

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 October 2004

BALCA Case No.: 2003-INA-299
ETA Case No.: P2003-NY-02491549

In the Matter of:

CARLOS MERY,
Employer,

on behalf of

JACQUELINE SALINAS,
Alien.

Appearance: Jennifer Oltarsh, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Dolores Dehaan
New York, New York

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 United States 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. We base our decision 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, Carlos Mery (“the Employer”) filed an application for labor certification on behalf of Jacqueline Salinas (“the Alien”) to fill the position of domestic cook. (AF 22). The job duties included preparing and cooking meals and the Employer required two years of experience as a restaurant cook. (AF 24).

The CO issued a Notice of Findings (“NOF”) on April 8, 2003 proposing to deny certification pursuant to 20 C.F.R. § 656.20(c)(1) and (8). (AF 42-44). In the NOF, the CO questioned whether a bona fide job opportunity existed and whether the Employer had sufficient funds available to pay the wages offered to the Alien. The CO requested that the Employer answer a series of eight questions, and provide a detailed schedule of entertainment, the number of guests entertained, and the number of meals served in the twelve calendar months immediately preceding the filing of the application. (AF 43). Additionally, the CO requested the Employer’s tax returns from the year immediately preceding the calendar year from the date this application was filed through the current year. (AF 44). The Employer had only included an unsigned copy of his 2001 Tax Return. The CO requested these materials in order to clarify if the Employer would be able to guarantee the domestic cook’s wages of \$26,000 a year because the Employer’s disposable income appeared to be \$36,859 in 2001. (AF 44).

The Employer’s rebuttal was timely and he responded to the questions posed by the CO. (AF 45-51). Specifically, the Employer stated that over the past year, he entertained an average of four to ten guests, four to seven times per month. The Employer noted that he entertains business clients one or two times a week and has larger parties several times per year. For larger events, the Employer noted that he also hires caterers, florists, calligraphers, wait staff, and bartenders. (AF 48). Additionally, the Employer resubmitted his unsigned 2001 Tax Return. (AF 45-47).

The CO reviewed the Employer’s rebuttal and issued a final determination (“FD”) on May 22, 2003 denying certification on the grounds that the Employer had not corrected the deficiencies raised in the NOF. (AF 52-53). First, the CO stated that the Employer failed to

include an entertainment schedule. (AF 52). Second, the CO stated that although the Employer's salary in 2001 was \$89,279, the Employer's disposable income was only \$36,859, according to the 2001 tax return. If the Employer were to pay the domestic cook the offered wage of \$26,000, 70.5% of Employer's taxable income would be occupied by the cook's salary. Additionally, the CO noted that other than the Employer's assertions that his salary for the year 2001 was \$89,279, there was no further evidence of the Employer's ability to guarantee the Alien's wage other than the 2001 Tax Return. The Employer did not include the tax returns for the other years, as requested by the CO. (AF 52).

The Employer requested review of his denial on June 24, 2003, and submitted a brief in response to the FD. (AF 1-66). The Employer also submitted additional evidence demonstrating his net worth as \$6,000,000.

DISCUSSION

Under 20 C.F.R. § 656.20(c)(8), the employer has the burden of proving that a bona fide job opportunity is clearly open to any qualified U.S. workers. The regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 CFR § 656.26(b)(4); *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989). Accordingly, evidence of the Employer's net worth submitted after the FD was issued will not be considered.

Pursuant to 20 C.F.R. § 656.20(c)(1), an application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. A CO may make reasonable requests for information demonstrating the ability to pay the wage offered as required by 20 C.F.R. § 656.20(c)(1). *The Whislers*, 1990-INA-569 (Jan. 31, 1992). Certification may be denied if an employer fails to meet its burden of proving the sufficiency of funds to pay the alien's salary. Denial may result from either the absence of documentation or the submission of documentation which contradicts an employer's claim of sufficient funds. *The Whislers*, 1990-INA-569; *White Harvest Mission*, 1990-INA-195 (Apr. 9, 1991); *Big Joy Chinese Restaurant*, 1988-INA-354, 1988-INA-362 (Oct. 30, 1989).

In the instant case, the CO denied labor certification in part because the Employer failed to demonstrate its ability to guarantee the wage offered. (AF 52). The Employer was advised to submit signed copies of his income tax returns immediately preceding the calendar year from the date this application was filed through the current year. The Employer merely resubmitted his unsigned tax return from 2001 and thus failed to demonstrate his financial ability to guarantee a domestic cook's wage. (AF 52-53).

The Employer argued that the returns were within the possession of the IRS and not easily obtainable. However, documents other than a tax return, such as bank statements, or certified "statements of income," can be used to demonstrate sufficiency of funds to pay the alien's salary. *Azumano Travel Service, Inc.*, 1990-INA-215 (Sept. 4, 1991); *Royal Antique Rugs, Inc.*, 1990-INA-529 (Oct. 30, 1991); *Fried Rice King Chinese Restaurant, supra*. The Employer did not provide any documents other than the 2001 tax return, which failed to demonstrate the ability to pay a domestic cook.

The Employer also contends that the CO erred in utilizing the Employer's disposable income as a measure of the Employer's ability to guarantee the Alien's salary. While this argument might have merit because adjusted gross income or net income is more often used to determine an employer's ability to guarantee an alien's salary, in this case, the CO's error was harmless because the Employer failed to demonstrate, either through tax returns or other evidence, an ability to pay the Alien's salary. Therefore, we agree with the CO's conclusion that the evidence in the record is insufficient to demonstrate that the Employer can guarantee the Alien's salary.

Additionally, the CO denied labor certification based on the absence of a detailed entertainment schedule from the Employer. (AF 52). Generally, standing alone, a CO's requirement of documentation of entertainment for a full year might be unwarranted and a potential basis for remand to permit the employer to remedy the matter. *See Guida Marie Santos Silva*, 1995-INA-286 (Feb. 6, 1997). However, in the instant case, the Employer's failure to submit an entertainment schedule and additional tax returns or any other evidence of his ability

to pay the Alien's salary provides a sufficient basis to deny certification. Therefore, based on the foregoing, we conclude that the Employer has not documented an ability to pay the offered wages, and thus conclude that labor certification was properly denied.

ORDER

The CO'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 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.