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Issue Date: 28 September 2004

BALCA Case No.: 2003-INA-227
ETA Case No.: P2002-NJ-02484830

In the Matter of:

ZENAIDA P. GONZAGA,
Employer,

on behalf of

NATIVIDAD FRANCO,
Alien.

Certifying Officer: Delores DeHaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a private household for the position of Domestic Cook. (AF 1-2, 51-52).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 16, 2001, the Employer, Zenaida Gonzaga, filed an application for alien employment certification on behalf of the Alien, Natividad Franco, to fill the position of Domestic Cook (Live-in).³ The job to be performed was described as “prepare and cook food for husband’s health reasons” and minimum requirements for the position were listed as two years of experience in the job offered. (AF 52). The Employer’s advertisement for the position described the job as Cook, Live-in, to “prepare and cook special dietary Filipino Food,” with no training or experience required. (AF 25-29).

The Employer received three applicant referrals in response to its recruitment efforts, all of whom were reported as either unavailable or uninterested in the position. (AF 36).

A Notice of Findings (“NOF”) was issued by the CO on January 7, 2003, proposing to deny labor certification on several bases. (AF 41-45). The CO questioned the existence of a *bona fide* job opportunity, whether the petitioned position was for a domestic cook or general housekeeper, whether the job was clearly open to U.S. workers and the issue of the live-in and ethnic cooking requirements.

In Rebuttal, the Employer stated that its intention was to hire a domestic cook and not a house-worker, and stated that it had deleted all unduly restrictive cooking requirements. The Employer further asserted that its advertisement for a live-in domestic cook was not affected, as it did not include any restrictive requirements. In addition, the Employer submitted a schedule of daily and weekly activities for food preparation, stating that the cook would be preparing 90% Filipino food, and a physician’s note regarding the Employer’s poor health. (AF 46-54).

³ The Employer initially petitioned for the position of Live-In Housekeeper, but later amended the position to that of Domestic Cook (Live-in). (AF 1-2, 51-52).

A Supplemental NOF (“SNOF”) was issued by the CO on January 29, 2003, again proposing to deny labor certification on several bases. (AF 55-58). The CO requested documentation that there was a *bona fide* full-time position for a Domestic Cook and documentation of business necessity for the live-in requirement, as well as documentation of the Alien’s past paid experience.

In Rebuttal, the Employer documented the Alien’s past paid experience, detailed the daily and weekly schedule and ability to pay the salary, and stated that either live-in or live-out was acceptable. The Employer further stated “[w]e are including the 2 years training experience in our application that you told us to delete initially to comply with the requirements.” (AF 59-71).

A Final Determination (“FD”) denying labor certification was issued by the CO on March 18, 2003, based upon a finding that the Employer had failed to adequately document *bona fide* full-time employment, that the Employer had re-instituted the restrictive two-year ethnic cooking training/experience requirement, and that the Employer had not documented business necessity for the live-in requirement. (AF 72-73).

The Employer filed a Request for Review by letter dated April 5, 2003, and the matter was referred docketed by the Board on July 8, 2003. (AF 74-78). The Employer filed a Statement of Position on July 28, 2003.

DISCUSSION

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). Requiring that the job opening be *bona fide* ensures that a true job opening exists. In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), the Board held that a CO may correctly apply the *bona fide* job opportunity analysis of 20 C.F.R. § 656.20 (c)(8) when it appears that the job was

misclassified as a skilled domestic worker rather than some other unskilled domestic service position, or where it appears that the job was created for the purpose of promoting immigration. The burden to demonstrate that the employer is offering a *bona fide* job opportunity is on the employer. *Gerata System America, Inc.*, 1988-INA-344 (Dec. 16, 1988)(*en banc*); 20 C.F.R. § 656.2(b).

As the Board noted in *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999)(*en banc*), “the lack of sufficient duties to keep a worker gainfully employed for a substantial part of a work week may be relevant to the issue of whether the employer is offering a *bona fide* job opportunity. If an employer appears to be mis-characterizing a job or to have created the job for the purpose of assisting the alien’s immigration, the CO may properly question the application under section 656.20(c)(8).” *Schimoler, supra*.

In this case, the CO found that the Employer had not documented *bona fide* full-time employment, but did not address the facts that resulted in that determination. However, the CO further took issue with the Employer’s live-in requirement and the fact that the Employer had indicated that it was re-instituting its requirement of two years of experience and requirement of experience in ethnic food. While the Employer stated a willingness to accept either live-in or live-out, the Employer did not document a willingness to re-advertise as was specifically required by the NOF. Similarly, the Employer stated that it was including the two years of training and experience in the preparation of Filipino food, which had been initially deleted, but the Employer did not offer to re-advertise nor document business necessity. Twenty C.F.R. § 656.21(b)(2) requires an employer to document that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States and as defined for the job in the *Dictionary of Occupational Titles* (“DOT”). While acknowledging that “cooking specializations are sometimes part of the job,” the Board held in *Martin Kaplan*, 2000-INA-23 (July 2, 2001)(*en banc*) that cooking specialization requirements for domestic cooks are unduly restrictive job requirements within the meaning of the regulation at 20

C.F.R. § 656.21(b)(2), and therefore must be justified by business necessity under the test enumerated in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*).

Based upon the Employer's failure to adequately document business necessity for its unduly restrictive two years of experience in Filipino style cooking requirement, and the failure to state a willingness to re-advertise without the live-in requirement, 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.