

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 15 September 2003

BALCA Case No.: 2002-INA-00116
ETA Case No.: P1996-CA-09045626/JS

In the Matter of:

DARLENE PLANT,
Employer,

on behalf of

BASILISA LORENZO,
Alien.



Appearance: Leonard W. Stitz, Esquire
Santa Ana, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Darlene Plant (Employer), filed an application for labor certification¹ on behalf of Basilisa Lorenzo, (Alien) on August 7, 1997, seeking to employ the Alien as a full-time domestic cook. (AF 25-53)² This decision is based on the record upon which the Certifying Officer (CO)

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.

denied certification and Employer's request for review, as contained in the Appeal File, along with any written arguments. 20 C.F.R. § 656.27(c).

BACKGROUND

In its application, Employer described the duties of the position which it was seeking to fill as follows:

Cook, season, and prepare meals predominantly but not limited to Mexican cuisine. Prepare meals in accordance with the employer's instructions or with cook book recipes. Pare, clean and prepare produce, beef, fish, poultry and pork. Bake breads and pastries, broil, fry and roast meats. Place menus, clean kitchen and cooking utensils and order items and kitchen supplies.

In the Notice of Findings, dated October 28, 1997, the CO questioned whether the position being offered by Employer was truly a full-time position which was open to qualified U.S. workers, and whether Employer had the ability to place the Alien upon the payroll immediately upon her entry into the United States, as required by 20 C.F.R. § 656.20(c)(1) and (c)(4). (AF 19-23) Accordingly, under a heading labeled "Corrective Action," the CO advised Employer to submit any one of four specific documents in order to establish that she had the ability to pay the Alien immediately upon her entry into the United States. The CO also instructed 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 19-23)

Employer filed her rebuttal on January 2, 1998, in which she submitted a chart indicating the daily work schedule for each parent, as well as the times during which each child attended school daily, and the Alien's expected work schedule. (AF 08-18) However, she did not submit any of the financial documentation specifically requested by the CO in the Notice of Findings. Instead, as proof of her ability to pay the Alien, Employer submitted a document entitled "DARLENE PLANT

INCOME STATEMENT FOR THE TWELVE MONTHS ENDED DECEMBER 31, 1996," which indicated that in 1996, her annual income equaled her overhead expenses. (AF 08-18)

In the Final Determination, dated December 6, 2001, the CO found Employer to be in violation of 20 C.F.R. §§ 656.20(c)(1), (c)(4), and (c)(8). In doing so, the CO stated:

... Regarding the ability to place the alien on the payroll at the salary indicated, the employer was advised to submit any of: a recent form W-2 or 1099 reports of income for the employer, the employer's most recent income tax return, or a certified financial statement.

The employer submitted a statement, DARLENE PLANT INCOME STATEMENT FOR THE TWELVE MONTHS ENDED DECEMBER 31, 1996. This statement shows: "Income, \$67,595.00, Overhead Expenses \$67,595.00, Net Profit[Loss]FROM OPERATIONS 0, OTHER INCOME 0, NET PROFIT [LOSS] 0."

The employer's financial statement is not a certified financial statement as requested, and therefore the employer has not chosen to submit any of the evidence that the Notice of Findings asked for. In reviewing the employer's income statement as submitted, there is no evidence of the ability to place the alien on the payroll at the salary offered for the labor certification position. If the employer has spendable income that is not shown on the statement provided, the employer should have provided information to show such available income. Based on the failure to submit evidence of the ability to pay the alien's salary, we find the employer in violation of 20 CFR 656.20(c)(1) and (c)(4).

Regarding the question as to whether the job for a domestic cook is truly open to U.S. workers, the employer was requested to respond to requests for detailed information about the employer's schedule, the job duties, and all domestic work in the household.

The employer's rebuttal is insufficient to show how this newly created position will truly exist. All information in rebuttal has been reviewed. The lack of demonstrated ability to pay is one factor. Another problem is that the work schedule of the cook,

Form ETA 750 A, box II, shows that the cook has already gone home for the day before one full hour before on [sic] parent is home and two hours before the other parent is home, yet the domestic cook is stated to both prepare and serve the meals including dinner. Based on all information of record, we cannot find that the position domestic cook, as described, exists in the employer's home or that it is truly open to U.S. workers.

(AF 06-07)

Employer filed a timely request for review by this Board, and the case was docketed on March 12, 2002. In a document entitled Statement of Position, dated April 1, 2002, Employer set forth the particular grounds for its appeal as follows:³

The sole basis for denial is the assertion by the Department of Labor that there is no legitimate job opportunity to which U.S. workers can be referred. The reviewing officer summarily and arbitrarily rejected the employer's response to the Notice of Findings, and issued the decision to deny. The decision is not based in fact or reason and is in error.

The position is that of a domestic cook. In response to the Notice of Findings the employer provided meal schedules, family schedules, duties of the job [for the]employee, and in general met each and every issue raised in the Notice of Findings. The reviewing officer summarily rejected these responses and issued the Final Determination denying the application.

The denial was based on nothing more than a prejudice by the reviewing [officer] against this occupation, and a predisposition against granting applications for this alien employment in this field. This is exemplified not only by the officer's refusal to consider the response of the employer, but is set forth in the language of the initial

³ In this document, Employer referred to the Final determination as having been issued by the CO on February 21, 2002. Since the CO did not indicate that Employer's rebuttal was untimely, it is possible that the CO originally considered Employer's request for review as a motion for reconsideration, which she denied on February 21, 2002, but inadvertently omitted from the Appeal File. It is also possible that Employer's representative, who handles numerous applications for labor certification, misstated the date on which the Final Determination was actually issued. In any event, either error is not relevant to the exigent issues.

Notice of Findings:

... It appears implausible that the actual number of job opportunities for skilled domestic workers has increased since 1991, since relatively few households have either the resources or the need for full time skilled domestic staff. It appears that employers are submitting applications for unskilled domestic job opportunities...

It is the function of the reviewing officer to review an application on its individual merits, not on what may or may not have occurred in other cases. Each case stands or falls on its own merits, not on what the reviewing officer may or may not perceive as trends in applications. The decision denying the application was in error and must be overturned.

DISCUSSION

Congress enacted Section 212(a)(14) of the Immigration and Nationality Act of 1952 (as amended by Section 212(a)(5) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to “protect the American labor market from an influx of both skilled and unskilled foreign labor.” *Cheung v. District Director, INS* 641 F.2d. 666, 669 (9th Cir., 1981); *Wang v. INS* 602 F.2d 211, 213 (9th Cir. 1979). To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Consequently, the burden of proof in the labor certification process is on the employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. 656.2(b).

In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), the Board held that a CO may properly invoke the *bona fide* job opportunity analysis authorized by 20 C.F.R. § 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. It is the employer's burden following issuance of a NOF to perfect a record that is sufficient to establish that a certification

should be granted.

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). In *Carlos Uy*, the Board made it clear that the financial ability of a household to employ a domestic worker as a professional cook is a relevant area of inquiry. Thus, for example, a request by the CO for a copy of an employer's tax return is clearly a reasonable request for a document having a direct bearing on the case, and an employer's unexplained failure to produce that document is, by itself, grounds for denial of labor certification.

In the instant case, Employer provided no explanation for its failure to provide any of the specific financial documentation requested by the CO in its rebuttal. Accordingly, the Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel:

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 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, NW

Suite 400 North
Washington, DC, 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.