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Issue Date: 28 September 2004

BALCA Case No.: 2003-INA-240
ETA Case No.: P2002-NY-02488283

In the Matter of:

RAJNISH KAPOOR,
Employer,

on behalf of

POONAM SABHARWAL,
Alien.

Certifying Officer: Delores DeHaan
New York, New York

Appearances: Baljit Singh, Esquire
New York, New York
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a private household for the position of Domestic Cook. (AF 11-12).² The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF"). 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² "AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

On April 29, 2002, the Employer, Rajnish Kapoor, filed an application for alien employment certification on behalf of the Alien, Poonam Sabharwal, to fill the position Domestic Cook. Minimum requirements for the position were listed as two years of experience in the job offered. The rate of pay was \$755.60 per week. (AF 11-12).

A Notice of Findings (“NOF”) was issued by the CO on January 18, 2003, citing 20 C.F.R. § 656.20(c)(8) and noting that the job opportunity must be *bona fide* and open to any U.S. worker. In addition, the CO cited 20 C.F.R. § 656.20(c)(1), requiring that the Employer have enough funds available to pay the wage or salary offered the Alien. Rebuttal evidence was to include responses to several enumerated questions, including documentation regarding the percentage of the Employer’s disposable income devoted to paying the Alien’s salary. The Employer was asked to provide signed copies of his complete federal income tax returns for the years 2000 and 2001. The Employer was also asked to document contact and lawful rejection of three U.S. workers. (AF 23-26).

In Rebuttal, the Employer submitted responses to the various enumerated questions, provided documentation of contact, and as pertinent herein, presented copies of the federal income tax returns for 2000 and 2001 showing taxable incomes of \$86,313 and \$53,589 per year, respectively. (AF 27-40).

A Final Determination (“FD”) denying labor certification was issued by the CO on March 14, 2003, based upon a finding that the Employer had failed to adequately document that a *bona fide* job opportunity clearly open to U.S. workers exists. (AF 41-42). The CO found the Employer’s submission of tax returns showing an adjusted gross income of \$52,935 in 2001 with a taxable income of \$12,007 per year for a family of four was insufficient to find that the Employer has the ability to pay the required annual salary of \$39,291.20 per year. Noting that one of the requirements for documenting the *bona fide* nature of a job is the ability to pay the wage or salary offered, the CO denied labor

certification, as the Employer had failed to provide evidence that he can meet the salary requirements of a permanent full-time domestic cook.

The Employer filed a Request for Review dated April 15, 2003, and the matter was referred docketed on July 21, 2003. The Employer submitted a Statement to Support Appeal dated August 18, 2003. (AF 43-52).

DISCUSSION

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).

Pursuant to 20 C.F.R. § 656.20(c)(8), an employer must document that the job opportunity has been and is clearly open to any qualified U.S. worker. The employer has the burden of providing clear evidence that a valid employment relationship exists, and that a *bona fide* job opportunity is available to domestic workers, and that the employer has, in good faith, sought to fill the position with a U.S. worker. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987)(*en banc*). Moreover, an application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. 20 C.F.R. § 656.20(c)(1). Certification may be denied if an employer fails to meet its burden of proving the sufficiency of funds to pay the alien's salary. Denial may result from either the absence of documentation or the submission of documentation which contradicts an employer's claim of sufficient funds. *Joy Chinese Restaurant*, 1988-INA-354, 1988-INA-362 (Oct. 30, 1989); *White Harvest Mission*, 1990-INA-195 (Apr. 9, 1991); *Whistlers*, 1990-INA-569 (Jan. 31, 1992).

In the instant case, the Employer submitted tax returns showing a taxable income of \$12,007 for the year 2001, yet proposed to pay the Alien an annual wage of \$39,291. Thus, the Employer's wage offer constitutes in excess of three times the Employer's taxable income. Although the taxable income is not the only factor to consider and the

CO must look at the overall financial circumstances of the Employer, the Employer has not provided any other documentation to support his assertion of the ability to pay. *See, e.g., Ranchito Coletero*, 2002-INA-105 (Jan. 8, 2004)(*en banc*). Absent any other documentation, the Employer's tax returns do not support a finding that the Employer would be able to pay the Alien's salary.

The account Statements and Deed of Sale submitted in conjunction with the Employer's Request for Review are insufficient to overcome the CO's finding of insufficient funds to constitute a *bona fide* job opportunity. As was noted by the Board in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." Based upon the foregoing, we conclude that the Employer has not documented ability to pay the offered wages, and thus labor certification was properly denied. *See, Foothill Division Darate Club*, 1993-INA-494 (Oct. 11, 1994); *Patucha Art*, 1993-INA-305 (Apr. 6, 1995).

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 OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor 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:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.