

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 August 2003

BALCA Case No.: 2003-INA-59
ETA Case No.: P2002-NY-02483744

In the Matter of:

TERRY SUE KLEIN,
Employer,

on behalf of

YVETTE WILSON,
Alien.

Appearance: Eunice Becker, Esquire
New York, New York
For Employer and Alien

Certifying Officer: Dolores DeHaan
New York, New York

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 domestic 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).

BACKGROUND

In a Notice of Findings dated July 19, 2002, the CO questioned whether Employer had a *bona fide* job opportunity for a domestic cook as required by 20 C.F.R. § 656.20(c)(8) and whether Employer had sufficient funds available to pay the wage or salary offered to the Alien as required by 20 C.F.R. § 656.20(c)(1). In addition to asking a series of questions about the circumstances of the household, the CO asked what percentage of Employer's disposable income would be devoted to paying the Alien's salary. The CO noted that Employer had submitted the first page from a joint Federal Income Tax return for the year 2000, but found that this single page was insufficient as proof because it did not show the taxable income available to pay the domestic cook's salary. The CO directed Employer to provide a complete, signed copy of the Federal Income Tax return for the year preceding the filing of the application through the current year, including a Schedule C if self employment income was claimed. (AF 15-18).

Employer filed a rebuttal letter on August 23, 2002. The rebuttal letter does not discuss the financial ability to pay the Alien's salary. (AF 19-21). Attached to the letter is the same page from Employer's 2000 Federal Income Tax Return that was already in the record. (AF 19).

The CO issued a Final Determination on September 5, 2002 denying labor certification on the ground that the rebuttal failed to provide the requested tax forms, and because the single page that was submitted indicated that Employer would have had to devote more than half its adjusted gross income just to pay the Alien's salary. (AF 22-23).

Employer filed a request for Board review by letter dated October 4, 2002, arguing that she had submitted her income taxes, that there was sufficient income to pay the salary of the cook, and that the cook is actually employed and being paid. (AF 24).

DISCUSSION

The issue of whether a job opportunity for a domestic cook is a *bona fide* offer of employment under section 656.20(c)(8) was discussed by the Board in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). In that case, the Board adopted a “totality of the circumstances” test for consideration of whether an application was based on a mis-characterization of the position, the problem being the appearance that employers were using the domestic cook position to classify the job as a skilled position to avoid the long wait for a visa, when in reality, the employer was seeking a housekeeper who also had cooking duties. In *Carlos Uy* the Board indicated that one of the important circumstances in assessing whether a *bona fide* offer of employment for a domestic cook is being made is how much money the employer has available to pay the salary of an employee whose only duties are cooking related. The Board indicated that ability to pay the cook's wages in an absolute sense is not necessarily credible where a large percentage of the employer's gross income would be required to pay for a cook.

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).

In the instant case, the only evidence of funds available to pay the Alien's salary is the first page from Employer's 2000 Federal tax return. On its face it shows that Employer's three-member household would have to devote substantially more than one-half its adjusted gross income to pay the salary. We find that such a circumstance supports the CO's denial of labor certification on the basis of lack of sufficient funds under 20 C.F.R. § 656.20(c)(1).

In regard to the *bona fide* job opportunity citation, *Carlos Uy* requires a totality of the circumstances analysis. The CO did not weigh the circumstances, but based the denial on the failure to provide the signed tax returns as directed in the NOF. It is well established, however, that if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by

reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

The CO reasonably requested the tax returns and Employer did not supply those documents. Accordingly, we also affirm the CO's denial of labor certification under 20 C.F.R. § 656.20(c)(8).

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 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.