



Date: OCT 29 1993

Case No: 93-INA-3

In the Matter of:

MARVIN AND ILENE GLEICHER
Employers

on behalf of

YVONNE CUMMINGS,
Alien

Before: Brenner, Clarke, Glennon, Groner,
Guill, Huddleston and Litt
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Immigration and Nationality Act of 1990 at 8 U.S.C. § 1182 (the "Act"), and the regulations promulgated thereunder at 20 C.F.R. Part 656.

Statement of the Case

On May 13, 1991, the Employers, Marvin and Ilene Gleicher, filed an application for permanent labor certification on behalf of Yvonne Cummings, the Alien, to fill the position of Live-in Child Care Monitor. Appeal File (AF) at 20. The job duties consisted of "Child care for triplets age 2" and "meal preparation for children and laundry." A 40 hour work week, from 8:00 a.m. to 5:00 p.m., was required at a wage of \$5.00 per hour with overtime pay at \$7.50 per hour. The Employers also required that applicants possess three months of experience in the job offered.

By letter dated June 3, 1992, the Employers requested waiver from Schedule B. AF at 26. On August 7, 1992, the Certifying Officer ("CO") issued a Notice of Findings ("NOF") wherein she proposed to deny labor certification on two grounds. AF at 15-17. First, the CO noted that the Employers required three months of experience in the job offered, yet "[a] review of the application reveals the only experience the alien has in this occupation was gained with the subject employer and therefore cannot be used to qualify." As a result, the CO requested that the

Employers document that the Alien possessed the three months of experience with another employer.

The second ground upon which the CO proposed to deny labor certification was for failure of the Employers to document that the Alien possessed one year of paid experience in the duties to be performed. The CO noted that "[t]his documentation (for one year of paid experience) is required to assure the Alien knows the demands unique to the job and will continue to work in the occupation after arrival."

On rebuttal, two letters were submitted. AF at 9-11. The first letter is from Marvin and Jackie Cox wherein they state that they hired the Alien as a "paid live-in child care worker [from] November 10, 1988 to June 1, 1989." AF at 11. The Alien's duties included caring for two children, ages 6 and 8 years, as well as doing laundry, preparing meals, getting the children ready for school, and reading to them. The second letter, dated September 8, 1992, was from the petitioning Employers wherein they state that the Alien received her one year of paid experience in the same type of job with them from June 15, 1989 through June 30, 1990. AF at 10.

A Final Determination ("FD"), dated September 16, 1992, was issued by the CO wherein she denied labor certification. AF at 7-8. Specifically, the CO concluded that the Employers failed to document that the Alien obtained her one-year of paid experience with another employer.

A Motion to Reconsider, dated September 18, 1992, was filed and subsequently denied by the CO on September 25, 1992 at which point she noted that the "application will be forwarded to the Board of Alien Labor Certification Appeals ("Board") for review. AF at 1-2.

By Notice and Order dated July 19, 1993, the Board determined sua sponte that it would consider this matter en banc. In particular, the Board notified the parties that it would consider whether to adhere to its prior holdings in Roger and Denny Phelps, 88-INA-214 (May 31, 1989) (en banc) and its progeny Mark and Andrea Smith, 90-INA-178 (Jan. 13, 1993) and Greg A. Lindquist, 91-INA-345 (Dec. 16, 1992), en banc review den. (Mar. 3, 1993), that the Alien's one year of equivalent, full-time, paid experience (necessary to remove the job from Schedule B) must be obtained through an employer other than the petitioning employer. The Employers filed a Statement of Intent to Proceed on August 6, 1993.

In response to this Notice, the CO filed a Motion to Remand dated September 15, 1993 and urged that the Board's holding on this issue in Roger and Denny Phelps be overruled to provide that the one year of paid experience may be obtained with the petitioning employer. Accordingly, the CO asks that we remand this case to her so that she may grant certification. No brief was filed by the Employers. The American Immigration Lawyers Association and the American Immigration Law Foundation, amici curiae, filed a joint brief, on September 20, 1993, asking that we overrule Roger and Denny Phelps.

Discussion and Conclusions

At 20 C.F.R. § 656.11, the Secretary of Labor has designated certain occupations as unsuitable for permanent labor certification because:

[T]here generally are sufficient United States workers who are able, willing, qualified, and available for the occupations listed . . . on Schedule B and that the wages and working conditions of United States workers similarly employed will generally be adversely affected by the employment of Aliens in Schedule B occupations.

In the occupations listed on Schedule B, a household domestic service worker is included. Section 656.11(b)(26) defines such a worker as one who performs tasks such as preparing meals, washing clothes, and caring for children. Of importance, this definition applies only to an Alien who has "less than one year of documented full-time paid experience in the tasks to be performed . . . "

The regulations do provide, however, that a waiver from Schedule B may be filed pursuant to § 656.23. One of the requirements for waiver is that the employer provide documentation as required by §§ 656.20(b), (c), (e), and (f) and 656.21. 20 C.F.R. § 656.23(d)(1). Of relevance here is § 656.21(a)(3)(iii)(A) governing live-in household domestic service worker jobs, which requires that the employer document "the alien's paid experience in the form of statements from past or present employers" and that "[t]he total paid experience must be equal to one full year's employment on a full-time basis."

In Roger and Denny Phelps, supra, the Board declined to permit the alien to establish the one-year requirement through employment in the same job with the petitioning Employer, and stated that:

Otherwise, an alien who does not, at the time of hire by the Employer, satisfy the criteria necessary to avoid a Schedule B denial or waiver, is bootstrapped at the unfair expense of other qualified workers into meeting the criteria.

Slip op at 5. See also Mark and Andrea Smith, supra, Greg A. Lindquist, supra. The regulations mandate that the Alien possess one year of full-time, equivalent, paid experience. Considering that as found by inclusion in Schedule B, there is high turnover and no shortage of workers for these jobs, which require little or no education or experience, it is logical that the one-year paid experience requirement is designed to demonstrate that the Alien is tied to this occupation. Indeed, as discussed in Roger and Denny Phelps, the Technical Assistance Guide (TAG) also states that such is the purpose.

Consistent with this concern, there is less assurance that the Alien has a reasonable attachment to the occupation when the one-year experience purportedly supporting such attachment is gained in whole or in part with the petitioning Employer. Experience with the petitioning Employer, gained prior to labor certification while the Alien normally is in something

other than a legal permanent resident status, provides insufficient assurance that the Alien would have a continuing attachment to the occupation. The amicus curiae's view that experience with a petitioning employer at least equally serves to acquaint an alien with the special demands of a household service worker job misses the point. It is not knowledge of the job, but assurance an alien really seeks permanent status to remain in such a job, which the one-year experience requirement, necessary to justify an exception to Schedule B, seeks to foster.

In reaching this result, we reject the view in the CO's motion to remand. The CO notes the regulatory requirement that the alien document the one year equivalent paid experience ". . . in the form of statements from past or present employers." § 656.21(a)(3)(iii)(A) (emphasis added). The CO, with no analysis, reads "present" employer as necessarily including a petitioning employer. Of course, an alien's "present" employer at the time a petition for labor certification is filed, need not be the petitioning employer who seeks to employ the alien if its petition for permanent labor certification is granted. The CO's motion is devoid of any reasoning in support of her reading of this regulation, and contains no other arguments in support of overruling Phelps. Given the purpose of listing jobs under Schedule B, and the consistent application of Phelps by the Board since 1989 with no change in the applicable regulations by the Secretary, we reaffirm the holding in Phelps and decline to permit exclusion from Schedule B, or in the case of a live-in job waiver from Schedule B, for household domestic service worker jobs unless the alien has one year of full-time paid experience with employers other than the petitioning employer.

As the record in this case fails to disclose one year of paid experience with employers other than the petitioning Employers, the holding in Roger and Denny Phelps is reaffirmed and labor certification is denied.

ORDER

Based upon the foregoing, **IT IS ORDERED** that the Certifying Officer's Motion to Remand is **DENIED** and permanent labor certification in this matter is **DENIED**.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/SF/pah