

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 July 2013

BALCA Case No.: 2013-TLN-00055
ETA Case No.: H-400-13101-259698

In the Matter of:

SODETTE SIMEONIDIS,
Employer.

Certifying Officer: Chicago National Processing Center

Appearances:

Sodette Simeonidis,¹ Pro Se, Elizabeth, NJ
For the Employer

Associate Solicitor, Division of Employment and Training Legal Services, Washington, DC
For the Certifying Officer

Before: Pamela J. Lakes
Administrative Law Judge

**DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("CO"'s) denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A. Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"), to be heard by a panel of the Board or an individual member. 20 C.F.R. § 655.33(a). Based upon a review of the Appeal File, the request for review, and any legal briefs submitted, the Board is required (within 10 days of receipt of the appeal file and five days of receipt of the CO's brief) to either affirm the denial of

¹It is not entirely clear what the individual employer's name is. On the application, she listed her first name as "Plunkett," middle name as "Ann Marie," and last name as "Sodette"; however, she signed the application and subsequently signed a statement and an affidavit with the name "Sodette Simionedes." (AF 18, 19, 29, 68, 77).

temporary labor certification, direct the CO to grant the certification, or remand the case to the CO for further action.² 20 C.F.R. § 655.33(a), (e).

STATEMENT OF THE CASE

Employer Sodette Simionedes (“Employer”) originally filed an application for a Nanny (child care worker) under the one-time occurrence temporary need standard. On the application, the Employer indicated that she was a working professional (attorney) who had recently given birth to twin boys and had two other children (ages 9 and 12). Although her mother was assisting with child care, she explained that her mother planned to return to her native Jamaica and she would require the services of a Nanny until the twins had reached two years of age (on June 14, 2014), at which point they would be able to attend day care. (AF 73). The application listed the following under item 5, Special Requirements:

Must have experience taking care of twins. Minimum of 1 year experience as a nanny. Must be able to cook meals for infants. Familiarity and knowledge of Jamaican culture and meals a plus.

(AF 70).

On April 18, 2013, the Certifying Officer (“CO”) issued a Request for Further Information (“RFI”), requiring a response within five days. (AF 59-61). Specifically, the CO found several deficiencies in the application, including failure to complete all pre-filing recruitment (based upon the date of completion of recruitment), failure to satisfy obligations of H-2B employers (based upon failure to establish that the job opportunity was bona fide, in view of the inclusion of terms and conditions not normal to U.S. workers similarly employed), and failure to satisfy pre-filing requirements (relating to prevailing wage and job orders/advertisement). With respect to the terms and conditions of employment under 20 C.F.R. §655.22(h), the CO stated:

Specifically, the employer had indicated that, “Familiarity and knowledge of Jamaican culture and meals is a plus.” The Department views this preference as a requirement for the job opportunity.

Additional Information Requested:

The employer must submit evidence that it satisfied the regulatory obligations of H-2B employers. The employer’s response must include, but is not limited to, a signed, written document explaining why the employer prefers familiarity and knowledge of Jamaican culture and meals. . . .

(AF 63). The CO explained that the employer must also (1) explain why its terms and conditions of employment were normal to similarly employed U.S. workers in the area of intended employment, not less favorable than those offered to the H-2B workers, and not less than the

² References to the Appeal File appear as “AF” followed by the page number.

minimum terms and conditions required by the regulation AND (2) produce evidence that its job opportunity is a bona fide, full time temporary position with required qualifications that are normal and accepted qualifications required by non-H-2B workers in the same or comparable occupations. (AF 63-64).

Employer responded to the RFI with her Affidavit (dated April 19, 2013) and other documentation. (AF 17-58). In her Affidavit, she discussed the need for her three requirements—experience taking care of twins, one year experience as a nanny, and ability to cook meals for infants. (AF 17-18). She indicated that there had been a typo on the application with respect to the recruitment period and she provided documentation relating to the recruitment and prevailing wage. (AF 17-19, 29-58). Also, she provided an excerpt from the ONET Online describing the job of child care worker and an article discussing the need for specialized experience for nannies responsible for twins. (AF 20-28). On the preference for familiarity with Jamaican culture and meals, she stated in her Affidavit:

[5.] Last, I stated that familiarity and knowledge of Jamaican culture and meals would be a plus. This was not a requirement for the nanny position. I did not include this in the advertisements (*please see attached job advertisements*) and I did not mention it or discuss it with any of the applicants that I interviewed. I also DID NOT use it as a negative factor to disqualify or reject an applicant.

[6.] The reason familiarity and knowledge of Jamaican culture and meals was a plus during the recruitment process is because my family and I are Jamaican. My mother and I speak Jamaican patois so my children have been exposed to it. It would be nice for the nanny to communicate with the babies in Jamaican patois in addition to English because she will be spending the majority of time with them and I would like them to become accustomed to the language. I also take the children to Jamaica every year so I want the babies to be exposed to the language, culture and food at an early age. Again, this was not a requirement. I am only concerned with the three requirements listed above and that is what I am looking for and looked for during the recruitment phase.

(AF 18).

On June 3, 2013, the CO issued a Final Determination that denied the application based upon failure to establish that there were not sufficient U.S. workers capable of performing the temporary services or labor and that employment of the foreign worker would not adversely affect the wages and working conditions of U.S. workers.³ (AF 6-16). The denial was premised upon the listing of terms and conditions not normal to U.S. workers similarly employed as Childcare Workers with respect to the preference (which the CO viewed as a requirement for the job opportunity) of familiarity and knowledge of Jamaican culture and meals. (AF 10-11). The CO also found the recruitment deficient because the advertisement did not list this requirement (or preference). (AF 11).

³ The CO also provided notice of a new prevailing wage methodology. (AF14-16.)

Employer requested administrative review by letter of June 10, 2013. (AF 1-5). Employer argued that she had satisfied the requirements of 20 C.F.R. §655.22(h) because her three requirements were supported. While the CO interpreted the statement “Familiarity and knowledge of Jamaican culture and meals is a plus” as a preference and requirement for the job opportunity, Employer maintained that it was not intended as a requirement and for that reason was not included in the advertisements. (AF 1-2). Employer argued that she had also complied with all pre-filing recruitment requirements, and she did not include the reference to Jamaican culture and meals in the advertisement because it was not a requirement. (AF 2). She indicated that the only reason she included it in section F, item 5 (relating to Special Preferences) was that there was nowhere else on the form to list it. (AF 2).

The case was docketed on June 13, 2013 and assigned to the undersigned administrative law judge to act on behalf of the Board. The administrative file was received from the Director of the Chicago National Processing Center on June 20, 2013.

The Certifying Officer, through the Office of the Solicitor, filed a letter brief dated June 28, 2013 by email, as permitted by the Notice of Docketing of June 14, 2013.

Employer did not file a brief. However, she stated her position in her request for administrative review dated June 10, 2013, filed on June 13, 2013 (AF 1-4).

DISCUSSION AND ANALYSIS

Essentially, the issue in this case is whether the Certifying Officer erred in considering a preference as a requirement (when Employer listed “Familiarity and knowledge of Jamaican culture and meals is a plus” on the application as a special requirement) and in therefore denying the application due to (1) inclusion of terms and conditions not normal to U.S. workers similarly employed and (2) failure to include a requirement of the job opportunity in the advertisements. Employer’s position is that inasmuch as the application listed “[f]amiliarity and knowledge of Jamaican culture and meals” as “a plus,” it was merely a preference, not a requirement, and was therefore properly omitted from the advertisements. Likewise, Employer argues that the only reason she listed it as a special requirement is that there was nowhere else on the form to list it.

In the letter brief from the Office of the Solicitor, the CO argued that, regardless of whether the statement that “familiarity and knowledge of Jamaican culture and meals is a plus” was considered a requirement or a preference, the application still could not be certified. If it is deemed to be a requirement, it is clear that the Employer has not established that familiarity and knowledge of Jamaican culture and meals is normal and accepted for the position of child care worker or nanny. Employer has conceded as much. However, as the CO argues, the application fails even accepting Employer’s statement that it was intended to be a preference and not a requirement.

For purposes of permanent labor certification applications, preferences have long been considered to be job requirements. *See, e.g., The Frenchway, Inc.*, 1995-INA-451 (Dec. 8, 1997), *citing Southern Connecticut State University*, 1990-INA-384 (Dec. 9, 1991). The requirement that an employer’s preference “shall be deemed to be a job requirement” was

previously set forth in a regulation, former 20 C.F.R. §656.21(b)(2)(iv); however, that provision was deleted when the PERM regulations were adopted. 69 Fed. Reg. 77326 (Dec. 27, 2004). There is no comparable provision in the regulations relating to temporary labor certification.

In *Francis Kellogg*, 1994-INA-465 (Feb. 2, 1998) (en banc), decided under the previous permanent labor certification regulations, the Board held that “any job requirements, including alternative requirements, listed by an employer on the ETA Form 750A must be read together as the employer's stated minimum requirements. . .” Applying *Kellogg*, the Board found in *Eagle Travel & Cargo, Inc.*, 1997-INA-259 (Aug. 19, 1998) that the use of alternative qualifying criteria greater than the alien possesses could have a “chilling effect” that discouraged otherwise qualified U.S. workers from applying; however, that case was remanded to give the employer the opportunity to readvertise after deleting the restrictive requirement.

The regulations relating to temporary labor certification for employment in occupations other than agriculture or nursing, appearing at 20 C.F.R. Part 655, Subpart A, set forth specific requirements for employers. Section 655.22 requires that an employer seeking H-2B labor certification attest that it will abide by conditions, including the following:

- (h) The job opportunity is a bona fide, full-time temporary position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.

As noted above, the CO has found that the Employer violated this provision by including a special requirement that was not normal and accepted.

After reviewing the appeal file and the arguments of the parties, I agree with the CO that, although stated as a preference, the inclusion of the language “Familiarity and knowledge of Jamaican culture and meals is a plus” on the application as a special requirement was violative of section 655.22(h). Considered in context, the inclusion of the three special requirements of one year of experience as a nanny, experience cooking meals for infants, and experience taking care of twins limited the pool of U.S. workers eligible for the job opportunity. The inclusion of an additional preference appears to be designed to further limit the number of U.S. applicants applying for the position by discouraging otherwise qualified applicants from applying and its inclusion would likely have a chilling effect. The fact that Employer did not include the preference in the advertisements does not assist the Employer as it was included in the Job Order and therefore potentially discouraged applicants otherwise available in the recruitment process. Employer’s statement to the effect that it was merely a preference and was not relevant to the selection process is belied by her statement that, when she could not find another place on the form to include it, she included it under “Special Requirements,” instead of just omitting the preference. A remand allowing for the application to proceed without the restrictive requirement does not appear to be warranted as Employer has not agreed to delete the restrictive requirement and the recruitment process would have to be reopened, in any event, due to the inclusion of the objectionable language in the job order. Under these circumstances, the CO’s determination should be affirmed. Accordingly,

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's Decision is **AFFIRMED**.

For the Board:

PAMELA J. LAKES
Administrative Law Judge