

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 September 2003

BALCA Case No.: 2002-INA-223
ETA Case No.: P2000-NJ-02458710



In the Matter of:

CHARLES WEISINGER,
Employer,

on behalf of

JULIAN PHILLIP,
Alien.

Appearance: Nora Lee, Director
New York, NY
For Employer

Certifying Officer: Dolores Dehaan
New York, NY

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 Julian Phillip (“Alien”) filed by Charles Weisinger (“Employer”) pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(“the Act”), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer (“CO”) denied the application, and Employer requested review pursuant to 20 C.F.R. §656.26.

The following decision is based 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 of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On January 8, 1998, Employer, Charles Weisinger, filed an application for labor certification on behalf of the Alien, Julian Phillip, for the position of Cook, Live-in. (AF 28). The only stated job requirement for the position, as specified on the application, was two years experience in the job offered. However, since the job title is "Cook, Live-in," it was apparent that the Employer also had a "live-in" requirement for the job opportunity (AF 28).

In a Notice of Findings ("NOF") issued on February 13, 2002, the CO proposed to deny certification on the grounds that Employer failed to establish a bona fide job opportunity clearly open to U.S. workers and that the live-in requirement was unduly restrictive. (AF 33-36).

Employer submitted its rebuttal on or about March 19, 2002. (AF 37-49). The CO found the rebuttal unpersuasive and issued a Final Determination, dated April 17, 2002, denying certification on the same basis. (AF 50-51). Under cover letter dated May 20, 2002 (AF 67-68), Employer requested reconsideration by the CO and/or requested review of the Final Determination, and submitted additional documentation. (AF 52-69). On May 31, 2002, the CO denied Employer's reconsideration request and the matter was docketed in this Office on June 14, 2002. (AF 70-71).

DISCUSSION

Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity has been and is clearly open to any qualified U.S. worker. This regulation also entails a requirement that a bona fide job opportunity truly exists. *See Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*).

In the NOF, the CO requested that Employer answer the following questions in order to help

ascertain whether the job opportunity is bona fide, while noting that merely answering all of the questions does not ensure approval of the application:

(1) State the number of meals prepared per day and per week; the length of time required to prepare these meals each day and each week; and the number of people for whom the meals are prepared.

(2) Provide the daily work and/or daily school schedules for **all** persons residing in the household. ETA form 750 A item 20 shows two adults living in the house, but employer's letter dated 7/27/2000 states that the employer is a single parent. Who is the second adult? Does this person take care of the children in the evening if the employer has to work?

(3) How frequently do you entertain? Describe in detail how often you entertained in the **twelve (12) calendar months** immediately preceding the filing of the application. List the dates of the entertainment, the number of guests entertained, the number of meals served, etc. To what extent will the **Domestic Cook** be involved in preparing food for guests?

(4) If there are pre-school or school-aged children residing in the household, please answer the following questions:

a. How will your children be cared for when the employer is absent from the home and the alien is fully engaged in preparing meals?

b. Who will care for your children during the alien's scheduled time off?

c. Will the alien be required to perform functions such as child care, general cleaning or other non-cooking functions? If not, how are those functions accomplished in the household?

(5) Describe any special dietary circumstances of the household, e.g., nutritional requirements. All special dietary requirements must be accompanied by a physician's statement.

(6) What percentage of the employer's disposable income will be devoted to paying the alien's salary? Your answer must be supported by providing a **signed** copy of your Federal Income Tax Return for the immediately preceding calendar year from the date this application was filed through the current year.

(7) If there are other domestic workers employed in the household, please list all positions, duties, and corresponding weekly hours of employment.

(8) Has the household ever before employed a **Domestic Cook**? If not, what circumstances led to the current job offer?

(AF 34-35). (*Emphasis in original*).

Employer's rebuttal consisted of a cover letter, dated March 19, 2002, signed by Nora Lee, Director of Alien's Evaluation Services (AF 49); Employer's letter, dated March 18, 2002, which sought to address the questions outlined above (AF 47-48); partial copies of Employer's Federal income tax returns for the years 1998 through 2001 (AF 40-46); and an entertainment calendar for the three months immediately preceding the filing of the application. (AF 37-39).

In the Final Determination, the CO found Employer's rebuttal to be inadequate, stating, in pertinent part:

According to employer's rebuttal, the household consists of the Employer and his two children, aged six and eight years, respectively. No one in the house has special dietary or nutritional needs. The employer's rebuttal indicates that no cook has worked for him prior to the hiring of the alien and states that because he is now a single parent and due to increase in the employer's business, the hiring of a Domestic Cook has become a business necessity. Employer states on rebuttal that he is a computer trainer and needs to serve meals to his students and other business associates. Moreover, the rebuttal fails to show that serving meals to his students is a service that his business provides....¹

We hold that the evidence on file is insufficient to substantiate a bona fide full-time job opening for a domestic cook exists within the employer's household.

(AF 59).

Upon review, we find that the similarity between the job opportunity as stated on the

¹ The CO also questioned whether Employer had sufficient income to guarantee the wages offered. (AF 59). However, even assuming Employer had established adequate income, as indicated in the documentation submitted with Employer's reconsideration/review request, (AF 61-68), we find, as outlined above, that labor certification was properly denied.

application and that which is now being described by Employer is almost nonexistent. As set forth above, one of the primary job duties as listed on the application was for the live-in cook to prepare and cook meals for a “couple who are under nutritionist care.” (AF 28). In his rebuttal, Employer states that he is now single with two minor children; he no longer has special dietary needs because he lost weight; and he now needs a live-in cook because his increased business as a computer trainer requires him to entertain his students and clients at home, because his children’s mother no longer lives at his home, nor takes care of his children. (AF 47-48).

Although Employer set forth these changes in lifestyle in correspondence to the Job Service, dated July 24, 2000, they are not reflected on the application form. (AF 7-8). The only amendments on the application form involved Employer’s address and telephone number. (AF 28). Moreover, we note that the job posting, dated September 10, 2000, signed by Employer, still reflects the original job duties. (AF 14). Similarly, the advertisements, dated September 8-10, 2000, also list the original job duties. (AF 15-17).

In view of these obvious inconsistencies, we agree with the CO that the evidence is insufficient to substantiate that a bona fide full-time job opening for a domestic cook exists within Employer’s household.

We also affirm the denial of certification on the grounds that Employer failed to adequately document that the live-in requirement arises out of business necessity. As stated by the CO (AF 59), Employer has simply provided his own statement that the live-in requirement arises from his need to entertain and feed students and clients at home as part of his computer training business because his children’s mother no longer takes care of them. (AF 47-48).² In the present case, we find

²Employer also provided an entertainment calendar for the three-month period of October through December 1997. (AF 37-39). However, this did not comply with the CO’s reasonable request for details regarding Employer’s entertainment schedule for the *twelve-month* period immediately preceding the filing of the application. (AF 34). Moreover, as discussed above, Employer claims significant changes in lifestyle since he filed the application for certification, as well as increased business. These new alleged bases for the live-in requirement clearly are not documented

Employer's mere assertion inadequate to document the business necessity of the live-in requirement, particularly in light of Employer's conflicting descriptions of the job duties for the job opportunity. Moreover, as discussed above, the reasons now cited by Employer as the bases for the live-in requirement did not exist at the time the application for labor certification was filed.

In summary, Employer failed to establish that there exists a bona fide job opportunity open to qualified U.S. workers, in violation of 20 C.F.R. §656.20(c)(8). Furthermore, Employer has not furnished sufficient, credible documentation to establish the business necessity for the live-in requirement, in violation of 20 C.F.R. §656.21(b)(2)(i). In view of the foregoing, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

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 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:

by Employer's entertainment calendar as it existed prior to the changed circumstances.

**Chief Docket Clerk
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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 ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.