



Issue Date: 16 March 2004

BALCA Case No.: 2003-INA-58
ETA Case No.: P2002-NY-02478333

In the Matter of:

NATALIE PACKER FREEDMAN,
Employer,

on behalf of

CARMEN FABELA,
Alien.

Certifying Officer: Delores Dehaan
New York, New York

Appearance: Manolo E. Tolentino, Esquire
New York, New York
For the Employer and the Alien

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 Carmen Fabela (“the Alien”) filed by Natalie Packer Freedman (“the Employer”) for the position of household cook.¹ (AF 52).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and the Employer’s Manifestation with accompanying Request for Review, filed on February 27, 2003.

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

On April 30, 2001, the Employer filed an application for alien employment certification on behalf of the Alien for the position of Household Cook at the Employer's home in Astoria, New York. (AF 48-52). Two years of experience in the position were required. Job duties included cooking in a private home for the family and for large groups during the weekends and holidays and cleaning the kitchen. (AF 52).

On June 1, 2002, the CO issued a Notice of Findings ("NOF") stating the intention to deny the application. (AF 35-38). The CO determined that the Employer did not comply with 20 C.F.R. § 656.20(c)(8) by failing to document whether there was a bona fide job opportunity that has been and is clearly open to any qualified U.S. worker. (AF 37). The CO reasoned that the application contained insufficient information to determine whether the position of Domestic Cook actually exists in the household or whether the job had been created solely for the purpose of qualifying the Alien as a skilled worker. (AF 37). Additionally, the CO found that the sole U.S. worker who applied for the job appeared to be qualified because his resume shows eight years experience as a Chef. (AF 36). The CO reported that the Employer's recruitment report of January 9, 2002 stated that applicant was rejected because he had only commercially oriented cooking experience, instead of family type cooking experience. (AF 35). The CO determined that the Employer's recruitment report did not adequately document that the applicant was rejected for lawful job related reasons because the Employer did not show that the applicant cannot adequately perform the job. (AF 35).

The NOF provided remedial steps that the Employer could take to correct and/or rebut the basis for denial by the CO. (AF 35-38). The CO instructed the Employer to submit both work schedules and meal schedules for all family members, as well as the Alien's prospective work schedule, in order to document that a full-time job opportunity did exist to which qualified U.S. workers could be referred. (AF 36-37). The deadline for submitting the rebuttal was July 5, 2002. (AF 38).

Employer's response was dated July 3, 2002, and received on July 8, 2002. (AF 38-47). In her rebuttal letter, Employer provided answers to the questions asked within the NOF regarding the specific details about meals and responsibilities of the household cook. (AF 44-46). The Employer stated that her husband commuted between Palm Beach, Florida, the location of one of the family's residences, and Houston, Texas, the location of his job. The Employer indicated that her husband entertained at the residence "to provide the intimacy and privacy of his business meetings." (AF 45). The Employer also stated that she was the owner of an automobile business in West Palm Beach, Florida. However, the Employer remained mostly at home, only occasionally going to the office.

The Employer also argued that she was justified in not hiring the U.S. applicant because he applied as a 'Sous Chef/Cook,' and a sous chef does not wash dishes or clean the kitchen and utensils. (AF 43). The Employer claimed that the U.S. applicant stated in his resume that he can only assist in the cleaning up duties. (AF 43). The Employer also presented legal argument that the CO failed to meet the burden of establishing that the U.S. applicant could perform the job duties based on related education, training, and experience. (AF 42).

The Final Determination ("FD") denying certification was issued on August 26, 2002. (AF 53-54). After consideration of the rebuttal evidence, the CO determined that the Employer failed to establish that there is a bona fide job opportunity. (AF 53). The CO reasoned that because the Employer has residences in New York and Florida and she and her husband commute back and forth, the Employer has not documented how this is a bona fide *full-time* position for a live out Domestic Cook to work at the New York residence. (AF 53). The CO also determined that the Employer failed to adequately document a lawful job-related reason for the rejection of the U.S. applicant. (AF 53). The CO reasoned that it is not clear why the Employer feels that the applicant would not be willing and able to perform the clean up in the Employer's kitchen. (AF 53).

Employer filed a Request for Review of the Denial of Certification on October 7, 2002. (AF 55-60). Employer bases its appeal on the following two reasons: 1) the FD is incorrect based on the evidence in the file at the time the decision was made; and 2) the FD was based on an incorrect application of the law and case precedent. (AF 60).

DISCUSSION

A. Bona Fide Job Opportunity

An employer must show that a bona fide job opportunity exists, which requires an employer to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." 20 C.F.R. § 656.20(c)(8). Although the words "bona fide job opportunity" do not appear in the regulations, this administrative interpretation was approved by the court in *Pasadena Typewriter and Adding Machine Co., Inc. and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AABT, (C.D. Cal. 1987).

In *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*), the Board followed *Pasadena Typewriter*, stating that the "employer has the burden of providing clear evidence that a valid employment relationship exists, and that a bona fide job opportunity is available to domestic workers, and that the Employer has, in good faith, sought to fill the position with a U.S. worker." In *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*), the Board reaffirmed the principle that 20 C.F.R. § 656.20(c)(8) "infuses the recruitment process with the requirement of a bona fide job opportunity: not merely a test of the job market." *Id.*, slip op. at 8-9 (footnote and citations omitted).

In her rebuttal, the Employer explained that it did not intend to state that the Employer's family had entirely left New York and relocated to Florida. (AF 57-58). The Employer specifically stated in its rebuttal:

Thus the phrase “Whether in Florida, Texas or New York” Petitioner’s husband “does more of his entertainment at home to provide the intimacy and privacy of his business meetings” simply means that without more, but they do not maintain two residences in different States. Petitioner however maintains that whether in Florida or in New York their need for a live out Domestic Cook is still imperative based upon the nature and scope of their business, social and civic functions. We are not sure that Florida and New York is the same area of intended employment so that it probably is necessary to obtain an advisory opinion as to whether the matter can proceed in New York or Florida.

(AF 57). This statement by the Employer is unclear and contradictory, as the Employer states that “they have moved to their new residence in Florida,” but also that “they do not maintain two residences in different states.” Furthermore, Employer’s rebuttal is not responsive to the deficiency stated in the FD because Employer’s statement shows an intention to have a live out Domestic Cook in both Florida and New York.

The employer bears the burden of proving that a position is permanent and full-time. If the employer's own evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988). In this case, the record does not contain evidence that the Employer has a need for a full-time live out Domestic Cook in New York. Under these circumstances, we find that the Employer has not adequately documented the need for the full-time requirement. Therefore the Employer has not shown that there is a bona fide job opportunity for a full-time live-out Domestic Cook. Accordingly, we affirm the CO’s denial of labor certification on this basis.

B. Lawful Rejection of U.S. Worker

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991); *Mancil-las International Ltd.*, 1988-INA-321 (Feb. 7, 1990); *Microbilt Corp.*, 1987-INA-

635 (Jan. 12, 1988). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *American Cafe*, 1990-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 1988-INA-492 (Sept. 19, 1990); *Richco Management*, 1988-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 1988-INA-29 (Apr. 7, 1988).

In her rebuttal, the Employer states that she rejected the only U.S. applicant on the grounds that: 1) the applicant did not meet the Employer's minimum of two years experience as a Household Cook; 2) the Employer needs someone with family-type cooking experience gained in a domestic setting where the quality of food rather than quantity is important; and 3) the applicant was applying for the position of 'sous chef,' which is a kitchen supervisor, but there are no staff members to be supervised. (AF 59).

The Employer argues that because the applicant's resume says that he has *assisted* in the cleaning duties, the U.S. applicant has incorrectly presupposed that there are other staff members to be supervised. (AF 59). An employer's contrary interpretation of a resume may not be sufficient to rebut the CO's conclusion that, based on the same resume, the U.S. worker was qualified for the job under 20 C.F.R. § 656.24(b)(2)(ii). *California Transport Enterprises, Inc.*, 1987-INA-710 (Sept. 20, 1988). The U.S. applicant's cover letter states that he is applying for a position as "sous chef/cook." (AF 56). The Employer's assumption that the applicant will not adequately perform the position offered because he has experience *supervising* the cleaning of the kitchen is unreasonable. There is nothing in the record to substantiate an assumption that the U.S. applicant is not willing to perform these tasks.

The CO determined that the U.S. applicant's eight years of experience as a chef in a restaurant qualifies him for the job offered because he possesses the core duties of a cook. (AF 53). Employer disagrees and argues that the case of *In the Matter of Bronx Medical and Dental Clinic*, 1990-INA-479 (1992) (*en banc*) supports her decision to reject the U.S. applicant. (AF 59). Employer argues that *Bronx Medical* held that the rejection of U.S. workers is lawful if the workers do not possess minimum requirements,

even if the CO asserts that the applicant maybe able to perform the job duties based on related education, training, experience. (AF 58-59). In *Bronx Medical*, the Board found erroneous the CO's determination that the employer unlawfully rejected U.S. applicants who did not have the M.B.A. degree required by employer because they had adequate alternative experience. *Id.* *Bronx Medical* is inapplicable here because the requirement of an M.B.A., which is a highly specialized degree that is only attainable thorough a specific educational curriculum, is not analogous to the experience requirement of a domestic or household cook, since one could attain the experience of cooking family-style meals in a variety of settings, including restaurants. Furthermore, the Employer did not list on the ETA 750A or the job advertisement that an expertise in household cooking was required. (AF 25, 52).

Employer correctly points out that the CO did not challenge the two years of experience listed in the ETA 750A or the advertisement as unduly restrictive. (AF 58). Rather, the CO found that despite the distinguishable job titles, the U.S. applicant's cooking experience gained in a commercial setting is the same experience needed to perform cooking in a domestic setting because the duties are the same core duties. (AF 53). On the other hand, Employer argues that they must be different, or else the Dictionary of Occupational Titles would not distinguish among different types of cooking occupations, e.g., domestic cook. (AF 59). Employer's argument fails because it places an unreasonably rigid reliance on the job titles rather than looking to the actual core duties of the particular jobs at issue.

In defining the requirements for the job, experience in the job offered means experience performing the listed job duties. *Integrated Software Systems, Inc.*, 1988-INA-200 (July 6, 1988). The Board in *Fritz's Garage*, 1988-INA-00098 (Aug. 17, 1988) (*en banc*), found that an applicant had been unlawfully rejected because expertise in Volkswagen repair was not listed as a requirement on the ETA 750A or in the advertisements; hence, it was an undisclosed requirement. The Board rejected a dissent that concluded that the job requirement was "implicit." The Board also stated that even assuming such a requirement was implicit, the CO would be affirmed because the basis

for rejection was vague and unconvincing. The Board framed the employer's burden in this situation as making "a convincing showing that [the U.S. applicant] could not perform the job in an acceptable manner, as contemplated by § 656.24(b)(2)(ii) of the regulations." In this case, the CO found that, based on applicant's experience, the applicant had experience performing the core job duties listed. (AF 53). The Employer takes issue with the fact that the U.S. applicant's experience in performing the job duties occurred in a commercial setting rather than in a domestic setting. (AF 59). The Employer asserts that because the applicant's experience occurred in a commercial setting, the quantity of food was more important than the quality of food. (AF 59). This is a baseless assumption. Furthermore, the CO's determination that the U.S. applicant has the ability to perform the job duties required by the job duties listed on the ETA 750A is reasonable. The Employer has not met its burden of showing that the U.S. applicant could not perform the job in an acceptable manner, as contemplated by 20 C.F.R. § 656.24(b)(2)(ii) of the regulations. The Employer has done no more than to make unfounded assertions about the ability of the U.S. applicant. This being the case, the Employer has unlawfully rejected an otherwise qualified U.S. applicant. Labor certification was properly denied, and the following order shall issue.

ORDER

The CO's denial of labor certification in this matter 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 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.