

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 January 2008

BALCA Case No.: 2008-INA-00066
ETA Case No.: P-05110-62924

In the Matter of:

MEISNER'S TAKE OUT,
Employer,

on behalf of

HUMBERTO REYES,
Alien.

Certifying Officer: Barbara J. Shelly
Philadelphia Backlog Elimination Center¹

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 the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of

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

the Code of Federal Regulations (“C.F.R.”).²

BACKGROUND

On April 30, 2001 the Employer, a take out restaurant, filed an application for alien labor certification for the position of Cook. (AF 26). On November 28, 2006 the CO issued a Notice of Findings questioning whether the application was for a bona fide job opportunity because the Employer’s attorney had been suspended from the practice of law.³ In the NOF, the CO listed specific documentation that she would require in rebuttal to confirm the existence of a bona fide job opportunity. In rebuttal, the Employer provided some of the requested records. (AF 18-22). The CO then issued a Final Determination on May 30, 2007, denying certification because the Employer had not provided, as directed in the NOF: (1) signed copies of its business Federal Income Tax Returns for the prior three years, (2) a staffing chart, (3) copies of its last four quarterly state unemployment insurance statements and its state unemployment insurance account number listing wages by employee and total contributions, or (4) an original restaurant menu and documentation of the size and seating capacity of the restaurant. (AF 15-17). The Employer requested BALCA review of the denial on June 18, 2007. (AF 1). The Employer wrote:

As per issue of financials, we will submit them to the US Dept of Homeland Security. The issue of financials is really outside the jurisdiction of the Labor Department. The certification applies to not finding qualifying American or legal workers, not our finances.

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.

³ *See Crosslands Transportation Inc.*, 2005-INA-198 and 199 (Jan. 22, 2007), slip op. at n.3 and surrounding text in regard to the reason that the CO was questioning the legitimacy of applications filed by employers whose attorneys had been suspended.

(AF 1).

The Board docketed the appeal on November 13, 2007, and issued a Notice of Docketing on November 15, 2007. The Employer did not file an appellate brief.

DISCUSSION

The requirement of a bona fide job opportunity arises out of 20 C.F.R. § 656.20(c)(8), which states that an employer must clearly show that the “job opportunity has been and is clearly open to any qualified U.S. worker.” An employer bears the burden of proving that a bona fide job opportunity exists and is open to U.S. workers. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (en banc). Whether a job opportunity is bona fide is gauged by a “totality of the circumstances” test. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc).

The Board in *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*), held that 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. An employer’s failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. *Meisner’s Take Out*, 1999-INA-219 (Dec. 21, 2000); *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 1988-INA-40 (July 5, 1988).

In the instant case, the Employer did not establish that the requested documentation was not reasonably obtainable. Rather, it merely argued that its “financials” were beyond the authority of the Department of Labor to inquire into. However, we find that the Employer’s tax returns were directly relevant to the issue of whether the Employer was offering bona fide employment. Moreover, the Employer also

failed to provide other requested documentation on unemployment insurance, a staffing chart, a menu, and documentation of the size and seating capacity of its restaurant. The Employer's appeal does not address these documentation failures. We find that the Employer's failure to produce the documentation reasonably requested by the CO supports the denial of certification.

ORDER

The Final Determination of the Certifying Officer denying 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. 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, DC 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.