U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 March 2005

BALCA CASE No.: 2004-INA-75
ETA Case No.: P2002-VA-03378614

In the Matter of:

MADNI, INC. t/a SILVER AND WATCH PALACE,
Employer,

on behalf of

IRFAN AMIR,
Alien.

Appearance: Arturas Overas, Esquire
Hyder & Overas
Richmond, Virginia
For the Employer and the Alien

Certifying Officer: Stephen Stefanko
Philadelphia, Pennsylvania

Before: Burke, Chapman, and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

Madni, Inc. t/a Silver & Watch Palace ("the Employer") filed an application for labor certification[1] on behalf of Irfan Amir ("the Alien") on May 13, 2002. (AF 157).[2]

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

The Employer seeks to employ the Alien as an Assistant Manager, Retail Store. This 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. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In its application, the Employer described the duties of the position which it was seeking to fill as assisting the manager in the overall operation of a retail jewelry store, including duties of sales, purchasing, inventory, personnel, and marketing. (AF 157). The Employer required two years of experience in the job offered or two years of experience in sales and marketing. The Employer requested a reduction in recruitment on May 7, 2002. (AF 151). The CO made no finding on this request.

In the Notice of Findings ("NOF"), issued December 6, 2002, the CO found the documentation in the file did not establish that the Employer was able to pay the wage offered as required by 20 C.F.R. § 656.20(c). The CO requested the Employer to provide documentation of sufficient income after all other business expenses to pay the wage offered to the Alien. The CO noted that the evidence may include a lease agreement, payroll records, tax returns or other records documenting the financial soundness of the business. The CO also required the Employer to submit the names and job titles of each and every employee, the wage rate for each employee and a description of the place of business including the square feet of the facility. Finally the CO directed the Employer to provide the business tax returns for 2000 and 2001. (AF 147-148).

In its rebuttal, dated December 16, 2002, the Employer submitted documentation including a copy of lease agreements with a map indicating the store location in a mall, copies of the Employer's Quarterly Federal Tax return for the quarters ending June 30, 2002 and September 20, 2002, copies of the Employer's 2000 and 2001 tax returns, and copies of the Employer's bank statements from January to September 2002. (AF 28-146). In particular, the Employer noted that the profit in 2001 of $16,421 is sufficient to

pay the offered salary of $12,540.00 ($9.50 per hour) for the period from May 2002 to the time of rebuttal.

The CO issued a Final Determination ("FD") on January 7, 2003, denying the Employer's application for labor certification. (AF 26-27). The CO found that the Employer's profits of $15,126 in 2000 and $16,421 in 2001 were not sufficient to pay the Alien's yearly salary of $19,760. The CO stated that the Employer's statement that the 2001 profit was sufficient to pay the salary earned in 2002 for thirty-three weeks of work was not sufficient to document an ability to pay because the business income, as documented by the tax returns, does not show that the business generated sufficient income to pay the Alien for year-round, full-time work.

The CO also noted that statements by the Employer indicated that the Alien may actually be the store manager. If that were the case, the CO noted that the prevailing wage would be higher and the Employer could not document the ability to pay a wage for a store manager. (AF 26-27).

By letter dated February 11, 2003, the Employer submitted a motion for reconsideration to the CO. (AF 8-25). With the motion, the Employer argued that the ability to pay had been demonstrated on the previously submitted 2001 tax returns since the total income of $16,421 would be supplemented by $1,114 in the form of depreciation. In addition, the Employer's bank statements for the business account showed a balance of over $2,225.00 each month. Thus, the Employer had adequate funds at its disposal with which it could pay the Alien. In addition, the Employer requested reconsideration on the basis of newly available evidence which showed that the Employer's net income for 2002 was $29,390.89, which is more than sufficient to pay the Alien's salary. Finally, the Employer submitted an affidavit supported by copies of recent personal bank statements from the owner, Mehboob Fazlani, in which Mr. Fazlani guaranteed that he had personal funds to pay at least $2,225.00 over the course of a year, which was the difference between the Employer's profit in 2001 and the prevailing wage. (AF 23).

On March 6, 2003, the CO stated that the request for reconsideration was denied because motions for reconsideration would be entertained only with respect to issues which could not have been addressed in the rebuttal. (AF 7).

On April 10, 2003, the Employer requested review by this Board. (AF 1). The Employer argued initially that it was an abuse of discretion for the CO not to reconsider the denial determination because the motion for reconsideration was based, in part, on evidence submitted with the motion for reconsideration which was not available during the rebuttal period. The Employer also argued that it had established the ability to pay the wages of the job opportunity offered to the Alien based on the earlier submitted evidence.

The case was docketed by the Board on March 9, 2004. On March 24, 2004, the Employer submitted an extensive brief. The Employer argued that the CO abused his discretion in failing to consider the motion for reconsideration and the evidence submitted with that motion. The Employer also argued that the CO erred in finding that the Employer did not have the ability to pay the wages of the job opportunity.

DISCUSSION

Initially, we agree with the Employer that the CO abused his discretion in failing to reconsider the denial of labor certification based on evidence submitted with the motion for reconsideration which was not available during the rebuttal period. *Royal Antique Rugs, Inc.*, 1990-INA-529 (Oct. 30 1991). We note that the Employer's rebuttal was submitted on December 16, 2002. Although the Employer submitted quarterly tax reports for June and September 2002, these documents did not establish the Employer's profit or income during 2002. Rather, the documents submitted with the motion for reconsideration on February 2003 included the final financial statements for 2002, which indicated an increased profit for 2002. Although the Employer is not a new enterprise as in *Royal Antique Rugs, Inc.,* we note that the Employer's earnings increased between

2000 and 2001. That circumstance indicates that the final financial information for 2002 would be relevant to the issue of the Employer's ability to pay. Because that documentation was available during the period when the Employer could request reconsideration and because it was not available during the rebuttal period, we find that the CO abused his discretion by failing to consider the new evidence.

As we have determined the matter should be remanded to the CO for consideration of the Employer's motion for reconsideration and accompanying evidence, we need not address at this juncture the Employer's arguments that the original documentation submitted on rebuttal was sufficient to establish the ability to pay the wage offered to the Alien for this job opportunity.

This matter was before the CO in the posture of a request for reduction in recruitment. Thus, on remand, the CO should rule on that request. If the CO determines that the Employer has sufficient funds to guarantee the Alien's salary, he may proceed to consider whether the pre-application recruitment was sufficient to merit granting the RIR request.

We observe that this panel has held that when the CO denies an RIR, such denial should result in the remand of the application to the local job service for regular processing. *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). Subsequently, this panel recognized that there are exceptions to the remand rule, such as where the employer fails to comply with a deadline set by the CO for responding to the CO's inquiries about the RIR request, *Houston's Restaurant*, 2003-INA-237 (Sept. 27, 2004), or where the application is so fundamentally flawed that a remand would be pointless (such as where the employer has not set forth a *bona fide* job opportunity), *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). Similarly, we hold that where the Employer has failed to establish sufficiency of funds to pay the Alien's wages for the position for which labor certification is sought, the application is so fundamentally flawed that a remand would be pointless. Thus, if the CO denies the RIR request on grounds that can be remedied upon supervised recruitment, a remand to a State

Workforce Agency or Backlog Reduction Center is required. If, however, the CO finds that the Employer does not have sufficient funds to guarantee the Alien's salary, a remand for supervised recruitment is not required.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and the matter is **REMANDED** for the Certifying Officer to make a ruling on the Employer's request for reduction in recruitment.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

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, NW Suite 400
Washington, DC 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