U.S. Department of Labor

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

BALCA Case No.: 2003-INA-300
ETA Case No.: P2003-NY-02493199

In the Matter of:

BEITH AHARON,
Employer,

on behalf of

ASHER COHEN,
Alien.

Certifying Officer: Delores DeHaan
New York, New York

Appearances: Earl S. David, Esquire
New York, New York
For the Employer and the Alien

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 U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by section 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 30, 2001, the Employer filed an application for labor certification on behalf of the Alien to fill the position of Cantor. (AF 11). The only job requirement was two years of experience in the job offered. The job to be performed was described as leading Bukharian Jewish prayer services on a daily basis and giving bar mitzvah lessons. The application was originally submitted under the reduction in recruitment ("RIR") process. (AF 3).

On January 8, 2003, the Employer withdrew the RIR request, (AF 12) but on April 3, 2003 requested that the application again be considered under the RIR process. (AF 15). The state workforce agency referred the matter to the USDOL CO on April 8, 2003 as a RIR case. (AF 16-17).

On May 15, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification pursuant to 20 C.F.R. §§ 656.20(c)(8), 656.21(b)(1), and 656.20(g). (AF 21-23). The CO found that the Employer failed to document that the job opportunity was clearly open to U.S. workers, failed to establish a good faith recruitment effort, and failed to post adequate notice of recruitment at the Employer's place of business. In connection with 20 C.F.R. § 656.20(c)(8), the CO advised the Employer to submit evidence clearly demonstrating the existence of an employing entity satisfying the definition of "employer" given at 20 C.F.R. § 656.3. (AF 18-20, 23). In addition, the Employer was directed to document how it would pay the Alien's salary at the prevailing wage rate of $20.00 per hour. (AF 21).

The Employer's rebuttal to the NOF was dated June 16, 2003. (AF 25-39). The Employer provided a job notice and stated that it had been posted at the Employer's facility for three weeks in May and June 2003. The Employer, however, did not report the results of that job posting. (AF 38). The Employer provided personal tax returns for tax years 2002 and 2001, including Schedule Cs for both years listing "Beit Aharon" as

the business name, and "synagogue" as the business, with an Employer ID number for "Beit Aharon" shown on the tax documents. (AF 28, 34). For tax year 2002, the Schedule C showed gross income of $170,357, no wages paid, and net profit of $153,097. The 2001 form showed similar amounts, again with no wages paid. *Id.* No additional documentation of the Employer's status as an employer as defined by 20 C.F.R. § 656.3 was provided. Moreover, the Employer provided no additional comment or documentation reporting the results of its recruitment efforts, establishing it satisfied the definition of "employer" given in the regulations, or demonstrating how it would pay the prevailing wage stated in the application.

The CO issued a Final Determination ("FD") denying labor certification on July 17, 2003. (AF 42-44). The CO questioned the existence of the Employer as a viable employer capable of satisfying the requirements of 20 C.F.R. § 656.20(c)(8). The CO found that the requested documentation relevant to this question of the Employer's viability was not provided. The CO also noted that the Employer failed to document its good faith recruitment efforts as required by 20 C.F.R. § 656.21(b)(1) and failed to document the results of its job notice posting at the Employer's place of business as required by 20 C.F.R. § 656.20(g).[1]

DISCUSSION

Section 656.20(c)(8) of the Department's labor certification regulations requires that the employer offer a *bona fide* job opportunity. *Bulk Farms v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*). Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *Modular Container Systems, Inc.*, 1989-INA-228, *supra.* Certification may be denied on the ground that no *bona fide* job opportunity exists where the employer fails to provide documentation requested by the CO. *Britt's Antique Importers/Exporters*, 1990-INA-276 (Dec. 17, 1990). For example, upon a request by

[1] Specifically, the CO found that the posting result was not documented because it was only stated in the attorney's cover letter to the rebuttal and not "acknowledged" by the Employer. In view of our affirmance of the CO on other grounds, we do not reach this ground for denial of certification.

the CO, a petitioner must provide a business license or other documentation to prove the existence of a viable business entity. *See also Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Kogan & Moore Architects, Inc*., 1990-INA-466 (May 10, 1991). The employer bears the burden of proving that a position is permanent and full-time, and certification may be denied if the employer's evidence fails on that point. *Gerata Systems America, Inc*., 1988-INA-344 (Dec. 16, 1988) (*en banc*). The employer also bears the burden of proving sufficiency of funds to pay the alien's salary, and failure to comply with a CO's reasonable requests for information showing the ability to pay the wage offered constitutes a ground for denial of certification. 20 C.F.R. § 656.20(c)(1); *see The Whislers*, 1990-INA-569 (Jan. 31, 1992).

In the instant case, the CO became suspicious that the petitioner was not presenting a *bona fide* job opportunity after failing to confirm the Employer's existence and location in a web site lookup system and in the applicable local telephone directory. Consequently, the CO directed the Employer to submit specific documentation: a lease or rental agreement, rent receipts for the last six months, telephone bills, tax returns, documents showing the total number of employees along with job titles, and payroll records and W-2 forms for all employees. (AF 23). Of this requested documentation, the Employer submitted only Federal personal tax returns of a married couple for 2001 and 2002 showing "Beit Aharon" as a Schedule C personal business with no wages paid out during either year.[2] (AF 28, 34). Other than the bald assertion that "Organization has enough funds to pay the offered salary," the rebuttal included no explanation of how the tax returns alone established the bona fide nature of the job offer or ability to pay the worker's wages. We find that the Employer's rebuttal was nonresponsive to most of the CO's requests for documentation on the *bona fide* job opportunity and sufficiency of funds issues, and therefore failed to meet the Employer's burden of proof on these issues.[3]

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[2] The attorney's cover letter to the rebuttal refers to submission of "phone bills, tax returns, receipts, business certificate, [and] photographs." (AF 39). The only documentation actually included in the rebuttal submission, however, was the tax returns and a copy of the job posting.

[3] Attached to the Employer's request for BALCA review are telephone bills for a telephone number different from that originally given to the CO. (AF 50-53). The request for review also offered two pages

This case was before the CO in the posture of an RIR request. In *Compaq Computer Corp*., 2002-INA-249-253, 261 (Sept. 3, 2003), this panel held that where the CO denies a request for reduction in recruitment, the proper procedure is to remand the case to the State Workforce Agency ("SWA") for regular labor certification processing under the procedures specified in GAL, 1-97, Change 1 (popularly know as the "Ziegler Memorandum"). In *Houston's Restaurant*, 2003-INA-237 (Sept. 27, 2004), however, we held that the where the "CO's denial of labor certification was based, not on a denial of the merits of the RIR request, but on the failure to comply with a reasonable time deadline the CO may properly deny the application outright rather than remanding to the SWA for regular processing, even if the case is currently before the CO in the posture of an RIR request." Moreover, in *Houston's* we observed that

> We do not rule today on whether a CO can skip ruling on an RIR request and go straight to the ultimate question of whether the labor certification should be denied where the application is apparently fundamentally flawed.4

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4 Such a procedure may make sense where the perceived flaw in the application is grounded in reasons unrelated to whether the pre-application recruitment efforts were sufficient.

An employer who is not able to establish that it can offer a *bona fide* job opportunity has presented an application that is so fundamentally flawed that it would serve no purpose to remand the case for regular processing. In such a case, the CO may deny the application outright rather than remand for regular processing, even if the case was presented in a RIR posture.

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of advertisements showing the name and address of "Beith Aharon" but also showing "Travel Service" and "Victoria Cruises" travel advertisements and telephone numbers. (AF 56-57). Evidence submitted after the issuance of the Final Determination with the request for review cannot be considered by the Board on appeal. 20 C.F.R. § 656.26(b)(4); *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988). Moreover, even had this documentation been submitted in the Employer's rebuttal, it does not adequately respond to the CO's reasonable concerns.

We note that in *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*), the Board recognized the danger cited in the concurring opinion *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), that section 656.20(c)(8) analysis could subsume the rest of Part 656 where a "totality of the circumstances" test is employed to gauge the *bona fides* of an employment offer. We emphasize, therefore, that our decision today is not an invitation for the CO to raise the *bona fide* job opportunity in every RIR application in order to avoid having to remand a case for regular recruitment if the RIR is denied. Rather, the CO should only raise the *bona fide* job opportunity issue if good cause exists for suspecting that the job offer is not *bona fide* or that the employer does not have a viable business to which applicants may be referred. This panel will not affirm the outright denial of a labor certification application presented to the CO in a RIR posture if there is any indication that failure to remand to the SWA would constitute a denial of due process.

We also observe, however, that if the issues of a *bona fide* job opportunity and/or ability to pay are clearly raised by the CO in a NOF based on a reasonable suspicion, an employer who fails to address those issues in rebuttal cannot reasonably expect to be able to remedy the problem later in a remand to the SWA.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the Panel by:

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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.