U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 16Apr2002

CASE No.: 2002-INA-73

In the Matter of:

LAS TRES AMERICAS SERVICES INC.,
Employer

On Behalf of:

ROSA ELENA AGUILAR,
Alien

Appearance: Adan G. Vega, Esquire
For the Employer

Certifying Officer: Charlene G. Giles
Dallas, Texas

Before: Burke, Chapman, and Vittone
Administrative Law Judges

LINDA S. CHAPMAN
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Rosa Elena Aguilar ("Alien") filed by Las Tres Americas Services Inc. ("Employer") pursuant to § 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 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

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 ("Secretary") has determined and certified to the Secretary of State and Attorney General that (1) there are not sufficient

workers in the United States who are able, willing, qualified, and available at the time of the application 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 U.S. 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.

The following decision is based 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 of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 29, 1996, the Employer filed an application for labor certification to enable the Alien to fill the position of "Bookkeeper." (AF 115). The job duties for the position, as stated on the application, were as follows:

> Verifies/allocates/posts details of various business transactions to appropriate accounts; Reconciles/balances accounts; Compiles reports related to accounts payable/receivable and profit and loss; Prepares checks for payroll and tax reports.

(AF 115). The requirements for the position were the completion of high school, two years of college with an associate's degree in accounting, and two years in the job offered, as well as two character references, and the ability to communicate in Spanish with clients. The job was 40 hours a week, at $8.00 an hour. (AF 115). Subsequently, the Texas Workforce Commission made numerous requests for modification or for further information, including information on the status of the alien, who was listed as one of the owners of the Employer (AF 113); a notice that the minutes or the organizational meeting were incomplete, and that the Employer should provide waiver notices signed by the directors, and documents of resignation for Michael Rodriguez, Yolanda Barrios, and the Alien; a notice that the combination of education/training/experience requirements was excessive, as the appropriate DOT code, 210.382-014 had a SVP of 6 (AF 107); a notice that the correct prevailing wage was $8.90 an hour (AF 105); and a notice that the Commission had attempted to contact Mr. Munoz, the president, who was the point of contact on the ETA 750A, but the business did not know who he was (AF 103). The Employer responded to each request, and the position was subsequently advertised.

In a Notice of Findings ("NOF") issued on April 21, 1998, the CO proposed to deny certification on numerous grounds (AF 78). Citing to 656.20(c)(8) and 656.3, the CO noted that the position as described in the application was open only to the alien. The CO stated that the

documentation accompanying the Employer's application showed that the alien owned an interest in the partnership that applied for the labor certification, thus indicating that the Alien is not working for an employer other than herself. The CO stated:

> Noting that the alien has a holding in the corporate organization, it is highly unlikely that the alien or a subordinate to the alien applicant would replace him with a qualified U.S. candidate. Accordingly, the case file fails to demonstrate that this position is clearly open to any qualified U.S. worker since the employer failed to show otherwise. Therefore, based on documentation, a bona fide job opening does not appear to exist.

The Employer was instructed that its rebuttal must consist of documentation persuasive on the issue of whether there was, in fact, an opportunity which was clearly open to U.S. workers, and that the alien could be replaced in the corporation. The Employer was specifically put on notice that it should establish that the corporation was sufficiently independent of the alien, both as an employee and investor, that the corporation could create a bona fide job opening that might be filled with someone other than the Alien. The Employer was notified that, at a minimum, this evidence should include a copy of the articles of incorporation; a list of all corporate officers and shareholders, titles and positions in the corporate structure, and a description of their relationships to each other and to the alien; the corporations Federal income tax returns for the preceding three years; the financial history of the corporation, including the amount of investment of each shareholder and the percentage such investment constituted in the total investment of the corporation; and the name of the corporate official with primary responsibility for interviewing and hiring applicants for positions in the company.

The CO also cited to Sections 656.21(b)(2), 656.21(b)(2)(i)(A) and (B), and 656.21(b)(2)(i)(C), and 656.21(b)(2)(iv), noting that job applicants were required to be able to communicate in Spanish. The CO stated that the Employer had provided a letter to establish business necessity for the foreign language requirement, but had not presented acceptable supporting documentation establishing that the job could not be performed without the foreign language requirement. Thus, the Employer did not submit documentary evidence to establish that Spanish was the sole means of communication within the company, or that communication could not be accomplished in English. The Employer was instructed to present such documentation.

The CO noted:

> While fluency in the Spanish may prove advantageous, the absence of such skill would not preclude one from performing the basic job duties. It appears that the requirement is a preference, not a business necessity and as such is restrictive and precludes referral of otherwise qualified U.S. workers. All restrictive requirements must be justified or in the absence of justification, deleted from the job order and advertisement.

The CO stated that the Employer's statement alone was insufficient unless it was supported by

documentation establishing that the foreign language requirement met the business necessity test. The Employer was notified that such documentation should consist of, *inter alia*, official records or data, original signed statements by disinterested, knowledgeable persons, or notarized affidavits to verify the claim. The CO also instructed the Employer to provide additional documentation establishing that Spanish was a normal requirement for the occupation in the area of intended employment. Such documentation was to include:

> position descriptions of the same or similar jobs within the employer's organization which hold the same job requirements as those required in this application. The document either shall be in the English language or shall be accompanied by a written translation into the English language, certified by the translator as to the accuracy of the translation and his/her competency to translate.

The CO also informed the Employer that if it submitted telephone bills as documentation, the Employer must establish what language was spoken, by whom, and whether the calls were for business purposes. The Employer was specifically instructed that telephone bills showing calls from one unidentified number to another unidentified number would not be sufficient. The CO also instructed the Employer to submit documentation showing the total number of clients and persons the Employer dealt with, and the percentage of these contacts that were not able to communicate in English; the percentage of the Employer's business that is dependent on Spanish and how the Employer's business would be affected without the language; and the percentage of time the worker would need to speak in Spanish. In short, the Employer was required to show how the use of Spanish was essential to the operation of its business.

The CO noted that the regulations require that the job opportunity's requirements shall be those normally required for the job in the United States, as described in the Dictionary of Occupational Titles, unless arising from business necessity. The CO stated that the requirement for fluency in a foreign language was not normally required for jobs in the United States, and thus was unduly restrictive. In addition, this requirement was in excess of the requirements as defined for the occupation in the DOT. The CO stressed that the foreign language requirement could not be based on employer and/or customer preference or convenience, but must be a requirement actually arising from business necessity.

In Rebuttal, the Employer submitted a letter from its attorney, stating that the Alien did not own any interest in a "partnership" applying for labor certification, but that she did own a 10% interest in the Employer corporation. However, this minority interest did not give her a controlling interest, nor was she a corporate officer. Attached was an affidavit signed by the Employer's president, John Munoz, stating that the Alien was not related to the corporate officers or employees, was not involved in the management of the corporation, and had no controlling interest in the corporation. The president also stated that a large number of the clients spoke Spanish, and would retain the services of a company which could assist them in Spanish. According to Mr. Munoz, it was imperative for the business to hire bookkeepers who are fluent in Spanish in order to remain competitive in their business niche, and

provide services to their existing clientele. He stated that the ability to speak Spanish by the bookkeeper would enhance the efficiency and quality of the services offered by the Employer, and that its absence would undermine the business operations. (AF 23-25). The minutes of the organizational meeting of the corporation were also attached, indicating the officers of the corporation. The Employer argued that the Alien was not in a position to influence the hiring practices of the Employer.

In response to the CO's request to establish that the Employer was independent of the Alien, the Employer submitted a copy of its corporate charter and articles of incorporation, stressing that the minutes and bylaws established that the Alien was not in control of the corporation, as she was not an officer, and owned only a 10% share. Employer stated that none of the current officers of the corporation are related to the Alien.

The Articles of Incorporation submitted by the Employer, which are undated, reflect that at the time of incorporation, the Alien was the sole shareholder of the authorized twenty shares of stock. In addition, the Alien, Mr. Rodriguez, and Ms. Barrios were the three directors and incorporators. The minutes of the organizational meeting, held on June 17, 1996, reflect that the Articles of Incorporation were filed on November 25, 1991. Although the Alien was present at the June 1996 meeting, Mr. Rodriguez and Ms. Barrios were present by proxy. The minutes indicate that a waiver of notice of the meeting was signed by all of the directors, and that the resignation of all directors was presented, but this documentation was not submitted by the Employer.[1] Elected as officers at this meeting were John Munoz and Juan Munoz. In addition, the minutes reflect that an "offer" was made to the corporation by John Munoz and the Alien regarding the issuance of shares of the corporation, although the offer itself was not submitted. The corporation was authorized to issue one share to the Alien, and nine shares to John Munoz, with a total capital value of $1,000.[2]

The Employer also submitted "Client Call" lists, reflecting the name of the client and spouse, the client's social security number, and a date. Although there is a column for the client's telephone number, this space is blank for the majority of the clients. There is nothing to indicate that these clients were actually called, or by whom, or what language was spoken. The Employer submitted a letter from Mr. Fredy Guardado, an "old client, " written in English, indicating that he preferred to speak Spanish. In his letter, Mr. Rudy Cortez, also a client, indicated that he spoke fluent English and Spanish, but that in his opinion, the employees seemed to speak Spanish most of the time because their clients did not speak English. Veronica Castro, an employee, stated in her letter that she was bilingual, and that in her opinion, 90% of the Employer's clients were Hispanics, and that most of the calls they received were from persons who did not speak English. Dalia and Heriberto Cazares, customers, submitted an affidavit, translated from Spanish, stating that they did not speak or read "correct" English, and

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[1] Indeed, the Texas Workforce Commission requested these documents earlier, but the Employer refused to provide them, claiming the request was irrelevant and onerous.

[2] The Alien's initial investment in the corporation was $1,000.

depended on the Alien to help. Rosa America Cruz also submitted an affidavit, translated from Spanish, stating that the Alien prepared her sales tax reports and income tax returns, and was a responsible person. She did not indicate that she could not speak English.

The Employer submitted federal tax returns from 1997 and 1996, and stated that it was awaiting a copy of its 1995 tax return from the IRS.[3] The 1997 Schedule K indicates that at the end of that tax year, no individual owned more than 50% of the corporation's voting stock. In addition, neither return reflects the issuance of any capital stock.

The Employer's attorney represented that the bookkeeper position required the ability to communicate with clients in Spanish because the "vast majority of the clients speak Spanish and generally prefer to speak Spanish in conducting business." Thus, if the applicant could not speak Spanish, the business would be jeopardized.

On October 30, 1998, the CO issued her Final Determination (FD), finding that the Employer had established the existence of a bona fide job offer, but not that the requirement of proficiency in the Spanish language was a business necessity (AF 13-14). Noting that the NOF requested the Employer to provide specific documentation to support the foreign language requirement, the CO stated:

> In rebuttal of May 26, 1998, the employer failed to provide the requested business necessity documentation to support the foreign language requirement. Furthermore, legal counsel for the employer states that the employer's clients **prefer** to speak Spanish. Consequently, it appears that the requirement is a preference, and not an actual requirement arising from business necessity.

By letter dated November 25, 1998, the Employer requested review of the denial of certification (AF 1). The matter was transmitted to the Board on January 23, 2002, and docketed on January 28, 2002.

Discussion

Federal regulations at 20 C.F.R. 656.21(b)(2), require 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. The purpose of 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *See Venture International Assoc., Ltd.,* 87-INA-659 (Jan. 13, 1989)(*en banc*); *Rajwinder Kaur Mann,* 95-INA-328 (Feb. 6, 1997); *Super Super, Inc.,* 94-INA-604 (Aug. 29, 1995).

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[3] They may wait a long time, because the organizational meeting for the corporation did not take place until 1996.

None of the rebuttal evidence that Employer presented adequately documents that the ability to speak Spanish is usual for the petitioned position, or even necessary for Employer's business.[4] As was determined by the CO, the requirement appears to be more of a preference for Employer's convenience, and tailored to the Alien. Thus, the letters from the clients and employee do not establish that either the ability to speak Spanish is usual for the bankruptcy process, or that it is necessary for Employer's business. Two of those clients, Mr. Cortez and Mr. Guardado, specifically stated, in English, that it was their preference to do business in Spanish. Nor is there any basis for or documentation to support the opinion of Mr. Cortez, a client who presumably is not on the Employer's premises on a day to day basis, that most of the clients do not speak English. Although the client call lists suggest that most of the clients are Hispanic, there is no documentation to support the further claim of Ms. Castro, an employee, that most of the calls they received were from persons who do not speak English.[5] Ms. Cruz, a client whose affidavit was written in Spanish, did not indicate that she did not speak English. The Cazares were the only clients who stated that they needed a Spanish speaking person to help them with their taxes.

Nor are the "Client Call" sheets sufficient to establish that the Spanish language requirement is usual for the position, and necessary for the Employer's business. These lists contain names and social security numbers, and infrequently, telephone numbers. But although the surnames appear to be Hispanic, there is nothing in these call sheets to indicate that any of these clients cannot speak English. The CO specifically required the Employer to submit documentation that Spanish was the sole means of communication within the company, or that communication could not be accomplished in the English language. The CO also specifically delineated the documentation that was required, including position descriptions of the same or similar jobs within the Employer's organization with the same job requirements, documentation of the total number of clients dealt with and the percentage of those clients who were not able to communicate in the English language,[6] the percentage of the business that is dependent on the foreign language, and the percentage of time the worker would need to use the foreign language.

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[4] We have serious reservations as to whether a bona fide job actually exists, as the evidence strongly suggests that the corporate structure was manipulated to reflect that the Alien has no control over the business, when this may very likely not be the case. However, the CO denied certification solely on the issue of the unduly restrictive language requirement, and we consider only that issue on appeal.

[5] Of course, the fact that the clients are Hispanic does not automatically mean that they do not speak English; nor is there any indication that "clients" are synonymous with persons who call the Employer.

[6] Thus, there is no factual support for the Employer's argument on appeal that more than 95% of their clients are from a predominantly Hispanic community, the majority of which do not speak English.

The documentation submitted in Rebuttal falls woefully short of establishing that the ability speak Spanish is essential to this job. Indeed, Employer's counsel, in his letter submitted in Rebuttal, stated that "the vast majority of the clients speak Spanish and generally prefer to speak Spanish in conducting business." John Munoz, the Employer's President, confirms in his affidavit that the ability to speak Spanish is a preference. Thus, he stated that 15 of the 393 clients listed on the Client Call sheets were non-Spanish speaking, and that the rest were Spanish speaking. Left unanswered was the question of how many of these clients speak **only** Spanish. Indeed, a fair reading of Mr. Munoz's affidavit is that the Employer would like to be able to attract Hispanic clients by offering them the ability to conduct their business in Spanish. But this does not establish that the ability to speak Spanish is essential to the performance of this position, as opposed to a preference of the Employer.

Nor did the Employer address the specific questions by the CO relating to position descriptions of the same or similar jobs, the percentage of clients who were not able to speak English, the percentage of the Employer's business that is dependent on Spanish, and the percentage of time that the worker would need to use the Spanish language.

The burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsh Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. 656.2(b). As was noted by the Board of Alien Labor Certification Appeals (Board) in *Carlos Uy III*, 1997-INA-304 (Mar 3, 1999)(*en banc)*, "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8. The Employer has the burden of satisfactorily responding to or rebutting all findings in the NOF. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Where the CO requests documents or information with a direct bearing on the resolution of an issue and which is obtainable by reasonable effort, the employer must provide it. *Gencorp*, 1987-INA-659 (January 13, 1988) (*en banc*).

The evidence submitted by the Employer is insufficient to establish this requirement as usual and customary in the area of intended employment. Moreover, Employer has presented no evidence that the ability to speak Spanish speed is essential to reasonable performance of the job. Thus, it has not documented business necessity for this requirement. *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989)(*en banc*). Based upon the foregoing, we conclude that labor certification was properly denied.

ORDER

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

For the Panel:

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LINDA S. CHAPMAN
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, 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 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.