



Issue Date: 18 February 2004

BALCA Case No.: 2002-INA-263
ETA Case No.: P2001-NY-02468267

In the Matter of:

SHANTI PRASHAD,
Employer,

on behalf of

BIBIE SAFALENE KHAN-TOOVEY,
Alien.

Appearances: Earl S. David, Esquire
New York, New York
For Employer

Certifying Officer: Dolores DeHaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Shanti Prashad (“Employer”) on behalf of Bibie Safalene Khan-Toovey (“the Alien”) for the position of Domestic Cook. (AF 14-15).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”). 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by § 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 September 5, 2000, Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Domestic Cook. Minimum requirements for the position were listed as two years experience in the job offered. The rate of pay was \$552 per week. (AF 14-15).

A Notice of Findings (“NOF”) was issued by the CO on March 14, 2002, citing 20 C.F.R. § 656.20(c)(8) and noting that the job opportunity must be bona fide and open to any U.S. worker. In addition, the CO cited 20 C.F.R. § 656.20(c)(1), requiring that Employer have enough funds available to pay the wage or salary offered the Alien. Rebuttal evidence was to include responses to several enumerated questions, including documentation regarding the percentage of employer’s disposable income devoted to paying the alien’s salary. (AF 19-22).

In Rebuttal, Employer submitted responses to the various enumerated questions, and as pertinent herein, presented copies of Employer’s Federal Income Tax returns for 2000 and 2001, evidencing taxable incomes of \$27,340 and \$28,555 per year, respectively. (AF 23-45).

A Final Determination (“FD”) denying labor certification was issued by the CO on May 24, 2002, based upon a finding that Employer had failed to adequately document that a *bona fide* job opportunity clearly open to U.S. workers existed. (AF 46-47). The CO found Employer’s submission of tax returns evidencing an adjusted gross income of \$27,340 in 2000 and \$28,555 in 2001 insufficient to find that Employer had the ability to pay the required annual salary of \$28,704 per year. The CO noted that one of the requirements for documenting the *bona fides* of a job is the ability to pay the wage or salary offered. The CO concluded that labor certification was properly denied as Employer had failed to provide evidence that she can meet the salary requirements of a permanent full-time domestic cook.

Employer filed a Request for Review/Reconsideration on June 18, 2002, wherein she submitted the tax returns and a statement from her niece stating that she was also responsible in part for payment of the proposed salary. (AF 48-53). Reconsideration was denied by the CO on August 7, 2002 and the matter was docketed in this Office on August 20, 2002. (AF 55).

DISCUSSION

Pursuant to 20 C.F.R. § 656.20(c)(8), an employer must document that the job opportunity has been and is clearly open to any qualified U.S. worker. The employer has the burden of providing clear evidence that a valid employment relationship exists, that a *bona fide* job opportunity is available to domestic workers, and that the employer has, in good faith, sought to fill the position with a U.S. worker. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987)(*en banc*). Moreover, an application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. 20 C.F.R. § 656.20(c)(1). Certification may be denied if an employer fails to meet its burden of proving the sufficiency of funds to pay the alien's salary. Denial may result from either the absence of documentation or the submission of documentation which contradicts an employer's claim of sufficient funds. *Joy Chinese Restaurant*, 1988-INA-354, 1988-INA-362 (Oct. 30, 1989); *White Harvest Mission*, 1990-INA-195 (Apr. 9, 1991); *Whistlers*, 1990-INA-569 (Jan. 31, 1992).

In the instant case, Employer submitted tax returns evidencing a taxable income of \$27,340 for the year 2000 and \$28,555 for the year 2001. Employer proposed to pay the Alien an annual wage of \$28,704. Employer's wage offer constitutes more than Employer's taxable income. A statement after issuance of the FD that Employer's niece is assisting in payment of the wages is insufficient to overcome the CO's finding of insufficient funds to constitute a *bona fide* job opportunity. As was noted by the Board in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), "[u]nder the regulatory scheme of 20 C.F.R. Part 656, 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." Based upon the foregoing, we conclude that Employer has not documented ability to pay the offered wages and thus conclude that labor certification was properly denied. *See Foothill Division Karate Club*, 1993-INA-494 (Oct. 11, 1994); *Patucha Art*, 1993-INA-305 (Apr. 6, 1995).

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 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. 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 typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.