

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 September 2003

BALCA Case No.: 2002-INA-155
ETA Case No.: P2000-NY-02449712

In the Matter of:

GEORGE GRILLO,
Employer,

on behalf of

YVETTE ELIANE THORPE,
Alien.



Certifying Officer: Dolores Dehaan
New York, New York

Appearance: Nora Lee
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Cook Live-in."¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

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

STATEMENT OF THE CASE

On January 14, 1998, Employer, George Grillo ("Employer") filed an application for labor certification on behalf of Yvette Eliane Thorpe ("Alien") to fill the position of "Live In Cook." (AF 26). The job duties included planning menus, ordering foodstuff and cooking meals for a family, following the recipes or taste of the employer. Employer required two years of experience in the job offered. The work schedule was 8:00 a.m. to 8:00 p.m. (AF 71-74).

The CO issued a Notice of Findings ("NOF") on November 14, 2001, proposing to deny certification for failure to establish that the job opportunity was clearly open to any qualified U.S. worker as required by 20 C.F.R. §656.20(c)(8).² (AF 55). Employer was advised that the application contained insufficient information to determine if the position of domestic cook actually existed in his household or whether the job was being created solely for the purpose of qualifying Alien as a skilled worker under current immigration law. Employer was directed to provide rebuttal evidence which documented that the position of domestic cook was a *bona fide* job opportunity. Employer was further directed to respond to 12 questions, as well as to provide tax returns for the immediately preceding calendar year from the date of filing the application through the current year. (AF 55).

Employer's rebuttal included a letter from the Alien's Evaluation Services dated December 18, 2001, along with a letter from Employer, and one from Employer's accountant, stating that income tax returns were only kept for three years, and therefore Employer's tax returns prior to 1998 were not available. (AF 65). In his letter, Employer claimed that 4.6% of his income would be used to pay the cook. On January 17, 2002, and pursuant to a telephone conversation with someone from the U.S. Department of Labor Employment and Training Administration, Employer forwarded copies of two brokerage account statements, one in Employer's name in the amount of \$161,745.79, and the other, an IRA account owned by Employer, in the amount of \$301,292.61. (AF 66-67).

² Those issues which were successfully rebutted will not be detailed herein.

The CO issued a Final Determination ("FD") on January 30, 2002, denying certification. (AF 76). The CO found that Employer had failed to rebut the finding rendered pursuant to 20 C.F.R. §656.20(c)(8), as he had failed to establish that the position was a *bona fide* one, clearly open to any qualified U.S. worker. Specifically, the CO found that Employer had failed to provide all requested documentation, and in particular the Federal tax returns for the time immediately preceding the calendar year from the date of filing of the application through to the current year. The CO further pointed out that Employer's agent was advised by telephone that the tax returns from 1998 through 2000 were needed to determine Employer's ability to pay the domestic cook's salary, but that what had been supplied by letter dated January 17, 2002 were the brokerage account statements. The CO found that Employer's additional rebuttal information did not show Employer's disposable income, nor were Employer's liabilities and expenses included. Accordingly, the CO was not able to determine Employer's ability to pay Alien's salary. Since one of the requirements for documenting the *bona fides* of a job is the employer's ability to pay the wage offered the alien, and Employer herein had failed to do so, labor certification was denied.

On March 5, 2002, Employer filed a Request for Review with the Board of Alien Labor Certification Appeals ("Board" or "BALCA"). (AF 92).

DISCUSSION

In his Request for Review Employer argues that sufficient documentation was provided regarding his ability to pay the wage offered to Alien, and that the statements provided from his brokerage accounts showed he had the financial resources to pay the salary required. Employer also contends that due to circumstances beyond his control he was unable to provide the tax returns at the time he filed his rebuttal. Included with the Request are the tax returns for 1997 through 2000 along with a letter from his financial advisor.

Employer is now belatedly attempting to submit the documentation requested by the CO in her NOF. This Board will not consider the material submitted with the request for review as our

review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. 656.27(c). *See also* 20 C.F.R. § 656.26(b)(4). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992).

The requirements of a *bona fide* job opportunity arise out of 20 C.F.R. §656.20(c)(8), which requires that an employer attest that the “job opportunity has been and is clearly open to any qualified U.S. worker.” *Pasadena Typewriter and Adding Machine Co. Inc. and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AABT (D. Cal. 1987). In the instant case, Employer was requested to provide documentation of his income in order to allow the CO to determine whether he had the ability to pay the wage offered to Alien, and thus, whether there actually was a *bona fide* position available to U.S. workers.

Employer was clearly notified in the NOF of the documentation he needed to provide in order to substantiate that the position was *bona fide*. He failed to provide it with his rebuttal. He was then advised in a telephone conversation that the tax returns were needed. In effect, Employer was given a second opportunity to comply with the NOF, and he still did not produce the tax returns. He also failed to request additional time in which to produce same, or otherwise indicate he was making any effort to comply with the NOF in this respect. Most significantly, he failed to establish his ability to pay the wage being offered to Alien.

An employer must provide directly relevant and reasonable documentation sought by the CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). Failure to do so warrants denial of labor certification. *Rouber International*, 1991-INA-44 (March 31, 1994). Employer herein failed to produce the reasonably requested evidence; such documentation was critical to establishing that a *bona fide* position existed, and 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 PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review 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 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.