U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 February 2004

BALCA Case No. **2002-INA-244**
ETA Case No. P2000-CA-09502802/ML

In the Matter of:

RENAISSANCE AT THE DANA POINT CAFÉ,
Employer,

on behalf of

ERNESTO CRUZ MARTINEZ,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Ruben Hernandez, Esquire
Santa Ana, California
For Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Ernesto Martinez ("Alien") filed by Renaissance at the Dana Point Cafe ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the 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 the Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

Employer filed its application for labor certification on behalf of the Alien for the position of Cook on May 3, 1999. (AF 11-12). On April 18, 2002, the CO issued a Notice of Finding (NOF) indicating intent to deny the application pursuant to 20 C.F.R. § 656.3 on the ground that the Job Service's records indicated that Employer's tax identification was inactive, which raised questions as to whether Employer has a current job opening, operates an on-going business, and/or can provide permanent, full-time employment. (AF 7–9). To remedy the deficiency, the CO directed Employer to document its ability to provide permanent full time employment for the position offered. Additionally, the CO directed that Employer include with its rebuttal a copy of its business license (noting that a Seller's Permit would not fulfill this requirement), and copies of Employer's state and federal income business tax returns.

Employer submitted its rebuttal on May 20, 2002. (AF 4-6). The cover letter to the rebuttal stated that it included Employer's current business license, the last filed tax return, and the last filed quarterly "EDD tax D-6." In fact, however, the documents attached to the rebuttal consisted of a copy of the first page of Employer's income tax return for the year 2000, a copy of its Seller's Permit issued in 1998, and a copy of its health permit issued in 1996.

The CO issued a Final Determination denying certification on June 11, 2002. (AF 02-03). The CO noted that although the tax return showed sales of one and half million dollars, no wages were reflected and no employer tax statement was submitted. Therefore, Employer had not shown that it had paid the wage offer on a sustained basis. Consequently, it was not clear that Employer would be able to provide permanent full-time employment as stated in the ETA 750 A.

On June 25, 2002, Employer filed its Request for Review, indicating that the CO had a preconceived intent to deny the case, as a company making over a million dollars had the ability to provide full time employment for the open position. (AF 1).

Employer in its brief before the Board argued that a restaurant showing over one and a half million dollars [in sales] could pay the wage of the job offer. Employer also argued that the

denial was all a misunderstanding – that it had filed additional documentation to the state job service to establish its viability as a business which had not arrived in time for the CO to have considered it. Employer argued that this documentation, a California Quarterly Wage and Withholding Report, shows a valid State Employer account number and a listing of employees and related tax wage withholdings. Employer argued that the state job service had confused the issue when it found the absence of a state employment number based on information about a previous owner of the business. Employer also argued that it had notified the state job service that the City of Dana Point did not require a business license and faulted the CO for not picking up on this assertion. Employer requested a remand to give it a second chance to explain.

DISCUSSION

The regulation at 20 C.F.R. § 656.3 defines employment as "permanent full-time work by an employee for an employer other than oneself." An employer bears the burden of proving that the position is permanent and full-time, and if an employer fails to meet this burden, certification may be denied. *Gerata Systems America, Inc*., 1988-INA-344 (Dec. 16, 1988) (*en banc*). 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 burden of proof, in the twofold sense of production and persuasion, is on the employer. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). An employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Employer's last opportunity to provide evidence and argument relating to the factual issues of the case is in the rebuttal. 20 C.F.R. § 656.24. Therefore, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

The NOF in this case was crystal clear as to the issue raised, and provided Employer a full and fair opportunity to document that it was an active business with the ability to pay full

time wages. Employer's rebuttal, however, was a bare bones submission consisting solely of the first page of its unsigned income tax return for the year 2000, its Seller's Permit and its health permit. The first page copy of the tax return supplied by the Employer presents more questions than it answers. For example, the line in the tax return where the salaries and wages should be reflected shows that no wages were paid. The salaries may be reflected in Schedule A, but that determination can not be made as the schedule was not provided. Additionally, the tax return shows $46,466 in taxable income, but there is no tax owed. Although Schedule J, might reflect some credits that would explain the zero tax liability, this determination cannot be made, because no schedules were attached. The CO clearly stated in the NOF that a Seller's License would not be acceptable as documentation of a Business License. Moreover we note that neither the Seller's License nor the Health Permit were particularly recent in vintage. Thus, it was reasonable for the CO to have concluded that Employer's rebuttal did not adequately address the issues raised in the NOF.

Employer asserts in its appellate brief that it sent the Quarterly Wage and Withholding Report to the local job service and intimates that the CO refused to consider them; however, we find no evidence in the Appeal File that this document was ever presented to the CO, either in direct rebuttal or in a motion to reconsider. Evidence first submitted with the request for review cannot be considered by the Board unless the employer did not have the opportunity to present all relevant evidence. *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988). Here, we find no circumstances indicating that Employer was prevented from timely presenting this evidence to the CO. Employer also made arguments in the appellate brief that the job service had confused the matter by reporting the absence of a current employer identification number based on the identity of a prior owner of the business, and that it had previously explained to the local job service about the relevant jurisdiction's purported waiver of business licensing requirements. Neither of these arguments were made in the rebuttal, however. The issue presented was not ambiguous and we find no reason that such explanations could not have been timely made before the CO. Where an argument made after the Final Determination is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

Employer in this case may well have been able to establish that it is a viable business, able to provide full-time employment to a successful applicant for the cook position. However, its rebuttal submission was insubstantial and unconvincing. The mere fact that an employer shows substantial sales on an income tax return, while potentially a credible and significant fact, does not standing alone provide proof of ability to provide permanent, full-time employment. The evidence and argument presented in Employer's appellate brief were not timely submitted to the CO and therefore cannot be considered by this Board. Accordingly, we affirm the CO's denial of labor certification.

ORDER

For the reasons stated above, the Certification Officer's denial of labor certification is **AFFIRMED**.

Entered at the direction of the Board 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 of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.