U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 22Apr2002

Case No: 2002-INA-00081

In the Matter of:

CHILI'S RESTAURANT
Employer

On Behalf of:

LEONARDO HERNANDEZ-RAMIREZ
Alien

Appearance: Gary Spencer, Esq.
for the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Leonardo Hernandez-Ramirez ("Alien") filed by Employer, Chili'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 the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On March 26, 1998, the Employer filed an amended application for labor certification to enable the Alien to fill the position of assistant cook in its Mexican restaurant.

The duties of the job offered were described as follows:

"Cook for authentic Mexican restaurant. Must be able to use standard restaurant equipment and utensils. Able to prepare a wide range of Mexican food including, Monterrey Chicken, Chili relleno, carnitas, carne asada, machaca etc. Garnish with lettuce, guacamole and salsa. This schedule allows for a thirty minute meal break. Responsible for scheduling within his shift and control and recording of all inventory with respect to foods and paper products used during the shift."

An 8th grade education and two years experience in the job or in the related job of cook was required. Wages were $13.26 per hour. The applicant supervises 0 employees and reports to

the General Manager. (AF-24-86)

On February 27, 2001, the CO issued a NOF denying certification. The CO citing Section 656.21(b)(1) and 656.21(g)(1)found that Employer failed to adequately recruit. The CO stated: “Your newspaper ad does not accurately reflect your actual job offer in that it makes no provision for the ‘related occupation’ experience qualification you offer. Corrective action was re-recruitment. The CO, also, found Employer used an unduly restrictive requirement in violation of 20 CFR 656.21(b)(2)(i)(A). Specifically, the two year experience requirement exceeds that for Specialty Cooks; Employer described the position as an assistant cook. Secondly, “..scheduling shifts and inventory control...” go beyond those of a Specialty Cook as defined in the DOT. Corrective requirement was either readvertising, or documentation that the requirements are based on ordinary business necessity and not personal preference. (AF-18-22)

On March 9, 2001, Employer forwarded its rebuttal contending that the two years experience in the offered position of assistant cook is inferior experience as compared to a cook. Therefore, there was no violation based on inadequate recruitment. With respect to the Unduly Restrictive issue, Employer stated: “Employer’s Foreign Specialty Cook’s job duties and responsibilities do not include the serving of meals or beverages to customers, nor are prepared meals served by waiters... Additionally, a central duty associated with the job described under DOT 313.361-026 (Cook, Specialty) is that of the serving of either meals and/or beverages by said cook. However, the job duties set forth under DOT 313.361-030 (Specialty, Foreign Food Cook) do not require the cook to serve customers directly, but rather, said cook serves food to waiters/waitresses on order. Additionally, a substantial number of items under employer’s menu require an extraordinary amount of time to prepare because, the ingredients that go into these items require recipe specific preparation and are cooked for many hours. In view of the requisite skill required to perform the duties of the offered position coupled with the volume of business, a two year experience requirement for the offered position is congruent with DOT 313.361-030 (Specialty, Foreign Cook).” Alternatively, Employer argued that the performance of scheduling shifts and inventory control bear a reasonable relationship to the occupation in the context of the employer’s business and is essential to the job’s duties. (AF-9-17)

On May 31, 2001 the CO issued a Final Determination denying certification, stating that the employer did not adequately address the issues. The CO stated: "NOF indicated that your ad did not accurately describe the job offer. You rebut that 'two years of experience in the offered position of 'assistant cook' is inferior experience as compared to the related occupation...as a 'cook'. We had trouble following the logic of this sentence. Our contention is that box 14 of the ETA 750A seems to require either two years experience as an assistant cook of Mexican food or two years as any kind of cook. Whether one is 'inferior' to the other is not our province to say; we contend that U.S. workers with any cooking experience should have been included as part of your market test. Since they weren't, it is evident that the labor market was not adequately tested..." With respect to the restrictive requirement issue involving inventory control and scheduling, the CO found that Employer's rebuttal confused an assistant cook with a cook. "Since most of the food preparation by the assistant cook would be overseen by the cook, less experience would be required."(AF-7,8)

On July 21, 2001, the Employer requested review of the denial of labor certification. (AF-1-6)

DISCUSSION

The employer has the burden of persuasion on the issue of lawful rejection of U.S. workers. Cathay Carpet Mill, Inc., 1987-INA- 161 (Dec. 7, 1988)(en banc). Although written assertions constitute documentation that must be considered under Gencorp, 1987-INA-659 (January 13, 1988)(en banc), bare assertions without supporting evidence are generally insufficient to carry an employer's burden of proof. (Sang Chung Insurance Agency, 2000-INA-259 (January 11, 2001). The good faith requirement in recruiting efforts is not set forth in the regulations, but is implicit. H.C. LaMarche Enterprises, Inc. 1987-INA-607 (Oct. 27, 1988) Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Belha Corp., 1988-BLA-24 (1989)(en banc)

We agree with the CO that Employer's contentions, particularly when taken as a whole, are unresponsive to the

NOF. Employer has advertised the job opportunity as an "assistant cook", but in rebuttal arguments alludes to two separate DOT sections while calling the job opportunity a "Cook, Specialty" and "Specialty, Foreign Food Cook". Obviously, Employer has advertised one job opportunity but given requirements that are not consistent with the job opportunity. While not necessary to our determination, it as also clear that the job duties relating to scheduling (employee) shifts and inventory control are beyond those required of an assistant cook. While the NOF was not without some ambiguities, the CO's instructions were more than sufficient to require an adequate and reasoned response from Employer. This Employer failed to do. The CO acted reasonably in denying certification.

ORDER

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

For the Panel:

A
JOHN C. HOLMES
Administrative Law Judge

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, 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 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.