

U.S. Department of Labor

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

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 01 July 2003

BALCA Case No.: 2002-1NA-84
ETA Case No. P1999-CA-09444052/JS

In the Matter of

SHAKEY'S PIZZA,
Employer,

on behalf of

FERNANDO CARDENAS,
Alien.

Appearance: John Montano, Jr., Esquire
Tustin, California

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by an Italian Restaurant & Pizza Parlor for the position of Italian Specialty Cook. (AF 23-24).² The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. §656.27(c).

¹Alien 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 20 C.F.R. Part 656.

²"AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

On October 16, 1997, Employer, Shakey's Pizza, filed an application for alien employment certification on behalf of the Alien, Fernando Cardenas, to fill the position of Italian Specialty Cook. Minimum requirements for the position were listed as two years experience in the job offered. (AF 23-24).

Employer received three applicant referrals in response to its recruitment efforts, all of whom were rejected by Employer on the basis they appeared disinterested in the position. Specifically, as pertinent herein, Employer rejected applicant Padilla because, in an interview, "the applicant stated that he is searching for a position as a Chef/Manager and asking for too much money." Employer concluded "Mr. Padilla is disqualified because he does not appear to be interested in the position being offered." (AF 29-30).

A Notice of Findings (NOF) was issued by the CO on May 30, 2001, proposing to deny labor certification based upon a finding that Employer had rejected applicant Padilla for reasons that cannot be considered lawful or job related. The CO found the applicant was qualified based upon a review of his resume. He observed that it did not appear that the applicant was offered the position and since he did apply for the job, the mere fact that he referenced a higher aspiration did not mean that he would have turned this job down. Thus, the CO concluded Employer had not documented lawful, job-related reasons for the rejection of this qualified U.S. worker. (AF 20-22).

In Rebuttal, Employer further detailed its basis for rejection of applicant Padilla, asserting that the applicant did not demonstrate the required interest for the position. Employer stated:

During his interview he stated that he applied for a kitchen manager/chef position and not as a permanent cook, specialized in Italian cuisine. Applicant PADILLA was willing to accept the cook position temporarily and referred a higher aspiration as a

requisition. The employer cannot afford a worker on a temporary basis when the need for a Cook, Italian Specialty, exists.

In addition, Employer maintained that the applicant was unable to provide the requested documentation for verification of his credentials, noting that his resume "reflects experience as a sous chef, that deals only with cold meats, where responsibilities include, but do not go beyond being involved with cooks in the preparation of cooked food." (AF 14-15).

A Final Determination denying labor certification was issued by the CO on July 23, 2001, based upon a finding that Employer had failed to adequately document lawful rejection of U.S. worker Padilla. With regard to the applicant Padilla's stated interest in a management position, the CO observed that there was no evidence that he would have left the labor certification position at any specific time after being hired; hence, he was clearly an available U.S. worker. With respect to the verification of credentials issue, the CO noted that the applicant's resume includes the telephone number of his current employer and includes the names of two other known restaurants, the cities and the periods of employment. The CO found Employer's assertion that the Alien lacked experience, as he only worked with cold meat, unpersuasive and unsubstantiated, in light of his experience as shown on his resume working for a known Italian style restaurant. (AF 13-14).

Employer filed a Request for Review on August 27, 2001, which was considered as a Request for Reconsideration and denied on September 13, 2001. (AF 1-11). The matter was docketed in this office on February 13, 2002.

DISCUSSION

Federal regulations at 20 C.F.R. § 656.24 (b)(2)(ii), state, in part, that the Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed.

Section 656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

The burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-1NA-64 (May 15, 1997); *Marsha 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 in *Carlos Uy III*, 1997-1NA-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." Slip op. at 8.

In the instant case, Employer initially reported that he had rejected applicant Padilla because he appeared overqualified, *i.e.* he was seeking a higher position as a Chef/Manager, and hence was not interested in the position offered. In response to the NOF, Employer stated that the applicant had indicated a willingness to accept the cook position temporarily, although he had higher aspirations, and thus he was rejected because Employer could not afford to hire a worker on a temporary basis. In addition, Employer asserted the applicant lacked verifiable credentials and experience.

As was noted by the CO, there is no evidence that the applicant would have left the labor certification position at any specific time after being hired and thus, he was clearly an available U.S. worker. An employer may not reject a U.S. worker solely because he or she is overqualified and employer fears that they may not stay in the position for long. *World Bazaar*, 1988-INA-54 (June 14, 1989)(*en banc*). See also *IPF Int'l, Inc.*, 1994-INA-586 (July 24, 1996); *Integrated Business Solutions, Inc.*, 1994-INA-209 (June 22, 1995); *Chuang, Chen, Fan & Pai Accountancy Corp.*, 1992-1NA-209 (June 1, 1993); *Kem Medical Products, Corp.*, 1991-INA-243 (July 2, 1993).

With respect to the verifiable credentials and experience issues, as was noted by the CO, the applicant's resume shows that he wrote the telephone number of the his current employer on the

resume and that the two other previous employers named were known restaurants, and hence the information and experience provided was easily verifiable. According to the applicant's resume, the applicant prepared Italian cuisine for a known Italian restaurant for over four years. (AF 33).

Based upon the foregoing, we conclude that this applicant was rejected for other than lawful, job-related reasons and thus labor certification was properly denied

ORDER

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

Entered at the direction of the panel by:

A

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 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.