



DATE: MAY 31, 1989
CASE NO. 88-INA-214

IN THE MATTER OF

ROGER AND DENNY PHELPS
Employer

on behalf of

JUDITH J.M. ROWE (FORMERLY BLAKE)
Alien

Appearance: William Newell Siebert, Esquire
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, Guill, Tureck, and
Williams
Administrative Law Judges

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. 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 reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

The Employer, Roger and Denny Phelps, filed an application for labor certification on behalf of the Alien, Judith Juanita Marcia Rowe (nee Blake) for the position of Household Domestic Service Worker on January 5, 1987 (AF 27). The only requirement listed under Sections 14 and 15 of the application was three months of experience in the job offered. However, the job duties, as provided in Section 13, were described as follows:

Responsible for all household domestic duties such as housekeeping, laundry, ironing, cooking (including dinner parties), shopping and mending. Must be responsible for all care and feeding of two children ages 4 & 8, including accompanying oldest child to extracurricular school activities, and accompanying both children to doctors appointments when necessary. Also responsible for light yard work. Must be able to live in. (Emphasis added).

Pursuant to the request of the Illinois Department of Employment Security, dated July 1, 1987 (AF 37-38), the Employer provided a letter, dated July 27, 1987, which set forth the reasons for the live-in requirement.

In his November 9, 1987 Notice of Findings (AF 21-23), the Certifying Officer (C.O.) denied the Employer's application for labor certification, in pertinent part, on the grounds that the Employer's documentation of the Alien's paid experience was deficient, pursuant to 20 C.F.R. §656.21(a)(3)(iii).¹

On February 9, 1988, the C.O. issued a Final Determination in which he denied the Employer's rebuttal (AF 19-20), and denied labor certification because of the Employer's failure to meet the requirements of §656.21(a)(3)(iii) (AF 13-15). The Employer requested a review of the denial on March 7, 1988, which included written argument regarding the pertinent issues (AF 11-12). No other appeal brief was filed.

Discussion

The C.O.'s denial of labor certification is grounded on the Employer's inability to establish at least one year of paid employment, and thereby remove the application for a household domestic service worker from Schedule B. See 20 C.F.R. § 656.11(b)(26). In the

¹ In his Notice of Findings and Final Determination, the C.O. also questioned whether the job was clearly open to U.S. workers; whether U.S. workers were unlawfully rejected; and whether the Employer had sufficiently documented its recruitment effort (AF 14, 22). We note, however, that the Employer did document its recruitment efforts, and that no U.S. workers applied (AF 24-26, 33-36).

absence of such action, an employer seeking a labor certification for a Schedule B occupation may petition for a waiver pursuant to § 656.23. See 20 C.F.R. § 656.11(a)(26).²

We agree with the C.O.'s denial of labor certification, because we find that the Employer failed to adequately document that the Alien had "paid experience" which was "equal to one full year's employment on a full time basis," as a household domestic (emphasis added). See 20 C.F.R. §656.21(a)(3)(iii).

The record establishes that the Alien's only prior household domestic experience was for her father-in-law, Mr. C.C. Rowe. She worked for Mr. Rowe from July 1973 until December 1979, in Jamaica (AF 29-30). Mr. Rowe's affidavit states that the Alien, Judith Rowe, became his daughter-in-law on January 26, 1974. Mrs. Rowe purportedly worked for more than 6 years, an average of 6 days per week, 40 to 55 hours per week, at a weekly salary of \$40.00 Jamaican dollars (AF 20).

As stated by the C.O. in his Final Determination (AF 13-15), the Employer was provided with information found in the Technical Assistance Guide (TAG), as follows:

"Documentation of one year's paid experience in the duties to be performed is to assure that the alien knows the demands unique to household domestic service work, has some attachment to the occupation, and will likely continue working in such occupation after arrival.

Documentation of experience working in one's own home, for a parent, close relative, or someone in a similar familial-type relationship cannot be regarded as a bona fide employer-employee relationship and is not acceptable."

Although we do not find TAG guidelines binding, the guidelines in this instance are sound.³ Simply stated, the guidelines seek to insure that previous experience, the "paid

² Sections 656.23(a) and (b) define Schedule B jobs as those occupations which require little or no education or experience and workers can be trained quickly to perform them satisfactorily. These sections also state that generally a nationwide surplus of U.S. workers are available for such positions and that the employment of aliens in such positions would adversely affect the wages and working conditions of U.S. workers employed in similar occupations. Thus, an employer must obtain a waiver in order for an alien to be certified for a Schedule B position. Section 656.11(b)(26) states that an alien with less than one year of documented full-time paid experience as a "Household Domestic Service Worker" is subject to Schedule B, and therefore would require a waiver. See A.V. Restaurant, 88-INA-330 (Nov. 22, 1988).

³ In between the portions quoted by the C.O., the TAG states: "This [one year paid experience] requirement in no way relates to the minimum training and/or experience required to perform the duties of a household domestic service worker and should not be shown by the employer as a requirement for the job opportunity." (TAG No. 656, p. 43, 9/81). We agree. The
(continued...)

experience" as a household domestic contemplated by the regulation, was performed in a bona fide employer-employee relationship. The bona fide employer-employee requirement is necessary in order to demonstrate that the alien is indeed an experienced domestic with the requisite abilities to perform domestic work in a manner satisfactory by market standards. Indeed, in the absence of such experience the alien is qualified only for the "schedule B" position of household domestic requiring less than one year experience, a position defined by the regulations as a job which requires little training and in which a surplus of available U.S. workers exists.

Given the unique nature of domestic work, (the fact that the employee works in a household setting with the employer), it would be relatively easy, if services performed for family members are considered legitimate domestic service experience, for duties performed as part of the familial relationship to masquerade as bona fide "arms-length" domestic service experience. In this context, the familial relationship is controlling. Certainly the regulatory scheme does not envision services performed in the course of the familial relationship, even if monetarily compensated, as the equivalent of services performed with a non-family employer where market standards of performance and conduct, not family bonds, determine satisfactory performance. For these reasons, and not because of potential credibility problems with relatives attesting to the prior employment as alleged by our dissenting colleague, we hold that "paid experience," as envisioned by the regulation means domestic experience with a non-family member in a bona fide "arms-length" employer-employee relationship.

Assuming arguendo that the Alien's six months of employment for Mr. C.C. Rowe, prior to her marriage to his son, constituted bona fide paid employment, it would still be insufficient to meet the one year requirement set forth in §§656.21(a)(3)(iii) and 656.11(b)(26).

The Employer's counsel argued on Appeal that the C.O. should have credited the time spent with the Employer now seeking certification, because it establishes the Alien's commitment to the occupation. Thus, Employer contends that the Alien had worked 18 months for them, in addition to the 6 months of work for Mr. C.C. Rowe.

In summary, Employer's counsel stated:

There is no legitimate reason to disallow the time spent with the sponsor. It is easily distinguishable from the totally separate requirement of what was required as a precondition to being hired by the sponsor. That requirement was stated on the job offer form as three months.

³(...continued)

one year experience requirement in section 656.21(a)(3)(iii) is a requirement for the alien to avoid automatic denial or the need for a waiver of Schedule B. It is not a minimum job requirement for recruiting U.S. workers.

This application should be certified, the alien's commitment to the occupation is clear.

(AF 11-12).

We disagree. The Alien may not establish the one-year requirement, or other requirements, through employment in the same job with the Employer/Sponsor. Cf. In the Matter of Apartment Management Co., 88-INA-215 (February 2, 1989). Otherwise, an alien who does not, at the time of hire by the Employer, satisfy the criteria necessary to avoid a Schedule B denial or waiver, is bootstrapped at the unfair expense of other qualified workers into meeting the criteria. Therefore, we find that the Employer has failed to establish the one-year of paid employment experience required by sections 656.21(a)(3)(iii) and 656.11(b)(26).

ORDER

The Final Determination of the Certifying Officer denying labor certification is **AFFIRMED**.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/MP/gaf

In re Roger and Denny Phelps, 88-INA-214

Judge Guill joined by Judge Vittone concurring:

I agree with the result reached by the majority in this matter. However, unlike the operation and maintenance of a private residence, the success of a commercial enterprise depends, to a large extent, upon the performance of its employees. Therefore, I would limit the holding in this matter to situations involving domestic workers.

Judge Jeffrey Tureck, dissenting:

By setting forth an absolute rule that domestic employment for family members cannot be considered to satisfy the one-year experience requirement of §656.11(b)(26), the majority finds itself in the anomalous position of holding that the Alien's employment for the period from July 1973 to January 26, 1974 can be qualifying experience, but identical employment subsequent to January 26, 1974 established by the exact same evidence cannot be qualifying experience. There is no basis either legally or factually for this inconsistent holding. While there may be a valid basis for creating a rebuttable presumption that a domestic worker employed by a relative is not

engaging in bona fide employment when the relative's house also is the worker's residence,¹ the majority instead has created an irrebuttable presumption, and has not limited it to this particular living arrangement.

In addition, the majority has not indicated any factors unique to work as a domestic that would limit the application of its per se rule to familial relationships in domestic employment. Accordingly, it appears that the majority would preclude any employment for a family member from being qualifying experience. The only basis for such a holding would be the majority's assumption that family members routinely lie for each other in matters of employment history. However, the Board has previously stated, in a clear and unequivocal manner, that it

does not operate under a preconception that employers routinely engage in fraud or other willful misconduct in attempting to obtain alien labor certification.

In re Yedico International, Inc., 87-INA-740 (Sept. 30, 1988) (en banc) (slip op. at 4). If this Board does not operate under a preconception that Employers, the moving parties in these cases, engage in fraud, then why is the majority operating under the preconception that the Alien's relative by marriage would engage in fraud? This Board has indicated on many occasions that evidence must be evaluated on its own merit, not solely on the basis of its source or author. See, e.g., In re Dove Homes, Inc., 87-INA-680 (May 25, 1988 (en banc)); In re Screen Actors Guild, Inc., 87-INA-656 (Mar. 9, 1988). Yet the ultimate outcome of this decision is that it rejects per se an otherwise credible letter regarding the Alien's employment experience solely on the basis that the author of the letter was the Alien's father-in-law.

Further, the majority's dividing up the Alien's employment for her father-in-law into the periods before and after her marriage to his son cannot be defended under any credibility analysis. This employment, as previously noted, is established by a single letter written after the job had been terminated, and covered all of the Alien's employment for her father-in-law, both before and after they became related. If the letter from the Alien's father-in-law is credible, it is credible for the entire period it documents; if the Board is holding that the familial relationship makes the letter from the Alien's father-in-law not credible per se, then it cannot be credible for any part of the period it documents. One can only wonder what the majority would have held if the Alien's marriage to Mr. Rowe's son had ended prior to the termination of her employment for Mr. Rowe.

Finally, I agree with the Employer that, for the purpose of §656.11(b)(26), the Alien's employment with the Employer in the same position for which certification is being sought can be counted. This is not an experience requirement set out by the Employer as a prerequisite for employment, which is governed by §656.21(b)(6). Obviously, it would be unfair for an employer to require experience of job applicants which it did not require of the Alien, and §656.21(b)(6) prevents such a practice. Thus, had the Alien gained the three months' experience required of

¹ There is no indication that the Alien's work for her father-in-law was on a live-in basis.

U.S. workers with the Employer, that experience requirement would be invalidated under subsection (b)(6).

But the one-year experience requirement of §656.11(b)(26) serves a different purpose. As the majority noted, the purpose of this requirement

is to assure that the alien knows the demands unique to household domestic service work, has some attachment to the occupation, and will likely continue working in such occupation after arrival.

(Majority decision at 4). For this purpose, it makes no difference if the experience is achieved with the Employer seeking certification or a previous employer. Having already worked for the Employer for 18 months, the Alien obviously is aware of the demands of the job and has demonstrated her commitment to the occupation.

For the reasons stated above, I would reverse the CO and grant certification.