U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: MAY 21, 1998

Case No. 97-INA-453

In the Matter of:

FLORA KOLAHI,
Employer,

on behalf of:

TERESITA LIM
Alien.

Appearance: Dan E. Korenberg, Esq.

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a) (5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer (CO) of the U.S. Department of Labor(DOL)denied the application, the Employer requested review pursuant to 20 CFR § 656.26.[2]

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application

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[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

[2]Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

THE CO'S DECISION

Employer seeks to fill the position of Domestic Cook with DOT Title Domestic Cook, DOT # 8811 305.281-010, a wage offer of $12.16 per hour, job duties of:

> Plan, prepare and cook meals for employer and guests. Plan weekly menus and submit to employer for approval. Estimate consumption and order supplies and groceries. Season and cook meats, poultry, seafood, salads, pasta dishes, rice, soups, etc. Mix and bake pies, cakes, desserts and breads. Plan and prepare fancy dishes for guests. Clean and wash appliances, utensils, dishes, etc. Set tables and serve meals. (AF 345)

and job requirements of two years of experience in the job offered.

Other special requirements:

Work Schedule: Monday, Wednesday and Friday 7:00 to 10:00 am
and 4:00 to 9:00 pm. Saturday and Sunday 10:00 am to 7:00 pm (AF 345)

The application was denied by the CO on the basis of employer's failure to document that the job is full time and that it is truly open to U.S. workers or that U.S. workers who applied were recruited in good faith and rejected solely for job related reasons. The CO also based her denial determination on employer's questionable ability to pay the offered wage. (AF 15-18)

ISSUES ON APPEAL

On appeal, employer seeks review of the contentions, among others, that the CO's basis for the denial of certification was based on "speculative assertions" and that no specific reasons were given in the NOF as to how the employer had failed to demonstrate that a full-time, bona fide position existed. (AF 3) The employer argues that adequate documentation has been provided which clearly demonstrates that the duties of the offered position of Domestic Cook, in the context of their household does exist and that it indeed is a full-time one. As to the issue of good-faith recruitment, employer has proven via certified mail receipts that invitation letters were sent to the applicants eight days after receipt of their resumes. (AF 7) Those applicants whom the CO cites were lawfully rejected since they showed no interest in the position by not appearing for their scheduled interview dates and their failure to contact the employer to

reschedule one at a later date. (AF 8-9) As in the case of Mr. Byron Harris, a U.S. applicant whom the CO claims was unlawfully rejected, the employer maintains that Mr. Harris was lawfully rejected since he "wanted to work in a restaurant in order to further his experience as a chef". (AF 9). Finally, employer argues that the CO's finding that the employer's yearly income was insufficient to pay the offered wage was erroneous. Employer claims support by the decision in *Oriental Pearl Restaurant*, 92-INA-59, where employer there had suffered a $29,000 loss. (AF 11)

DISCUSSION

Employer has not justified reversal of the FD. It is unnecessary to address all of the findings of the CO and arguments of the employer[3] since the application fails on the issue of employer's ability to pay for a bona fide full-time job opportunity on which issue the FD found:

> Based upon review of the rebuttal, we cannot find that there is a full time job that is truly open to U.S. workers at the offered salary. (AF 16)
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> As evidence of the ability to place the alien on a payroll as a full-time domestic cook, the employer submits a 1994 tax return copy showing the family gross income at $64,889. The tax return also shows self-employment tax and estimated tax paid out at about one third of the total income.
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> However, the salary offered to the alien for the labor certification position $12.16 per hour, equals about one third of the family's income, more even than was paid in taxes: $12.16 times 40 hours per week + about $486.40 per week times 52 weeks per year = about $25,292.80. (AF 17)
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> Where the job is proposed to be newly created, there is no evidence that the job duties have been full time in the past, and the offered salary is more than half of the prospective employers' annual income, according to the information provided, it

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[3] Employer has littered the record by attaching to its Motion to Reconsider and in the Alternative for Review "twelve alien labor certifications for the position of cook that have already been approved by the U.S. Department of Labor" (AF 6, 19-129), and stated that six were approved without rebuttal and that in the other six the "rebuttals...were very similar in kind and form to the instant rebuttal", leaving it to the CO or BALCA to scrutinize, analyze, compare, equate or differentiate. Apart from the principles that each case must be decided on its own record irrespective of a CO's findings in other cases, *Tedmar's Oak Factory*, 89-INA-162 (Feb. 26, 1990) and *Paralegal Priorities*, 94-INA-117 (Feb. 1, 1995) and that new evidence will not be considered by the CO in such post FD motions in the absence of a showing of relevance and inability to submit prior to the FD, *Harry Tancredi*, 88-INA-441 (Dec. 1, 1988)(*en banc*), and BALCA will not consider evidence which the CO has declined to consider in denying a motion for reconsideration, *Schroeder Brothers Co.*, 91-INA-324 (Aug. 26, 1992), this wholesale dumping of more than 100 pages of the records in other cases without analysis is reprehensible.

> does not appear convincing that the position is truly full time or that it is open to U.S. workers as such.

The Request for Review argues:

> In response to the NOF, the employer in the instant case submitted documentation, specifically 1994 tax returns, which clearly show that the employer has the funds available to pay the salary offered to the alien. Despite this evidence, the CO still questions the employer's ability to hire a full-time cook at the offered wage of $12.16 per hour because the total salary is more than the family paid in taxes. (AF 11)
> ******
> In the instant case, the employer has clearly demonstrated the ability to pay. Given the employer's income as reflected on the income taxes submitted, there is more than a reasonable expectation that the employer would be able to generate sufficient funds to pay the salary offered. (AF 11)

In the first place, the rebuttal was not fully responsive to the NOF which requested evidence in the form of, *inter alia*, "the employer(s)' most recent income tax return, or the employer may submit a certified financial statement" and immediately thereafter cautioned that the regulations place the burden on the applicant rather than the CO. After quarreling with the need to respond to this request, employer stated:

> Nevertheless, attached herewith are copies of the employer's tax returns for 1994 and 1995 clearly evidencing sufficient income and resources to pay the offered wage for a full-time domestic cook. (AF 138)

but in fact attached only the 1994 Form 1040 without the substantiating Schedule C. Under the circumstances it is clear that the CO was correct in the above quoted conclusions with respect to financial ability. The employer's 1994 after tax income of $45,677 ($64, 899-19,222, AF 155-156, ll. 22 & 53) does not appear to leave room to pay the alien's full-time wages of $25,292.80 (AF 17) and sustain the family. No financial statement was submitted although the NOF alerted employer to this possible means of proof. Employer has failed to support its generalized argument that "there is more than a reasonable expectation that the employer would be able to generate sufficient funds to pay the salary offered." (AF 10) Employer's claim is not supported by the decision in *Oriental* since the employer there produced substantial additional information showing gross receipts of $756,501 including a complete first-year business return and a statement by its accountant that it had never failed to pay employees or taxes on time.

Accordingly, the following order will enter.

ORDER

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

For the Panel:

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JAMES W. LAWSON
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, 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.

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