U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 August 2008

BALCA Case No.: 2008-INA-00047
ETA Case No.: P-05124-91309

In the Matter of:

MAST ENTERPRISE, INCORPORATED,
Employer,

on behalf of

ANTONIA LADIS,
Alien.

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center[1]

Appearance: Dominick S. Cardinale, Esquire
For the Employer and the Alien

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U. S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of

[1] The Backlog Elimination Center closed effective December 21, 2007. All further correspondence to the Certifying Officer about this application should be directed to the Chicago Processing Center.

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.").[2]

STATEMENT OF THE CASE

On April 3, 2001, the Employer, a restaurant/nightclub in Astoria, New York, filed an application for labor certification to enable the Alien to fill the position of Ethnic Singer/Entertainer. (AF 51-55). The position required two years of experience, and the duties of the position included singing and the entertainment of clients, as well as interpreting music using knowledge of harmony, melody, rhythm and voice. The incumbent would specialize in Greek Music, and would also direct and lead a musical support group.

On June 13, 2006, the CO issued a Notice of Findings ("NOF") proposing to deny certification under 20 C.F.R. § 656.3 on the basis that the job was not full-time, because workers in the occupation of Ethnic Singer/Entertainer are not normally employed on a full-time basis in Astoria, New York. (AF 26-27). Accordingly, the position could not be considered permanent because it did not involve full-time work during the entire year. The NOF provided with respect to the Employer's burden on rebuttal:

> … You must establish that the job offer meets the definition of "employment" as stated in the regulations by providing evidence that the position as performed in your establishment clearly constitutes full-time employment.
>
> The evidence or documentation must consist of data to support each of the assertions or conclusions raised. At a minimum, your rebuttal evidence must include a daily/weekly work schedule that is based upon the actual requirements/activities of your organization. In addition, if applicable, you must show that the job was previously filled by an incumbent on a full-time basis before the alien was hired. Documentation must include, but is not limited to, position descriptions, payroll records, resumes of

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

> former incumbents; and copies of job advertisements for similar positions in your organization, not associated with labor certification applications, placed in the last three years.

(AF 27).

The Employer filed its rebuttal on June 29, 2006. (AF 11-28). The Employer stated that the specific requirement for the position of ethnic singer/entertainer is that the performances are scheduled on Thursday, Friday, Saturday and Sunday from 8:00 p.m. to 1:00 a.m. for a total of 20 hours. (AF 21) The Employer claimed that this was a full-time position. (AF 11). The Employer explained that the duties of the job of ethnic singer/entertainer are performed in the context of scheduled performances. (AF 11). In support of its rebuttal, the Employer also submitted newspaper listings for this position that show that the position requires 20 hours per week and the Employer's recruitment efforts to fill this position in connection with its May 9, 2002 request for conversion to reduction in recruitment processing. (AF 13-18).[3]

The Employer further pointed out that the Department of Labor had previously approved an application for alien employment certification for an entertainer who was required to work 20 hours per week and perform job duties in the context of musical performances. The Employer claimed that this is exactly the same case and attached the approved application in that case. (AF 20–25).

On July 26, 2007, the CO issued a Final Determination denying certification. (AF 8-10). The CO reiterated that the Notice of Findings had identified two violations: the Employer's failure to demonstrate that the position was full-time employment, and that the Employer had not engaged in adequate recruitment efforts to enlist applicants for the position. (AF-9). The CO determined that the Employer had rebutted the second violation by providing a written report of all the Employer's recruitment efforts prior to

[3] The Employer has not raised the Reduction in Recruitment issue on appeal, other than to include the results provided in its recruitment report. (AF 1-2).

filing the current application for certification. The CO also determined, however, that the Employer "did not successfully rebut the first violation," and explained:

> The NOF advised you to document the full-time nature of the position, since a labor certification cannot be issued for a part-time job. At a minimum, your rebuttal evidence was to include daily/weekly work schedule that is based upon the actual requirements/activities of your organization. In addition, if applicable, you were required to show that the job was previously filled by an incumbent on a full-time basis before the alien was hired. Documentation must include, but is not limited to, position descriptions, payroll records, resumes of former incumbents; and copies of job advertisements for similar positions in your organization, not associated with labor certification applications, placed in the last three years.
>
> In rebuttal, you indicate that performances are scheduled, Thursday, Friday, Saturday and Sunday from *8:00 pm to 1:00 am*, for a total of 20 hours. You indicate that this constitutes full time hours. You also indicate that similar applications have been submitted and approved by the Department of Labor in the past, therefore, the instant application should be approved. This response is not accepted.
>
> First, you did not provide the documentation required. Please note that an employer's failure to produce documentation that is requested by the Certifying Officer and that has a direct bearing on the resolution of an issue, is a ground for denial of certification.
>
> Second, the work schedule you provided does not adequately rebut that the position offered is a full-time position.
>
> Lastly, please note that certification of prior labor applications are not precedent setting and do not cure a violation. While we acknowledge the sample labor certification you provided, each case is analyzed on its individual merits and processed accordingly. In this specific instance, the employer was responsible for documenting a full time position. The employer failed to do this.
>
> Based on the foregoing, your application for ***Antonia LADIS*** remains a violation of federal regulations and certification is denied accordingly.

DISCUSSION

The Employer must establish the elements necessary to establish entitlement to labor certification. 20 C.F.R. § 656.2(b). The regulatory definition of "employment" for purposes of labor certification is "permanent full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.3 (2004). Section 656.3 defines "Employer" as a

> person, association, firm or a corporation which currently has a location within the United States to which U.S. workers may be referred to employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm or a corporation. …

20 C.F.R. § 656.3. The employer has the burden of demonstrating that it meets this definition and that the position that is offered is both permanent and full-time. Certification may be denied if the employer fails to meet this burden. *Already There Messenger Service*, 1995-INA-138 (March 27, 1997). In meeting this burden of proof, the employer must also shoulder the burden of production. Thus, upon request by the CO, the employer must provide "directly relevant and reasonably obtainable documentation" to support the claim of an ongoing business and job opportunity. *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). It follows that the employer must also document its claim that the position is full-time. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

In *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (en banc), the Board held that the focus of the section 656.3 definition of employment is on whether the job is permanent versus temporary and full-time versus part-time. The Board held that "[i]f an employer offers, for example, only a 25 hour a week work week, then section 656.3 may be properly cited by the CO as a ground for denying labor certification." In the instant

case the Employer only offered 20 hours of work per week.[4] The mere fact that the job is as an entertainer does not provide a compelling reason to find that the Employer is thereby offering a full-time job.

Moreover, the Employer failed to provide all of the documentation that was reasonably requested by the CO in the NOF. The CO stated in the Final Determination that "[d]ocumentation must include, but is not limited to, position descriptions, payroll records, resumes of former incumbents; and copies of job advertisements for similar positions in your organization, not associated with labor certification applications, placed in the last three years."

Thus, we find that the CO correctly determined that the Employer failed to establish that the position constitutes full-time employment. Accordingly, labor certification was properly denied.

The Employer also asserted that because identical applications had been approved in the past, the application before us should likewise be approved. However, each "labor certification application involves its own set of facts and issues, and, therefore, 'submission of another employer's approved application does not set any precedent to which the CO [or the Board] is bound.'" *Rosalinda Larner*, 1997-INA-300 (April 29, 1998) (quoting *Paralegal Priorities*, 1994-INA-117 (Feb. 1, 1995)). *See McAree Construction*, 2004-INA-85 (Dec. 15, 2004); *Best Donuts*, 1997-INA-00053 (Jan. 20, 1998).

[4] In this case, in support of its request for review of the Final Determination, the submitted an amended proposed performance schedule to reflect additional hours, *i.e.* 38 hours with performances from 8:00 p.m. until 1:00 a.m. on Monday through Thursday and 8:00 p.m. to 2:00 a.m. on Friday through Sunday. The Board, however, does not have the authority to consider evidence that is first submitted with the employer's request for BALCA review or with the brief on appeal. *See, e.g.*, *Alverez, Inc.*, 2003-INA-160-65 (June 16, 2004); *Snowflake Donuts*, 1996-INA-00468 (Oct. 14, 1999); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *O'Malley Glass & Millwork Co.*, 1988-INA-49 (Mar. 18, 1989). Thus, we decline to consider the Employer's amended work schedule.

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 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.