

4. The right to work revocation remained in place until 1990. During those nine years the petitioner survived by living in the homes of various families who provided him with room and board (which sometimes was just a bed in a corner) and occasionally cash at some personal risk as it was not legal to hire or pay him. To repay these families, the petitioner tutored their children in math or physics to prepare them for twice yearly school exams. The petitioner would typically live with one family for an average of four months, but never more than six months and move on to another family. The petitioner does recall that he tutored one child for about six months over a two year span but he does not believe those months were consecutive. He found the homes he stayed in through word of mouth.

5. The petitioner's tutoring duties typically lasted three hours or so per day. The rest of his time was spent studying history and philosophy and looking for a way to escape from the country. Because he was unable to work in his usual profession, he lost his skills as an engineer and all contact with his colleagues.

6. The petitioner estimated that the value of the sustenance (shelter and food) he received was the equivalent of \$25.00 to \$27.00 per month. The petitioner agreed that there are persons in Romania who do some types of work who may only earn \$25.00 to \$27.00 per month. However, he estimated that if he had been allowed to hire himself out as

a tutor, he would have received roughly \$30.00 per week in cash for the work he did (15 hours x \$2.00 per hour).

7. The petitioner received refugee cash assistance from the Department from December 26, 1990 through November of 1991. Thereafter, he was told he would no longer be eligible because his one year period of eligibility ended. The petitioner thereafter expressed a desire to apply for and receive General Assistance (G.A.) benefits to help him with his rent which is overdue and which he cannot meet from his part-time salary.

8. The petitioner was told that he did not meet the eligibility requirements¹ for G.A. because as a person without children he could not demonstrate two barriers to employment. The Department agreed that the petitioner has an age barrier as a person over forty but disagreed that he has a barrier caused by long-term (5 years) of unemployment.

The Department considers the petitioner's tutoring from 1981 to 1990 to be "work" under the regulation and relies particularly on the fact that the petitioner included the tutoring he did on the resume he uses to seek employment. Testimony offered by the District Director was that any work performed by an applicant is considered qualifying and that an analysis of the nature of the work is never made in this context.

ORDER

The decision of the Department is reversed.

REASONS

Persons who do not have children and are able-bodied can only qualify for General Assistance if they have two or more barriers to employment set forth by the Department in its regulations:

1. Age 40 or over;
2. Eighth-grade education or less;
3. Inability to read or write;
4. Lives 10 or more miles from a town of 2500 or more and has no available transportation, and cannot reasonably be expected to relocate within 30 days;
5. Has not for six consecutive months or more in the last five years been either employed by one employer or been a full-time student;
6. Released within 6 months from a mental health institution or hospital unit;
7. Participating in a state or federally funded drug or alcohol treatment program.

W.A.M. § 2607.1

At issue in this case is the barrier set forth in paragraph 5 above and specifically the meaning of the term "employed". The facts as best the petitioner could recall and relate them do not make it appear that he has had the same employer for six consecutive months or more in the last five years even if his tutoring activity could be considered work. However, even if he had lived with one family for six months or more, the term "employed" as it has previously been interpreted by the Board does not encompass the activity described by the petitioner.

In Fair Hearing No. 7777, the Board decided that the term "employed" as used in paragraph 5 above meant gainful employment as that term is defined in the Department's own regulations:

Gainful Employment - individuals shall be considered gainfully employed when they:

. . .

3. If self-employed, he works at least 35 hours per week and the balance of income remaining after deducting allowable self employment deductions, Sections 2608.2, equals or exceeds the minimum wage. (For minimum wage information see Procedures, Appendix IV, Page A.) An individual shall be considered self employed if he meets the Internal Revenue Service requirements for classification as self employed.

W.A.M. § 2601

Using that definition, the Board determined in that case that an antiquarian bookdealer who worked out of his home a few hours per day and who made so little income that he did not have to file a tax return for a twenty-six year period had not been "employed" within the meaning of paragraph 5 of W.A.M. § 2607.1. He was found by the Board to have two barriers specifically because this work did not meet the definition at W.A.M. § 2601 above. The petitioner's situation here is strikingly similar except for the fact that he received no cash and did not choose himself to so restrict his work activity. The petitioner here clearly engaged in his "work" activity considerably less than thirty-five hours per week and clearly received in-kind remuneration which was worth approximately 25% of what the petitioner would have received if he had freely bargained his services. The \$25.00 to \$27.00 per month he received is probably less than 10% of the same money he would have received working the same hours in the United States for

minimum wage. Therefore, it cannot be said, and indeed the facts clearly contradict, that the petitioner was gainfully employed for the five years prior to his immigration to the United States. During that time he did not have the kind of substantial employment experience, reference development, or work seeking or maintaining skills which usually accompany recent substantial employment. Indeed it is not unfair to say that the petitioner's recent experience in Romania did nothing to prepare him for the United States labor market which he had so much difficulty entering in spite of considerable effort on his part.

It is always disturbing to find that the Department has a policy with regard to interpreting and enforcing a regulation which is directly contrary to a long-standing Board decision (Fair Hearing No. 7777) which has not been appealed or overturned. In fairness to all applicants, the Department should either appeal Board decisions with which it does not agree or accept the decision and apply it equally to all its clients and not just those who successfully appeal those decisions.

FOOTNOTES

¹Documents reviewed by the hearing officer after the hearing, appear to indicate that no actual G.A. application was received but rather that the petitioner was told before applying that he would not be eligible. Neither party, however, asserts that this matter is not ripe for review and it will be treated as if the petitioner had actually filed the application and received the written denial. It should be noted that the Board has on numerous occasions ruled that the Department violates the due process rights of applicants by discouraging applications and making oral eligibility determinations. # # #