



Issue Date: 13 August 2004

BALCA Case No.: 2003-INA-220
ETA Case No.: P2002-MA-01323787

In the Matter of:

CHEEMA'S SUPERMARKET,
Employer,

on behalf of

NUSRAT CHEEMA,
Alien.

Appearances: John K. Dvorak, Esquire
Boston, Massachusetts
For the Employer and the Alien

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

On September 17, 2001, the Employer, Cheema's Supermarket, filed an application for labor certification¹ to enable the Alien, Nusrat Cheema, to fill the position of Meat Cutter Apprentice. (AF 44). On January 23, 2003, the Certifying Officer ("CO")

¹ Permanent 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 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 the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

issued a Notice of Findings (“NOF”) proposing to deny certification. (AF 39-40). In the NOF, the CO, citing 20 C.F.R. §§ 656.3 and 656.20(c)(8), questioned whether there was a familial relationship between the sponsoring Employer and the Alien and whether such a relationship prevented certification. In rebuttal, the Employer admitted a familial relationship, submitted some evidence to attempt to show that the familial relationship would not be disqualifying, but stated:

However, at this time we wish to withdraw sponsorship for Nusrat Cheema and substitute a new alien (presently overseas) into the pending Labor Certification.

(AF 7). Attached was an ETA 750A and B for the proposed substitute alien, Talat Mahmood. (AF 9-12). The CO thereafter issued a Final Determination finding that the Employer's rebuttal documentation failed to establish that the Employer was offering a bona fide job opportunity in view of the familial relationship. (AF 19-20). The Final Determination was silent in regard to the fact that the Employer withdrew the application on behalf of Nusrat Cheema and sought the substitution of another alien. In its request for BALCA review, the Employer argued, *inter alia*, that the issue of the relationship between the Employer and the Alien was moot in view of the request for the substitution of the Alien. (AF 1-2).

DISCUSSION

The Employer in this matter unambiguously withdrew its sponsorship of Nusrat Cheema and sought substitution of another alien. This action mooted the familial relationship grounds for denial of the application, unless that relationship in itself establishes that the bona fides of the application were so dubious as to establish that the job was clearly not open to U.S. workers in violation of 20 C.F.R. § 656.20(c)(8), regardless of whether a different alien is substituted for the original beneficiary. In *Paris Bakery Corp.*, 1988-INA-337 (Jan. 4, 1990) (en banc), the Board held that a familial relationship between the alien and the employer is not per se fatal to the application provided that there is a genuine need for an employee with the alien's qualifications, the

job has not been specifically tailored for the alien, and the employer has undertaken recruitment in good faith, which has not produced qualified applicants.

In the instant case, the CO only addressed the question of whether Mr. Cheema's familial relationship to the Employer was disqualifying, and not the more general question of whether the Employer has a genuine need for a Meat Cutter Apprentice and whether there had been a good faith recruitment without the unlawful rejection of qualified U.S. workers. This panel cannot, on the record presented, find that the job offer was so inherently in bad faith that certification could not be granted regardless of the current identity of the sponsored alien. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) ("...when the CO invokes section 656.20(c)(8) as grounds for denial of an application, administrative due process mandates that the CO specify precisely why the application does not appear to state a bona fide job opportunity").

Thus, we find that the familial relationship issue was mooted by the substitution of aliens request in the rebuttal.²

The remaining question is whether the CO erred by ignoring the request for the substitution of the Alien. The legal authority for substitution of aliens has not been briefed in this matter. The regulation at 20 C.F.R. § 656.30(c)(2) indicates that the Alien cannot be substituted. It provides:

(2) A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

This regulation, however, only deals with approved applications. Moreover, it was part of an Interim Final Rule published in 56 Fed. Reg. 54930 (Oct. 23, 1991), which was invalidated in pertinent part by the U.S. District Court for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994). Although it was invalidated for failure to follow proper notice and comment rulemaking rather than the substance of the

² The CO, however, is free on remand to inquire into whether the newly proffered alien also has a disqualifying relationship with the Employer.

rule, the Department issued Field Memorandum No. 37-95 (May 4, 1995), which essentially returned to the state of the law prior to the 1991 Interim Final Rule -- i.e., permitting substitution of aliens. On March 22, 1996, the Department issued Field Memorandum No. 29-96, which announced that DOL and INS had developed a Memorandum of Understanding to transfer operational responsibility for processing substitution requests to the INS. Both of these memoranda, however, address only the question of substitution of aliens for approved labor certifications. They do not describe what policy COs follow where a request for substitution of the alien occurs while the application is still pending.

Although the panel has attempted to research this issue, and has found a writing suggesting that DOL permits substitution of aliens while the application is still pending approval, see, e.g., website of the Law Offices of Cyrus S. Nallaseth, PLLC, <http://www.nallaseth.com/documents/AmendToLC.htm> (visited July 9, 2004), we have not found any case law, regulation or DOL policy statement describing an applicable procedure. We find, therefore, that the record is not ripe for decision on the question of substitute of aliens while the application is still pending. Therefore, we remand this application for the CO to rule on the Employer's request for substitution of the alien.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED**, and this matter **REMANDED** for proceeding consistent with the above.

For the panel:

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JOHN M. VITTON
Chief Administrative Law Judge

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 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.