



Issue Date: 11 February 2004

BALCA Case No.: 2003-INA-40
ETA Case No.: P2000-CA-09508433/JS

In the Matter of:

MARIO J. RAMIREZ,
Employer

on behalf of

ROSARIO PEREZ,
Alien.

Appearance: Luis Sabroso, Esquire
Anaheim, California
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Mario J. Ramirez (“Employer”) on behalf of Rosario Perez (“the Alien”) for the position of Child Tutor. (AF 21-22). The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as contained in the Appeal File (“AF”)² and any written argument of the parties. 20 C.F.R. § 656.27(c).

¹ 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 20 C.F.R. Part 656.

² AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

On January 20, 1998, Employer filed an application for alien employment certification on behalf of the Alien for the position of Child Tutor. (AF 21-22). The job duties included monitoring the child, preparing the child's meals, cleaning the child's room, among other housecleaning duties, educating the child on Hispanic culture and teaching the child Spanish. Minimum requirements for the position were listed as two years experience in the job offered.

A Notice of Findings ("NOF") was issued by the CO on July 10, 2002, proposing to deny labor certification on several bases, including a finding that the experience requirement was unduly restrictive and that the job description contained a combination of duties. The CO also questioned Employer's ability to pay the worker's salary. (AF 13-19). Employer was instructed to justify business necessity or to delete the two years experience requirement and to document the ability to hire a full-time worker at the offered wage. Employer was also instructed to conclusively establish that a current full-time tutor opportunity, clearly open to U.S. workers, exists.

In Rebuttal, Employer responded by amending the requirement to six months rather than two years experience. In response to the combination of duties issue, Employer stated that the job actually does not require any tutoring, that the job is only for a child monitor. In response to the ability to pay finding, Employer submitted a copy of his 2001 W-2, showing income of \$47,254.³

A Final Determination ("FD") denying labor certification was issued by the CO on October 3, 2002, based upon a finding that Employer had failed to show that the job opportunity as presented on the ETA 750A existed and that it was truly open to U.S. workers, in violation of 20 C.F.R. §§ 656.20(c)(8) and 656.3. (AF 3-5). The CO noted

³ This summation is based upon the CO's summation in the Final Determination, as further confirmed in Employer's Statement of Position, as Employer's rebuttal is not contained in the record.

that Employer had changed the job offer so fundamentally that the position was no longer the tutor position that was petitioned for as a skilled occupation.

Employer filed a Request for Review by letter dated October 24, 2002, and the matter was docketed in this Office on December 24, 2002. (AF 1-2). Employer filed an Appellant's Brief/Statement of Position on March 11, 2003.

DISCUSSION

The requirement that the job opening is bona fide ensures that a true job opening exists. The CO may correctly apply the bona fide job opportunity analysis of 20 C.F.R. § 656.20(c)(8) when it appears that the job was misclassified as a skilled domestic worker rather than some other unskilled domestic service position or where it appears that the job was created for the purpose of promoting immigration. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). The burden to demonstrate that the employer is offering a bona fide job opportunity is on the employer. *Gerata System America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*); 20 C.F.R. § 656.2(b).

In the instant case, the CO observed that Employer has submitted the instant application for a skilled tutor and has persisted in supporting that position in correspondence with the local office. Employer was afforded several opportunities to alter or to justify its position and has maintained that the job was for a bilingual tutor to educate children on Hispanic history, culture, customs and language. The CO appropriately questioned the application, as it appeared that Employer mischaracterized the job. *See, e.g., Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*).

Employer has been through the local office assessment process and the recruitment process with the application for a skilled tutor, yet now denies that the job is that of a skilled tutor. By deleting both the duties of tutoring and the duties of general housework, Employer has completely changed the job to a basic child monitor position. The job offered is no longer that of a child tutor, the position for which Employer

advertised, recruited and petitioned. Accordingly, 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 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.