



**Issue Date: 18 February 2004**

**BALCA Case No.: 2002-INA-264**  
ETA Case No.: P2001-NJ-02472414

*In the Matter of:*

**MURIEL SPORTELLI,**  
*Employer,*

*on behalf of*

**CELESTE OLIVEIRA,**  
*Alien.*

Appearance: Susan W. Scheer, Esquire  
Morristown, New Jersey  
For the 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 an application for labor certification on behalf of Celeste Oliveira (“the Alien”) filed by Muriel Sportelli (“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 C.F.R. Part 656. The Certifying Officer (“CO”) denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based 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 of the parties. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On April 23, 1999, Employer filed an application for labor certification on behalf of the Alien for the position of Household Cook. (AF 12). The work schedule was listed as: “Tues. – Friday 11 am - 8 pm with 1 hour break, Monday 4-8, Saturday 9-1.” The job duties included menu planning, shopping, cooking and serving lunch and dinner for an elderly household. The primary stated job requirement for the position, as specified on the application, was two years experience in the job offered. In addition, Employer noted that references were required. Id.

In a Notice of Findings (“NOF”) issued on March 16, 2002, the CO proposed to deny certification on the grounds that Employer failed to establish that the job opportunity was bona fide and clearly open to U.S. workers. (AF 42-44).

Employer submitted rebuttal on or about April 11, 2002. (AF 45-50). The CO found the rebuttal unpersuasive and issued a Final Determination (“FD”), dated June 4, 2002, denying certification on the same basis. (AF 51-52). Under cover letter dated July 1, 2002, Employer requested review of the FD and submitted additional documentation. (AF 53-78). The matter was docketed in this Office on August 22, 2002.

### **DISCUSSION**

Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity has been and is clearly open to any qualified U.S. worker. Twenty C.F.R. § 656.20(c)(8) also entails a requirement that a bona fide job opportunity truly exists. *See, e.g., Pasadena Typewriter & Adding Machine, et al v. U.S. Department of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987); *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*).

In the NOF, the CO requested that Employer answer numerous questions in order to help ascertain whether the job opportunity was bona fide, while noting that merely answering all of the questions did not insure approval of the application. The CO requested information as to the dietary needs and requirements of the household, as well as the financial circumstances of Employer, including a copy of Employer's tax return for the previous year. (AF 42-43).

Employer's rebuttal, dated April 11, 2002, consisted of a cover letter from Employer's counsel and a letter from Employer, stating that "there are no special dietary circumstances of the household," but nevertheless requesting favorable consideration, and Form W-2 Wage and Tax Statements for the years 1998 through 2001. (AF 45-50).

In the FD, the CO found Employer's rebuttal unpersuasive. The CO noted that Employer's rebuttal did not include Employer's tax return, merely Employer's W-2 statements, which do not show Employer's disposable income. The CO found that Employer had not demonstrated the ability to pay wages for a domestic cook. (AF 51).

Upon review, we fully agree with the CO and find Employer's rebuttal was inadequate. In the NOF, Employer was instructed to provide a signed copy of her Federal Income Tax Return for the year immediately preceding the application date, in order that the CO could ascertain the percentage of Employer's income devoted to paying the Alien's salary. (AF 43). Moreover, we note that the CO specifically advised Employer that efforts to cure the above deficiencies after the rebuttal period would not be considered. (AF 42).

Notwithstanding these specific, reasonable instructions, Employer did not provide the Federal Income Tax Return until its request for review. (AF 53-78). The new evidence submitted by Employer with its request for review is not properly before us on appellate review because such evidence should have been provided prior to the issuance of the FD. *See, e.g., Meta Engineers, P.C.*, 1995-INA-415 (July 2, 1997); *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7,

1992); *see also* 20 C.F.R. §656.26(b)(4).<sup>1</sup> Furthermore, if an employer fails to comply with the CO's request for documentation that is reasonably available, certification is properly denied. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Employer has failed to comply with the CO's request for a copy of Employer's tax return, a document that was reasonably available, as evidenced by its belated submission with the request for review. Employer failed to offer an explanation as to why this documentation was not provided in rebuttal. In view of the foregoing, we find 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**

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

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<sup>1</sup> Although not the basis for our decision herein, we also note that Employer's belated submission still does not fully comply with the CO's reasonable request for a signed copy of her Federal Income Tax Return. (AF 70).

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