



Issue Date: 15 September 2003

BALCA Case No.: 2002-INA-108
ETA Case No.: P1995-CA-09037435/JS

In the Matter of:

JUZER SAIFEE,
Employer

on behalf of

ANIS ZAHIR,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Garish Sarin, Esquire
Los Angeles, 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 Juzer Saifee (“Employer”), on behalf of Anis Zahir (“Alien”) for the position of Domestic Cook. (AF 132).² The following decision is based on the record, after remand, upon which the Certifying Officer (CO) denied certification and Employer’s request for review, as contained in the Appeal File.

¹ 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 20 C.F.R. Part 656.

² “AF” is an abbreviation for “Appeal File”.

STATEMENT OF THE CASE

On January 17, 1995, Employer applied for alien labor certification on behalf of the Alien to fill the skilled labor position of “Cook/Domestic” for his household. The job was classified as “Cook” under DOT Occupational Code No. 305.281-010.³ Employer described the job duties as follows:

Plans menus with the family. Prepare and cooks meals according to habits and taste of employer who is Muslim from Pakistan. Requiring experience and knowledge with Indian/Pakistani food. Especially curries, Kababs, breads using Halal meat and traditional, knowledge in spices and preparation. Serve meals, buys meats and vegetables. Must be non-smoker.

AF 132, box 13. (Copied verbatim without change or correction.) The wage offered was \$26,524 per year for a forty-hour week, without overtime provisions. The work hours listed on the application were from 11:00 A.M. to 7:00 P.M. No educational requirement was stated, but Employer specified two years of experience in the job offered or in the related occupation of Indian/Pakistani Cook/Chef. *Id.*, box 14.

The Certifying Officer (“CO”) issued a Notice of Findings (“NOF”) on March 13, 1996 (AF 123-130) and Employer filed his rebuttal on April 15, 1996. (AF 112-122). On May 30, 1996, the CO issued a Final Determination denying certification because: 1) the job as described did not require eight hours of work per day, therefore a *bona fide* job opportunity did not exist; and 2) the requirement for experience in Pakistani cooking was unduly restrictive. (AF 80-84). Employer then sought administrative review. (AF 79). The BALCA panel remanded the case to the CO for review under the subsequent

³ 305.281-010 **COOK (DOMESTIC SER.)** Plans menus and cooks meals, in private home, according to recipes or tastes of employer. Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes bread and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist (domestic ser.) *GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 6 DLU: 81*

holdings of *Daisy Schimoler*, 1997 INA 218 (Mar. 3, 1999)(*en banc*) and *Carlos Uy, III*, 1997 INA 304 (Mar. 3, 1999)(*en banc*).

Following the order of remand, the CO issued a second NOF on December 13, 2000 (AF 47-51), which was followed by a rebuttal from Employer on January 11, 2001. (AF 38-45). The CO again denied certification on December 5, 2001. (AF 25-27).

In the most recent NOF (AF 47-51), the CO questioned whether a *bona fide* job opportunity existed and found that the job requirement for expertise in cooking a specific foreign cuisine was unduly restrictive. The CO instructed Employer on the supplemental information he should provide in support of a rebuttal to the NOF. In Employer's rebuttal (AF 30-36), he argued that a full-time job existed and provided six recipes to demonstrate the types of meals the Domestic Cook would be preparing. Employer submitted a copy of his 1999 tax return as proof of his ability to pay the proposed salary. He also asserted that the requirement that the cook be experienced with Indian/Pakistani food was necessary due to his family's strict adherence to the dietary restrictions of his religion and culture.

In the Final Determination, the CO denied certification because Employer had not demonstrated that a *bona fide* job opportunity existed. (AF 25-27). The CO stated that, in his rebuttal, Employer listed the work hours as 7:30 a.m. to 7:00 p.m. without indicating that overtime would be paid. In addition, Employer would be using 60 percent of his adjusted gross income to pay the Domestic Cook's salary. The CO stated that it was not clear that Employer could afford to live on 40 percent of his income and spend the greatest portion of his income on a Domestic Cook. Employer, individually and without counsel, again requested administrative review and referenced his previous responses. (AF 16).

DISCUSSION

This case was remanded so that the CO could issue a new NOF and Final Determination based on a review of Employer's application under the standards

articulated in *Carlos Uy, III* and *Daisy Schimoler*. The CO stated in the Final Determination that certification was denied because no *bona fide* job exists that is open to U.S. workers. (AF 27). Under *Carlos Uy, III*, (1997 INA 304 (Mar. 3, 1999)(*en banc*)), whether a *bona fide* job opportunity exists is analyzed using the “totality of circumstances” test.

The primary factor in the CO’s determination was the finding that Employer did not have sufficient ability to pay the proposed salary. In rebuttal, Employer submitted a copy of his 1999 tax return. (AF 35-36). In order for a *bona fide* job opportunity to exist, Employer must show that he has the ability to pay the salary for the position. *Fred's Allaf Jewelers*, 1994-INA-620 (Aug. 15, 1996).

Whether based on Employer’s gross income or taxable income, it is clear that Employer does not have sufficient income to guarantee the proposed salary. Employer’s taxable income, after itemized deductions were subtracted, was well below the amount of the proposed salary.⁴ (AF 35). Moreover, Employer did not provide any explanation of the itemized deductions to indicate that these expenses would be eliminated once the Domestic Cook was employed. (AF 132, box 12).

As the CO observed, based on Employer’s adjusted gross income, Employer would spend 60 percent of his gross income to pay the salary of a Domestic Cook. In the past, we have questioned whether an employer would devote large portions of his income to the salary of a Domestic Cook. See *Carlos Uy, III*, 1997 INA 304 (Mar. 3, 1999)(*en banc*)(“...it is highly questionable on the record before us that he would be willing to use approximately one-third of his gross income to pay for a cook.”)(~~m~~ phasis in original). The percentage of Employer’s income needed for the salary would further increase if Employer requires the Domestic Cook to work from 7:30 a.m. to 7:00 p.m., as stated in the rebuttal to the second NOF. (AF 31). This is due to the fact that Employer would

⁴ *C.f.* *Fred's Allaf Jewelers*, 1994-INA-620 (Aug. 15, 1996) (basing decision on ability to pay salary on business profit instead of gross profit).

then be required to pay overtime wages. These facts make it highly unlikely that the position exists in the manner stated on the application.

Based on the foregoing, the CO did not err in determining that no *bona fide* job existed using the “totality of circumstances” test expressed *Carlos Uy, III*.

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 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:

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, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced,