



Issue Date: 01 March 2004

BALCA Case No.: 2003-INA-2
ETA Case No.: P2000-CA-09502400/JS

In the Matter of:

PATRICIA GONZALEZ,
Employer,

on behalf of

MAYDE GOMEZ,
Alien.

Appearances: Guillermo S. Marin, Esquire
Los Angeles, California
For Employer and the 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 Cook¹. 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 January 20, 1998, Patricia Gonzalez ("Employer") filed an application for labor certification to enable Mayde Gomez ("Alien") to fill the position of "Cook." (AF 37). The job requirement was two years experience in the job offered. The job entailed planning menus and cooking American and Mexican food dishes according to the recipes or following orders and taste of Employer.

On April 11, 2002, the CO issued a Notice of Findings ("NOF"), proposing to deny certification based on several findings. (AF 30-35). Citing 20 C.F.R. § 656.20(c)(8), the CO pointed out that although the ETA 750 B showed that the Alien had been in the position since 1991, Employer did not have a California employer tax identification number and was applying for one at the request of the local office. In California, wages are required to be reported, and if the Alien had been paid other than in wages, it did not appear that this was a job opening for a U.S. worker, which would require the payment of wages. In order to rebut this finding, Employer was directed to show that she was paying wages to the Alien and to produce a W-2 for the Alien. If no such documentation was available, Employer was directed to provide persuasive argument as to how the job was truly open to U.S. workers at the prevailing wage. (AF 31).

The CO also determined, pursuant to 20 C.F.R. § 656.21(b)(5), that the requirement of two years of experience or training as a cook did not appear to meet the Employer's true minimum requirements because at the time of hire, the Alien did not meet these requirements. (AF 32). Rebuttal required (1) deleting the requirement and retesting the labor market; (2) retaining the requirement and establishing that it was not now feasible to hire anyone with less than this requirement; (3) establishing that the occupation in which the Alien was hired was dissimilar from the occupation for which Employer was seeking certification; or (4) documentation that the Alien had obtained the experience elsewhere. (AF 32-33).

Employer was further advised that 20 C.F.R. §§ 656.21(g)(1) - (9) require that the position be described with particularity. (AF 33). Employer had failed to place her advertisement in that section of the advertisements where domestic opportunities are normally placed. Employer was provided the opportunity to re-advertise. Finally, the CO questioned whether a position for a Domestic Cook actually existed in Employer's household. (AF 34). Employer's rebuttal needed to explain why the position of a domestic cook should be considered a bona fide job opportunity rather than a job opportunity created solely for the purpose of qualifying the alien as a "skilled worker²." At a minimum, rebuttal needed to include responses to the seven questions raised in the NOF. (AF 34).

Employer submitted a rebuttal letter on April 30, 2002. (AF 21-29). Therein, she asserted that the position was clearly open to U.S. workers. Responses were given to some of the seven questions raised in the NOF. (AF 21-22). Also attached was a statement from the Alien that she had the minimum requirements for the position because she worked for two years for Guadalupe Duenas. (AF 23). Employer's W-2 was provided as was Employer's 2001 Federal Tax Return. (AF 24-26).

The CO issued a Final Determination ("FD") on May 28, 2002. (AF 9-10). The CO found that Employer had failed to address two of the four findings made in the NOF, pointing out that where a finding is un rebutted, it is deemed admitted. In this case, Employer had not established that the job opening existed, having failed to show how wages paid to the Alien were reported or provide persuasive argument as to how the job was truly open to U.S. workers. (AF 10). Additionally, Employer had failed to address the issue of the placement of her advertisement in a section which is not where domestic positions are normally placed. While Employer had responded to the questions raised in the NOF regarding whether her household truly had a full-time position for a Domestic

²The Immigration Act of 1990 (IMMACT 1990) reduced the number of immigrant visas available to unskilled alien workers (aliens granted labor certification in occupations requiring less than two years of experience.) The visa waiting period for aliens in the unskilled category now exceeds seven years, while visas for skilled alien workers (aliens granted labor certification in occupations requiring at least two years of experience) are currently available without a waiting period.

Cook versus a domestic position in the categories requiring lesser skill, Employer's responses to those questions were insufficient to rebut the findings.³

Employer and Alien both filed Requests for Review of Denial of Certification on June 27, 2002. (AF 2, 4⁴). Employer's Request for Review also asked that the CO reconsider the denial. (AF 2). On July 19, 2002, the CO denied the Request for Reconsideration, forwarded this matter to the Board of Alien Labor Certification Appeals ("Board" or "BALCA") and it was docketed in this Office on October 8, 2002. (AF 1-8).

DISCUSSION

In the instant case, the CO reasonably requested, among other things, documentation regarding the payment of wages to the Alien. (AF 31). Employer provided none of the documentation which was specifically requested, and gave no explanation or justification for that failure.

Twenty C.F.R. § 656.25(e) very clearly requires an employer to address every one of the CO's findings in the NOF and provides that all such findings not rebutted are conclusively presumed to be admitted by the employer. This Board has consistently and repeatedly held that a finding made in the NOF not rebutted in the employer's rebuttal is deemed to have been admitted, and that an employer's failure to address a deficiency stated in the NOF justifies a denial of certification. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*); *Samir El-Kabani*, 1991-INA-358 (Aug. 2, 1993).

³Given that labor certification is being denied on issues other than this one, Employer's responses will not be detailed herein.

⁴ Employer's Request for Review included new documentation and argument which will not be considered at this juncture, as our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c); *see also* 20 C.F.R. § 656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992).

Thus, an employer must provide directly relevant and reasonable documentation sought by the CO. See *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Failure to submit documentation reasonably requested by the CO warrants denial of labor certification. *Rouber International*, 1991-INA-44 (Mar. 31, 1994).

Employer herein failed to produce the requested information. The CO requested a copy of the Alien's W-2; Employer provided a copy of her own W-2. (AF 24). This in no way establishes the payment of wages to the Alien. At most, it establishes Employer's ability to pay wages, but does not establish that Employer has in fact done so. Employer's only explanation was a bare assertion that the job opportunity was open to U.S. workers. (AF 21). Accordingly, based upon Employer's failure to provide documentation reasonably requested by the CO, we find that certification was properly denied, and it is unnecessary to address the remaining issues.

ORDER

The Certifying Officer's denial of labor certification 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 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.