



Issue Date: 10 February 2004

BALCA Case No.: 2003-INA-38
ETA Case No: P2000-CA-09508746/GH

In the Matter of:

VIRGINIA FAJARDO,
Employer,

on behalf of

FAUSTO DE FIESTA, JR.,
Alien.

Appearance: Evelyn Sineneng-Smith, Representative
San Jose, 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 an application for labor certification¹ filed by a private household for the position of Household/Domestic Helper. (AF 101-102).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as contained in the Appeal File (“AF”) and any written argument. 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by § 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 August 27, 1999, Employer filed an application for alien employment certification on behalf of the Alien for the position of Household/Domestic Helper. Minimum requirements for the position were listed as three months experience in the job offered, as well as the requirement to live on premises and be available on call twenty-four hours per day. The rate of pay was listed as \$1369.33 per month. (AF 101-102).

On July 29, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny labor certification. The CO concluded that the job was not open to U.S. workers because the Alien appeared to be related to Employer. In addition, the CO cited Employer’s live-in requirement as restrictive. (AF 96-99). Employer was instructed to document that the job was clearly open to U.S. workers and to document all wages paid to the sponsored worker for the past two years. Employer was also directed to submit copies of Federal tax returns as evidence that Employer has sufficient income to pay the offered salary and that Employer has reported wages paid to the worker. Employer was further instructed to either document business necessity for the live-in requirement or to indicate a willingness to delete the requirement and to retest the labor market.

In Rebuttal, Employer acknowledged that the Alien was related to Employer but maintained that the job was clearly open to U.S. workers as evidenced by the fact that no one responded to the newspaper ad submitted. (AF 27-95). Employer also submitted copies of Employer’s tax returns for 2000 and 2001 and copies of Employer’s employment tax reports. With respect to the live-in requirement, Employer provided evidence in an effort to document business necessity and in the alternative, agreed to delete the requirement and to retest the labor market.

On October 4, 2002, the CO issued a Final Determination (“FD”) denying labor certification based upon a finding that Employer had failed to adequately document that a bona fide job opportunity clearly open to U.S. workers existed. (AF 24-26). The CO found Employer’s submission of tax returns showing an adjusted gross income of

\$15,526 for the year 2001 insufficient to find that Employer has the ability to pay the offered annual wage of \$16,431.96. Noting that Employer submitted copies of California employment tax records reporting wages paid to the Alien in 2001 and 2002 equivalent to the offered wage, the CO questioned whether Employer actually paid those wages because the wages would have constituted more than the Employer's adjusted gross income. The CO also noted there was no evidence that Employer reported the Alien's wages to the U.S. Internal Revenue Service or that Employer paid the required federal employment tax of 7.65% on the Alien's wages.

Employer filed a Request for Reconsideration and Request for Review on November 12, 2002. (AF 2-23). The CO denied reconsideration on November 13, 2002 and the matter was docketed in this Office on December 24, 2002.

DISCUSSION

Pursuant to 20 C.F.R. § 656.20(c)(8), an employer must document that the job opportunity has been and is clearly open to any qualified U.S. worker. The employer has the burden of providing clear evidence that a valid employment relationship exists, that a bona fide job opportunity is available to domestic workers and that the employer has, in good faith, sought to fill the position with a U.S. worker. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*). Moreover, an application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. 20 C.F.R. § 656.20(c)(1). Certification may be denied if an employer fails to meet its burden of proving the sufficiency of funds to pay the alien's salary. Denial may result from either the absence of documentation or the submission of documentation which contradicts an employer's claim of sufficient funds. *Joy Chinese Restaurant*, 1988-INA-354, 1988-INA-362 (Oct. 30, 1989); *White Harvest Mission*, 1990-INA-195 (Apr. 9, 1991); *Whistlers*, 1990-INA-569 (Jan. 31, 1992).

In the instant case, Employer submitted tax returns showing an adjusted gross income of \$15,526 for the year 2001, yet proposed to pay the Alien an annual wage of

\$16,431.96. Employer's wage offer constitutes more than the Employer's adjusted gross income. The CO also noted there was no evidence that the Employer reported the Alien's wages to the U.S. Internal Revenue Service, or that Employer paid the required Federal employment tax of 7.65% on the Alien's wages.³ Based upon the foregoing, we conclude Employer has not documented ability to pay the offered wages, and thus conclude that labor certification was properly denied.

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**

³ Of significance, we also note for the record that Employer lists its business as JK Dental Clinic in its tax filing with a deduction for wages of \$42,765. (AF 52). The Alien listed JK Dental Clinic as his employer on his tax filing. (AF 19).

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.