



Issue Date: 19 November 2003

BALCA Case No.: 2002-INA-280
ETA Case No.: P2000-CA-09507018/AT

In the Matter of:

SIZZLER'S RESTAURANT,
Employer,

on behalf of

ANTONIO GARCIA,
Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearance: Yvette Pizana
Santa Maria, CA
For Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Antonio Garcia ("Alien") filed by Sizzler's Restaurant ("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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record

upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On February 9, 2000, Employer filed an application for labor certification on behalf of the Alien for the position of Kitchen Helper. (AF 19-20).

On June 19, 2002, the CO issued a Notice of Findings ("NOF") indicating the intent to deny the application on the grounds that the position did not appear to be a full-time job and a bona fide job opening. (AF 15-17). The CO noted that in accordance with the documentation submitted by Employer, the Alien had been working on a part-time basis since November 1989. Accordingly, it appeared unlikely that Employer would displace the Alien with a U.S. worker. In order to correct the deficiencies, the CO requested that Employer submit a copy of his business license, a current tax identification number and documentation supporting Employer's ability to pay the wage offered. Additionally, Employer was asked to provide the total number of individuals working for Employer and a description of their responsibilities. (AF 16).

In rebuttal, Employer asserted that the position was, and always had been, a full-time position. No documentation was included with the rebuttal and no additional assertions were made by Employer. (AF 13).

On July 31, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 10-11). The CO found that Employer's rebuttal was not responsive to the NOF. The CO noted that Employer's statement asserting that the position was a full-time job was unsubstantiated. Additionally, Employer did not supply any of the items requested in the NOF. As Employer failed to provide the documents requested and limited its rebuttal to an unsubstantiated statement, the application was denied. (AF 11).

In the request for review filed on August 22, 2002, Employer reasserted that the Alien had been working forty hours a week. (AF 1-9). Employer also indicated he had thirty-five employees. (AF 1). Employer provided a copy of the business license, the tax identification number and a note handwritten by the owner of the business indicating that she had been in business for sixteen years. (AF 1-6).

The AF does not reflect that a brief was filed.

DISCUSSION

Under 20 C.F.R. § 656.26(b)(1), a request for review shall be in writing, shall clearly identify the particular labor certification determination from which review is sought and shall set forth the particular grounds for the request. When the request for review does not set forth specific grounds for review and no brief is filed, the request for review will be dismissed. *North American Printing Ink Co.*, 1988-INA-42 (Mar. 31, 1988)(en banc); *Bixby/Jalama Ranch*, 1988-INA-449 (Mar. 14, 1990); *Rank Enterprises, Inc.*, 1989-INA-124 (Nov. 13, 1989); *The Little Mermaid Restaurant*, 1988-INA-489 (Sept. 1, 1989).

Employer did not file a brief and in its request for review, it did not allege a single ground for this Panel to review. Employer limited its request to an undocumented and self-serving assertion that the position was a “forty hour a week” job. (AF 1). However, general statements of disagreement with the CO do not constitute an assignment of error and such a request for review will be dismissed. *GCG Corp.*, 1990-INA-498 (Mar. 11, 1991); *Ajem Thread Rolling*, 1990-INA-412 (May 20, 1991).

Consequently, for the above stated reasons, we dismiss Employer’s request for review and affirm the CO’s denial. Accordingly, the following order will enter¹:

¹ We note that another ground for affirming the CO’s denial is Employer’s failure to document its assertion that the position was a full-time position and its failure to provide the documents the CO requested in the NOF. The burden of proof, in the twofold sense of production and persuasion, is on the employer. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). The employer bears the burden in labor

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

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 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 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:

certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Employer failed in its obligation to prove its case by limiting its rebuttal to a single self-serving and undocumented assertion indicating that the position was a full-time position. (AF 12). Denial of certification has been affirmed where the employer has made only generalized assertions. *Winner Team Construction, Inc.*, 1989-INA-172 (Feb. 1, 1990). Employer's unsupported assertion is particularly troublesome as the ETA 750A indicated that the job involved thirty-six hours per week. (AF 19). If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Denial of certification is proper when the Employer fails to provide reasonably requested information. *O.K. Liquor*, 1995-INA-7 (Aug. 22, 1996). The CO requested reasonable documentation, including a copy of Employer's business license and tax identification number; however, Employer failed to provide the documents requested. The employer's last opportunity to supplement the factual issues of the case is in the rebuttal. 20 C.F.R. §656.24. Therefore, it is the employer's burden at that point to perfect a record that is sufficient to establish that certification should be granted. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Accordingly, Employer's failure to document that the job was full-time and a bona fide job opportunity is grounds for denial of certification. We also note that documents first submitted by Employer with its request for review cannot be considered by this Panel because our review must be based on the record upon which the CO reached his decision. Evidence first submitted with the request for review cannot be weighed. *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994), *Cappricio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Therefore, the documentation requested by the CO but not submitted by Employer until the request for review cannot be considered by this Board.

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
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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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.