

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 July 2003

BALCA Case No.: 2002-INA-247
ETA Case No.: P2000-CA-09499650/AT

In the Matter of:

CHICKEN GEORGE,
Employer,

on behalf of

EDVARD MEGERDICHIAN,
Alien.

Appearances: Peter A. Hosharian, Esq.
Glendale, California
For the Employer and Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Cook."¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ Permanent alien 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 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. We base our decision 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. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On September 25, 1998, Employer, Chicken George (“Employer”) filed an application for labor certification on behalf of the Alien, Edvard Megerdichian (“Alien”) to fill the position of "Cook." (AF 16). The job duties were described as follows:

Prepare traditional Middle Eastern, Armenian, and Greek dishes. Prepare and cook dolma, moussakka, keyma and kufta. It is expected from the applicant to be able to prepare low-fat vegetarian and international food.

Employer required four years of experience in the position offered.

The CO issued a Notice of Findings ("NOF") on March 29, 2002, proposing to deny certification, based on violations of 20 C.F.R. §656.20(b)(3)(i) and (ii) and 20 C.F.R. §656.21(j)(1)(iv). (AF 12). Specifically, the CO noted that during the final stages of the recruitment period, the attorney for Employer and Alien was the one who issued the letter of invitation to interview to the one U.S. applicant who applied for the job. The letter was written on the letterhead of the law firm. When the applicant did show up for the interview, she was informed by another representative of Employer that she needed to provide work experience letters from previous employers or a resume. Thus, it appeared to the CO that this applicant did not have an actual interview, a good faith effort to recruit had not occurred, and the applicant was not rejected for a lawful job-related reason. Employer was advised to submit rebuttal explaining with specificity why it was not involved in the recruitment efforts. The CO found no evidence that the attorney was the representative who normally interviewed applicants, and Employer needed to explain why the attorney of record acted as Employer’s representative who normally interviews or considers applicants for jobs that do not involve labor certifications. Employer was directed to explain why the applicant was not actually interviewed by Employer when she showed up for her interview and to document the lawful, job-related reasons for her rejection.

Employer's rebuttal consisted of a letter dated April 29, 2002, signed by Employer's owner and attorney. (AF 9). Therein, it was asserted that the attorney was the legal representative of Employer and Alien, and it was "the attorney's duty and obligation to guide and monitor the Labor Certification process from the beginning to its completion." It was argued that those duties included contacting prospective U.S. workers and arranging their interview with Employer. The letter further asserted that it was Employer's Manager who greeted the applicant at the job site, and despite the fact that the interview letter directed the applicant to provide a resume or letter of qualification, she had none with her. She stated that she would return within a few days with the information requested of her. Employer claimed that it attempted to contact the applicant twice after the initial meeting. It was "merely the employer's intention to obtain some verifiable information of the applicant's prior employment and confirm the applicant's past employment as any ordinary employer would have done." Employer stated that the U.S. applicant did not return Employer's telephone calls. Employer argued that despite the fact that the applicant's letter stated that she had experience in Middle Eastern, Armenian, and Greek foods for over thirty years, there was no basis by which to consider the applicant's experience. Employer asserted it could not verify this claim, given that there was no contact information about prior employers. Employer contended that the applicant was given ample opportunity to return and provide the information requested, and her failure to do so established that she was not interested in the job offered.

The CO issued a Final Determination ("FD") on May 31, 2002, denying certification. (AF 7). The CO found that Employer had failed to rebut the findings rendered pursuant to 20 C.F.R. §656.20(b)(3)(i) and (ii) and 20 C.F.R. §656.21(j)(1)(iv). The CO noted that Employer did not state in its rebuttal that the attorney in this matter was also the representative who normally interviewed or considered applicants for jobs which do not involve labor certification. Employer's owner was the sole contact in the labor application process, as evidenced by the fact that he signed the application, his name was listed as the contact person on the posted notice of the job opportunity, and he was listed as the person to contact for all CalJobs referrals. The record, however, did not show that Employer's owner involved himself in the recruitment efforts of the one U.S. applicant. There was also no evidence that any other company official was designated to act in this labor certification

process, particularly during the recruitment process. The CO found that involvement of individuals other than Employer's owner could not be considered as representing the best interests of the U.S. applicant and the lack of involvement of Employer discouraged her from following through in this matter. Accordingly, labor certification was denied.

By letter dated July 2, 2002, Employer requested review of the denial of certification. (AF 2). Therein, Employer argued that the U.S. applicant failed to return for an interview or to respond to Employer's later communications, demonstrating a lack of interest on her part in the job offered. Employer further contended that neither Employer's attorney nor a staff member of Employer was involved in the recruitment process, and that the failure to interview the applicant was through no deficiency on the part of Employer. Employer argued that the U.S. applicant was afforded ample opportunity to be interviewed for the job offered, however, she failed to comply with the specifications requested by Employer, and she failed to follow up and/or produce the necessary documentation. Employer claimed it had to investigate the applicant's credentials and that the requested information was crucial in determining the applicant's qualifications.

On July 10, 2002, the CO notified Employer that its request for reconsideration was denied, and the petition was being forwarded to the Board of Alien Labor Certification Appeals. ("Board" or "BALCA"). (AF 1).

DISCUSSION

In her letter responding to the advertised position, the U.S. applicant indicated that she had experience in Middle Eastern, Armenian and Greek foods for over thirty years. (AF 26). She further stated that she was Lebanese American and there was nothing she could not cook. In response to her letter, Employer's legal counsel, on law firm letterhead, sent the applicant a response. (AF 27). The letter advised the applicant that the writer was the legal representative of Employer, and that an interview had been scheduled for the applicant. The applicant was requested to bring a resume or a letter of qualification for the job. When she appeared at the interview without the resume or letter,

she was not interviewed.

Section 656.20(b)(3) (i) provides that it is contrary to the best interests of U.S. workers for the alien or his agent or attorney to participate in the interview process or consideration of U.S. applicants for the job offered the alien. Therefore, the alien or his agent or attorney may not interview or consider U.S. workers *unless* the agent or attorney is also the employer's representative who normally interviews or considers the applicants for jobs such as that offered the alien when labor certification is not involved. Section 656.20(b)(3)(ii), which limits who can represent the employer in interviews with U.S. applicants, applies only if the employer's attorney is also the alien's attorney under Section 656.20(b)(3)(i). *See Marcelino Rojas*, 1987-INA-685 (Mar. 11, 1988). In the NOF, Employer was specifically requested to specify whether the attorney was the representative who normally interviewed or considered applicants when labor certification was not involved. No response was given to that question, although Employer's attorney did assert that he was the attorney for Employer and Alien, raising the applicability of the aforementioned regulation.

Section 656.25(e) provides that an employer's rebuttal evidence must rebut all findings in the NOF and that all findings not rebutted shall be deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989)(*en banc*). Such is the case here. Employer failed to rebut the finding of a violation of 20 C.F.R. §656.20(b)(3). Labor certification was properly denied, the remaining issues need not be addressed.

ORDER

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

Entered at the direction of panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF 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 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for 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 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten 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.