U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: NOVEMBER 28, 2000
CASE NO. 2000-INA-00218

In the Matter of:

JOHN'S CUTTING SERVICE,
Employer

On Behalf Of:

BONG HEE HWANG,
Alien

Appearance: Matthew C. Long, Esq.
For the Employer/Alien

Certifying Officer: Pandora Wong
San Francisco, California

Before: Holmes, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(5) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the 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.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. 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.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File, [1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 5, 1996, John's Cutting Service, ("Employer") filed an application for labor certification to enable Bong Hee Hwang ("Alien") to fill the position of Pattern Maker (AF 27). The job duties for the position are:

> Draw and cut out sets of master patterns of garments. Follow & examine sketches, sample articles & design specs to ascertain number, shape and size of pattern parts & quality of cloth reg to make finished article using (knowledge) of mfg. processes & characteristics of fabrics. Draw outline of parts on paper. Draw detail on outlined parts to indicate position of pleats, pockets, buttonholes, etc. Draw & cut out sets of different sizes.

The requirements for the position are two years in the job offered.

The CO issued a Notice of Findings on January 6, 2000 (AF 23), proposing to deny certification on the grounds that the alien beneficiary is the mother of the petitioner, and there is a

[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

question whether a current job opening exists to which U.S. workers can be referred in violation of 20 C.F.R. §§ 656.3, and 656.20(c)(8). The CO required the Employer to submit rebuttal evidence showing an unfilled job opening currently exists, or if the position is new, submit rebuttal to show what change in the company circumstances necessitated the new position. The CO also required the Employer to submit rebuttal to show how the person who makes the hiring decision for the position is completely independent of the alien and the alien's influence. The Employer was given until February 10, 2000 to submit a response.

In its rebuttal, dated January 24, 2000 (AF 10), the Employer's Attorney submitted a response contending that no U.S. workers' applied for the position, that the Alien is highly qualified, and "the mother/son relationship will have no effect on a proper employer/employee relationship." The Employer's counsel further stated the Alien will have the same expectations placed upon her as any other employee and "[w]e believe she is the right person for the position, based on her background, experience in the field, reliability and reputation as a hard worker." The CO issued the Final Determination on February 7, 2000 (AF 8), denying certification because the Employer failed to address the issues of whether a current job opening exists, to show that there was actually an unfilled position or that a change in circumstances necessitated a new position. The CO further concluded that while the Employer addressed the familial relationship between the Alien and the Employer, it did not address the issue of the job opening itself.

On February 29, 2000, the Employer submitted a notice of appeal (AF 1), and the case was forwarded to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.20(c)(8) requires that the employer show that the job has been, and is clearly open to qualified U.S. workers; that a bona fide job opportunity exists. Although the words "bona fide job opportunity" do not appear in the regulations, this administrative interpretation has been upheld, as it ""clarifies that the job must truly exist and not merely exist on paper."*Pasadena Typewriter and Adding Machine Co., Inc. and Alirez Rahmety v. U.S. Dept. of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987). The employer has the burden of proving by clear and convincing evidence that a valid employment relationship exists, that a bona fide job opportunity is available to U.S. workers, and that the employer has sought, in good faith, to fill the position with a U.S. worker. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*).

Section 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings of the NOF, and that all findings not rebutted shall be deemed admitted. On this basis the Board has repeatedly held that a CO's finding which is not addressed in rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*); *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989); *Salvation Army*, 1990-INA-434 (Dec. 17, 1991). Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable*

Mortgage Consultants, 1992-INA-321 (Aug. 4, 1993); *Korean Manpower Development, Inc.*, 1993-INA-121 (Mar. 21, 1994); *Prace Fabrication Corp.*, 1993-INA-179 (Mar. 28, 1994).

The Employer does not offer any evidence or argument concerning whether an unfilled position actually exists, or whether a new position has been created to meet some change or need of the business. Regardless of whether the Employer can maintain "an appropriate employer-employee relationship" with the Alien who is also his mother, the Employer never explains whether an unfilled job opening currently exists. Denial of certification is proper because of the Employer's failure to address these deficiencies as requested by the CO in the NOF. See *Reliable Mortgage, supra*; *Korean Manpower Development, supra*. Denial of certification is also proper because the Employer's rebuttal fails to provide any evidence that a bona fide position exists. See *Sun Valley Co.*, 1990-INA-393 (Jan. 6, 1992); *Ted Tokio Tanaka Architect*, 1988-INA-334 (June 27, 1989).

Based on the foregoing, we find that the Employer has not carried its burden of proving that the bona fide position exists, and the CO's denial of certification was, therefore, proper.

ORDER

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

For the Panel:

John Holmes
Administrative Law Judge

NOTICE OF 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 a 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 for such review 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 the 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 a petition, the Board may order briefs.