ground that the Employer's application did not provide sufficient information to determine whether the position constituted a *bona fide* full-time job opportunity in accordance with 20 C.F.R. § 656.20(c)(8). (AF 69-71). The CO requested that the Employer document that the Choir Director position was full-time employment (forty hours per week) and, pursuant to the Board's decision in *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), the Employer was directed to submit documentation in support of its assertions.

The Employer submitted rebuttal dated December 30, 2002. (AF 56-68). A detailed description of the Alien's daily duties was provided, which totaled approximately forty hours per week. (AF 59-60). The Employer also submitted a copy of the *Dictionary of Occupational Titles* description for the position of "Cantor" and stated that the job duties were "substantially the same" as those proposed for the Alien. Finally, the Employer submitted certain Internet job postings for full-time choir or music directors at other institutions.

On February 21, 2003, the CO issued a supplemental NOF ("SNOF"). (AF 14-16). In the SNOF, the CO noted that the Employer's regular worship services were every Wednesday, Friday, and Sunday. The CO found that the weekly schedule submitted by the Employer, which included preparation and rehearsal time, covered Tuesdays through

Saturdays but totaled only thirty-four hours, such that the job did not constitute full-time employment. Further, the CO noted that the Employer's lease of space from the Family Bible Church provided that it could use the facility for worship on Fridays from 8:00 p.m. to 10:00 p.m. and Sundays from 9:00 a.m. to 12:00 p.m., which was also inconsistent with the hours claimed for the position of Choir Director (AF 41).

The Employer submitted a second rebuttal letter dated March 19, 2003. (AF 11-13). The Employer asserted that the Alien would be required to work forty and one-half hours per week. The Employer submitted an amended daily schedule of activities for the Choir Director. (AF 17). The Employer further argued that the Fair Labor Standards Act (FLSA) does not define "full-time" employment and it maintains that "[t]his is a matter generally to be determined by the employer." (AF 11). The Employer conceded that "individual efforts of preparation and rehearsal to perform the prescribed duties do not count toward the work hours" as "[n]o employer would compensate for the employee's own time to prepare for the job performance." (AF 12). Finally, at the time the application was filed, the Employer leased worship space from the Family Bible Church. In its rebuttal, the Employer noted that it had a new facility and new lease agreement. (AF 12-13).

On May 2, 2003, the CO issued a Final Determination ("FD") denying labor certification. (AF 8-10). The CO noted that the proposed daily work schedule for the Alien continued to include "considerable" time for preparing, selecting, and rehearsing for performance at the church. In this vein, the CO stated that "employer agrees that no employer would compensate its employee's own time to prepare for the job performance." (AF 9). Finally, the CO maintained that the prior and current lease agreements provided for "worship service time of approximately six and one-half hours and twelve and one-half hours, respectively." As a result, the CO concluded that the Employer did not establish full-time employment and labor certification could not be granted.

The Employer appealed the FD by letter dated May 29, 2003. (AF 1-2). The Employer argued that the CO "capriciously and arbitrarily disregarded the 40 ½ hour weekly schedule that did not include individual preparation time." (AF 1). Moreover, the Employer asserted that the CO "arbitrarily" concluded that its lease agreement "prevented the landlord from allowing the Employer to use the rented facilities for more than specified in the agreement." (AF 1).

The Employer submitted a statement of position dated July 30, 2003 and reiterated its disagreement with the CO's denial of labor certification for reasons set forth in its May 2003 appeal.

DISCUSSION

The CO made a factual finding that the Employer had not established that the job opportunity was for full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

In accordance with the Board's decision in *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*), the CO properly challenged whether the Employer is offering a *bona fide* full-time job opportunity under 20 C.F.R. § 656.20(c)(8) of the regulations. As will be discussed, the Employer has proffered a work schedule of forty and one-half hours per week and has agreed to pay the prevailing wage for such employment which, on its face, appears to constitute full-time employment. However, our inquiry does not end here; rather, the Employer bears the burden of proving *bona fide* full-time employment. While the CO's findings may not be based on speculation, undocumented statements of an employer, which are inconsistent or illogical, are not compelling evidence of entitlement to certification. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

The Board, in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), utilized a "totality of the circumstances" test to determine whether a domestic cook position actually supported full-time employment. In that case, the Board considered such factors

as (1) the percentage of an employer's income that would be devoted to paying the alien's salary, (2) the total numbers of hours the alien would work per week, (3) taking into consideration the industry standard, whether the alien would be engaged in duties for a substantial portion of the working day, (4) the credibility of the position, and (5) whether the employer had motive to inaccurately describe the position.

Upon review of the evidence submitted in this case, it is determined that the CO properly determined that a *bona fide* full-time job opportunity has not been established.

First, the Employer submitted copies of Internet job postings for choir or music directors at other institutions to demonstrate the full-time nature of the job offered. Although the job postings are for full-time choir and music directors, we note that most of the postings are for medium-sized to large congregations, ranging from 600 to 5,000 members. (AF 63-67). It appears from photographs submitted by the Employer that it has fewer than seventy-five members and the adult choir consists of approximately thirteen members. (AF 116-117). It is reasonable to find that the duties of a choir or music director for a large congregation would require more time than the time required for a similar position at a small congregation.

Second, the Employer advertised the position as requiring forty hours per week. However, in response to the CO's request for a detailed schedule of work activities to support a full-time position, the Employer initially submitted a schedule setting forth thirty-four hours of work per week. (AF 76). In response to the SNOF, the Employer submitted a revised scheduled, which purported to account for "approximately" forty hours of work per week. (AF 59). The CO found that the schedule "still include(d) preparation and rehearsal time" and the hours totaled only thirty-four, which did not support a full-time position. The Employer correctly countered that the revised schedule reflected forty and one-half hours per week. However, it remains unclear whether the tasks of "calling each choir and team member and praying for mediation" would properly constitute compensable job duties. Moreover, in its rebuttal, the Employer states that preparation and rehearsal time would not count towards the compensable duties for the

position, yet it fails to address the apparent inclusion of such time on the amended work schedule. (AF 12).

Third, the *General Agreement* dated May 2, 1999 between lessor Family Bible Church and lessee the Employer provided that the Employer would have use of the facility on Sunday afternoons from 12:30 p.m. to 2:30 p.m. and Friday evenings from 7:30 p.m. until 9:00 p.m. (AF 114). A subsequent tenancy agreement dated August 23, 2002 between landlord Vietnamese District of the C&MA (Vietnamese District), and tenant the Employer provided that the Employer would have use of the landlord's facility (1) from 5:30 a.m. to 7:00 a.m. Tuesday through Saturday for a prayer meeting, (2) from 8:00 p.m. to 10:00 p.m. on Friday for worship service, and (3) from 9:00 a.m. to 12:00 p.m. on Sunday for worship service. (AF 41). This accounts for twelve and one-half hours of actual worship or prayer services convened by the Employer.

The significant difference between the twelve and one-half hours of building use for worship and prayer services and the forty and one-half hours purportedly required of the Employer's Choir Director position is, without further explanation by the Employer, too disproportionate. The Employer maintains that the August 23, 2002 agreement does not preclude the landlord from permitting it to use the building for additional hours during the week and we agree. However, the Employer has not submitted any documentation, such as written agreements with the Vietnamese District or a declaration from the Vietnamese District setting forth the Employer's regular use of the building in excess of the times allocated in the August 2002 agreement to account for additional hours expended by the Choir Director.

Given (1) the modest size of the Employer's congregation, (2) the significant disparity between the proposed forty and one-half hours in the amended work schedule and the Employer's lease permitting it to use the building for only twelve and one-half hours per week, and (3) inclusion of duties in the forty and one-half hours a week amended work schedule that do not appear to be related to the job offered, we find that, while the Employer successfully documented a part-time job opportunity, the CO

properly denied labor certification on grounds that the Employer failed to document a *bona fide* full-time position as required by 20 C.F.R. § 656.20(c)(8).

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.